SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 13, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4517 John Lucente, Index 26386/03
Plaintiff-Respondent,

-against-

Riverbay Corporation, et al.,
Defendants-Appellants.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered April 28, 2008, which, in an action for personal injuries sustained when plaintiff fell in a dark stairwell in defendants' building during the blackout of August 14, 2003, denied defendants' motion to renew their motion for summary judgment dismissing the complaint or, in the alternative, for a stay of trial pending issuance of the Court of Appeals' decision in *Kopsachilis v 130 E. 18 Owners Corp.* (43 AD3d 744 [2007], *revd* __ NY3d __, 2008 NY Slip Op 9431), unanimously affirmed, without costs.

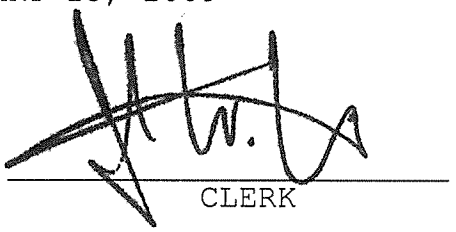
Defendants' initial motion for summary judgment was denied as untimely by an order dated April 27, 2006 (CPLR 3212[a]),

which defendants did not appeal. By order to show cause dated December 31, 2007, defendants moved to renew their summary judgment motion, arguing that this Court's decision in *Viera v Riverbay Corp.* (44 AD3d 577 [Oct. 30, 2007]) effected a change in the law that would necessarily change the court's denial of summary judgment (CPLR 2221[e][2]). Our decision in *Viera*, however, addressed whether, under the circumstances therein, defendant had a duty under common-law principles of premises liability to provide stairwell lighting during a blackout (44 AD3d at 579); in no manner did that decision involve the timeliness of a summary judgment motion. Furthermore, we decline to address the import of *Viera* for this case given the untimeliness of the motion. Nor did the stay of trial we issued on January 4, 2007 (2007 NY Slip Op 60256[U]) in connection with defendants' appeal from the denial of their motion to consolidate this action with *Viera* have any impact on the time limit for filing a motion for summary judgment. The motion court's statement in its decision denying renewal that even if renewal were granted questions of fact would remain that preclude the granting of summary judgment in defendants' favor is dictum, is unrelated to the untimeliness of defendants' initial motion, and

does not provide a basis for taking an appeal (*see Edge Mgt. Consulting v Irmas*, 306 AD2d 69 [2003]; *Schuster v Schweitzer*, 203 AD2d 552 [1994]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



CLERK

Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4612 Property Clerk of the Police Department of the City of New York, et al., Petitioners,

-against-

Harrison Brown, et al., Respondents.

Index 405930/07

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for petitioners.

Charles D. McFaul, New York, for respondents.

Determination of respondent New York City Office of Administrative Trials and Hearings (OATH), dated July 12, 2007, which, after a post-seizure vehicle retention hearing, directed the release of respondent Brown's vehicle, annulled, on the law, without costs, the petition in this CPLR article 78 proceeding (transferred to this Court by order of Supreme Court, New York County [Martin Shulman, J.], entered on or about September 5, 2007), granted, and petitioners directed to impound the vehicle seized incident to Brown's arrest pending the outcome of the forfeiture procedure.

OATH's determination was not supported by substantial evidence. The evidence at the hearing held pursuant to *Krimstock v Kelly* (306 F3d 40 [2d Cir 2002], *cert denied* 539 US 969 [2003]), established that Brown committed a drug-related offense from the subject vehicle less than 1000 feet from a public

school, and that he had an extensive history of arrests and felony convictions. Under the circumstances, we agree with the findings that petitioners established that probable cause existed for the arrest of Brown, and that it is likely that they will prevail in the forfeiture action (*see e.g. County of Nassau v Canavan*, 1 NY3d 134, 144 [2003]). Contrary to the administrative determination, we find petitioners established that continued impoundment of the vehicle was necessary (*id.*). Brown's criminal history and general lawlessness reveal a heightened risk to the public safety were the subject vehicle released to him.

All concur except McGuire and DeGrasse, JJ. who dissent in part in a memorandum by McGuire, J. as follows:

McGUIRE, J. (dissenting in part)

In my view, the Administrative Law Judge applied the wrong standard in evaluating the third element of the test for determining whether a police department may retain possession of a vehicle pending the determination of a civil forfeiture proceeding regarding that vehicle (*Krimstock v Kelly*, 506 F Supp 2d 249, 252 [SD NY 2007]; *see also Property Clerk of Police Dept. of City of New York v Harris*, 9 NY3d 237, 241 n 3 [2007]). Accordingly, I would grant the police department's petition to annul the ALJ's determination that the department did not satisfy that test (and the concomitant directive to the department to return the vehicle to respondent Brown) to the extent of remanding the matter to the Office of Administrative Trials and Hearings for further proceedings on the issue of the third element.

Respondent Brown's vehicle was seized by officers of the New York City Police Department after Brown was arrested for selling a controlled substance near a school. The vehicle was seized as an instrumentality of a crime (Administrative Code of City of NY § 14-140), and Brown was served with a "Notice of Right to a Retention Hearing" by the police department. The notice stated:

> "The retention hearing will provide you with an opportunity to be heard either yourself or through your attorney with respect to three issues: (1) whether probable cause existed for the arrest [of] the vehicle operator; (2) whether it is likely that the City will

> prevail in an action to forfeit the vehicle; and (3) *whether it is necessary that the vehicle remain impounded in order to ensure it's [sic] availability for a judgment of forfeiture*" (emphasis added).

Following the evidentiary hearing, the ALJ issued a written decision in which she concluded that the police department had established, by a preponderance of the evidence adduced at the hearing, that the police had probable cause to arrest Brown and that the department was likely to succeed in the civil forfeiture action. The ALJ, however, stated that "[t]o satisfy the third prong, the Department must prove that [Brown] poses a heightened risk to the public if his vehicle is returned to him," and concluded that, despite his "substantial criminal history" and that the vehicle was "used to facilitate the crime for which he was arrested," the police department failed to demonstrate, by a preponderance of the evidence, "a heightened risk to the public of releasing the vehicle to [Brown] pending the civil forfeiture action." The police department subsequently commenced this CPLR article 78 proceeding to annul the ALJ's determination, claiming that her conclusion that the department failed to satisfy the third element of the *Krimstock* test was not supported by substantial evidence.

Where, as here, the police seize a vehicle because it was an instrumentality of a crime, the police must provide certain persons, including the owner of the vehicle, with a "prompt

retention hearing" "to test the probable validity of continued deprivation of the[] vehicle[]" (*Krimstock*, 306 F3d 40, 69 [2d Cir 2002]). "At that '*Krimstock* hearing,' [the] NYPD has the burden to prove, by a preponderance of the evidence, that a) probable cause existed for the arrest of the vehicle's operator, b) it is likely the City would prevail in an action to forfeit the vehicle, and c) it is necessary that the vehicle remain impounded in order to ensure its availability in the eventual civil forfeiture action" (*Krimstock*, 506 F Supp 2d at 252; *see Harris*, 9 NY3d at 241 n 3; *see also County of Nassau v Canavan*, 1 NY3d 134, 144-145 [2003] ["due process requires that a prompt post-seizure retention hearing before a neutral magistrate be afforded, with adequate notice, to all defendants whose cars are seized and held for possible forfeiture. At such a hearing, the County must establish that probable cause existed for the defendant's initial warrantless arrest, that it is likely to succeed on the merits of the forfeiture action, and that retention is necessary to preserve the vehicle from destruction or sale during the pendency of the proceeding"] [footnote omitted]).

Nowhere in her written decision did the ALJ acknowledge that the third element of *Krimstock* required the police department to establish, by a preponderance of the evidence, that "it is necessary that the vehicle remain impounded in order to ensure

its availability in the eventual civil forfeiture action"; rather, the ALJ repeatedly stated that the third element required the department to establish that "[Brown] poses a heightened risk to the public if his vehicle is returned to him." Obviously, there is a significant difference between what is actually required under the third element of *Krimstock* and what the ALJ determined must be shown under that element.

Our function in a CPLR article 78 proceeding challenging an administrative determination made after a hearing required by law is to ascertain whether that determination is supported by substantial evidence (CPLR 7803[4]). However, "[w]here the grounds relied upon by the agency are inadequate or improper, a reviewing court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis [, and the court is] constrained to remit the matter to the [agency] for a new determination . . . in light of the appropriate factors and standards" (*Matter of Stone Landing Corp. v Bd. of Appeals of Vil. of Amityville*, 5 AD3d 496, 497-498 [2004]; *see Matter of Cohen v Bd. of Appeals of Vil. of Saddle Rock*, 297 AD2d 38 [2002], *affd* 100 NY2d 395 [2003]; *see also* CPLR 7803[3] [court may vacate administrative determination that "was affected by an error of law"]). Given the ALJ's failure to consider the correct standard under the third element of *Krimstock*, we are, in my view, precluded from exercising our

proper role of ascertaining whether her determination is supported by substantial evidence.

Accordingly, I would grant the petition to the extent of remanding the matter to the ALJ for further proceedings on the issue of the third element of *Krimstock* and a new determination.

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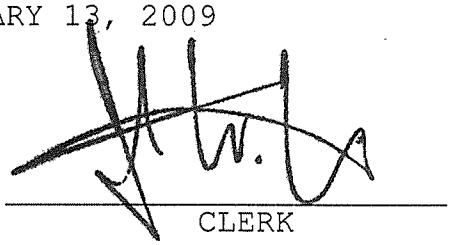
ENTERED: JANUARY 13, 2009



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Saxe, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4142 Tonya Morris, Index 20054/05
Plaintiff-Respondent,

-against-

Mady Cisse, et al.,
Defendants-Appellants,

Paul Hiltbrand Ltd.,
Defendant.

Marjorie E. Bornes, New York, for Mady Cisse, appellant.

Mead, Hecht, Conklin & Gallagher, LLP, Mamaroneck (Sara Luca Salvi of counsel), for Abdul Sawaneh, appellant.

Jacoby & Meyers, LLP, Newburgh (Kristine M. Cahill of counsel), for respondent.

Amended order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered on or about February 29, 2008, which, insofar as appealed from, denied defendant Cisse's motion and defendant Sawaneh's cross motion for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to the extent of granting those portions of the motions seeking summary judgment dismissing the claims based on the 90/180 provision of Insurance Law § 5102(d), and dismissing those claims, and otherwise affirmed, without costs.

The record presents triable issues regarding whether plaintiff sustained a serious injury (Insurance Law § 5102[d]) as a result of a car accident that occurred on September 10, 2004 while a passenger in a livery vehicle. Considering the facts in

the light most favorable to plaintiff (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 353 [2002]), the properly affirmed evidence submitted by plaintiff's physicians demonstrates that plaintiff may well have sustained a "significant limitation of use of a body function or system" (Insurance Law § 5102[d].

While plaintiff was treated at and released from the emergency room at St. Barnabas Hospital on the day of the accident, she remained home from work for two weeks. She then sought treatment at Bronx Rehabilitation Associates and continued treatment there until July 31, 2006. Plaintiff's physician, Dr. Edwin Gangemi, reports that she sustained cervical strain and cervical radiculitis on the left side that diminished her extension by 10 degrees and that she continued to have left-sided pain. He further found continued pain, bilateral joint dysfunction, lumbosacral dysfunction, and lumbar radiculopathy. He prescribed various pain killers, including Ultracet and Flexoril. Dr. Michael Shapiro, a board certified radiologist, found muscle spasm, and central disc herniations at C3-4, C4-5 and C5-6 and Dr. Michael Marini, also of Bronx Rehabilitation Associates, found cervical radiculopathy and lumbosacral derangement, secondary to herniated disc and referable to the accident of September 10th. Based on that, there is substantial evidence that plaintiff sustained, inter alia, a permanent cervical strain, cervical and lumbar radiculopathy, central disc

herniations and had limited range of motion in the cervical and lumbar spine (*see Hoisington v Santos*, 48 AD3d 333 [2008]; *Brooks v Zises*, 16 AD3d 221 [2005]). She also underwent arthroscopic surgery to her left shoulder approximately 2½ years after the accident at Montefiore Hospital following a diagnosis of olecranon bursitis by Dr. Sanjiv Bansal, an orthopedist who also attributed her shoulder impairment to the accident. She has continued treatment with Dr. Bansal. All of the above physicians' findings, are referable to the accident on September 10, 2004. Plaintiff also attached affirmations from Dr. Michael L. Russ and Dr. Ronald Lanfranchi, who had performed independent medical examinations of plaintiff in 2004. The latter physicians found that plaintiff was not disabled from performing her daily activities, but Dr. Lanfranchi found that she sustained lumbosacral sprain/strain.

Contrary to defendants' contention, there is no evidence that plaintiff had a pre-existing or degenerative condition prior to the subject accident (*see Pommells v Perez,* 4 NY3d 566, 577-578 [2005]), and the record is devoid of evidence of any gap in treatment (*id.* at 574). The conclusion of Dr. Stanley Ross, who examined plaintiff on one occasion in October 2006, that any strain or sprain that plaintiff sustained had been resolved and that she could carry on daily activities without restriction is undermined by the subsequent arthroscopic surgery and continuing

treatment.

However, those portions of the motions seeking summary judgment dismissing the claim under the 90/180-day category should be granted. Defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing that claim by establishing that plaintiff only missed two weeks of work following the accident (*see Camacho v Dwelle*, 54 AD3d 706 [2008]; *Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [2008]; *Thompson v Abbasi*, 15 AD3d 95, 96-97 [2005]). In opposition, plaintiff failed to raise a triable issue of fact regarding whether during the first 180 days following the accident she was "curtailed from performing [her] usual activities to a great extent rather than some slight curtailment" (*Gaddy v Eyler*, 79 NY2d 955, 958 [1992], quoting *Licari v Elliott*, 57 NY2d 230, 236 [1982]).

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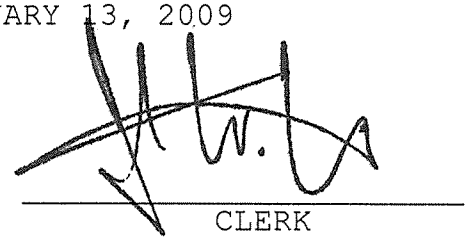

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Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4219 In re Alrick J.,

A Person Alleged to be a
Juvenile Delinquent.

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Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for Presentment Agency.

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about November 28, 2007, which adjudicated appellant a juvenile delinquent, upon his admission that he had committed an act constituting unlawful possession of weapons by persons under 16, and imposed a conditional discharge for a period of 12 months, affirmed, without costs.

The petition charged appellant with acts that, if committed by an adult, would have constituted two counts of criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [1],[2]), menacing in the second degree (Penal Law § 120.14), menacing in the third degree (Penal Law § 120.15) and unlawful possession of weapons by a person under 16 years of age (Penal Law § 265.05). Rather than proceed to a fact-finding hearing, appellant admitted that he had committed the act alleged in count five of the petition charging unlawful possession of a weapon by a person under 16. As is clear from the plea allocution, the

petition and a stipulation between the parties, the "dangerous knife" appellant admitted that he had possessed in a public park was a gravity knife.

We reject appellant's contention that Family Court improvidently exercised its discretion in imposing a conditional discharge rather than granting his request for an adjournment in contemplation of dismissal. Family Court certainly was not required to grant that request "merely because this was [appellant's] first brush with the law" (*Matter of Nikita P.*, 3 AD3d 499, 501 [2004] [internal quotation marks omitted]; *see also Matter of Rufino M.*, 168 AD2d 385 [1990] [rejecting claim that an adjournment in contemplation of dismissal should have been granted and observing that "the fact that this was appellant's only contact with the law is not dispositive"]). Unquestionably, the possession of a gravity knife or any dangerous knife by a juvenile in a park is a serious matter. Thus, this case does not reduce to "an act of thoughtlessness committed by an adolescent fooling around with some friends" (*Matter of Justin Charles H.*, 9 AD3d 316, 317 [2004]). Rather, appellant "committed a type of misconduct that in and of itself supports the conclusion that a conditional release, at the very least, was appropriate" (*Matter of Nikita P.*, 3 AD3d at 500 [rejecting claim that an adjournment in contemplation of dismissal should have been granted where juvenile was found to have committed acts which, if committed by

an adult, would have constituted the crime of attempted assault in the third degree]).

Moreover, as Family Court was aware, the recommendation of the Department of Probation was for probation, a more restrictive disposition than the conditional discharge Family Court imposed. Family Court expressly stated that the reason it was "not going for the ACD is the allegations are very serious." That observation by Family Court is entirely accurate. In essence, the sworn allegations of the petition charged appellant not only with possessing a "dangerous knife" in a park but with displaying the knife to the complainant and thrusting the knife at him, after having told the complainant that he could get his friends to "beat [him] up." The report of the Department of Probation referred to both the complainant's sworn account of the foregoing allegations and the sworn statement of a police officer that he had recovered a gravity knife from appellant's person. Also before Family Court at the outset of the dispositional hearing were appellant's school records, court exhibit 1. Those records reveal that between September 4 and November 17 of the Fall 2007 semester, appellant was absent on 8 days, and that during the prior academic year, appellant was late on 55 of the 186 days and absent on 14 days. This troublesome history of absences and tardiness also supports Family Court's determination that an adjournment in contemplation of dismissal was not an appropriate

disposition.

The dissent is not persuasive. None of the cases it cites in which this Court concluded that an adjournment in contemplation of dismissal should have been granted involved the possession of a dangerous weapon. The serious nature of the criminal conduct that appellant admitted he had committed, possession of a gravity knife, cannot be questioned. Even though appellant also admitted possessing this dangerous knife in a public park, the dissent writes with considerable understatement that "the crime appellant admitted to committing . . . is not to be condoned."

Instead of coming to grips with the seriousness of the criminal conduct appellant admitted that he had committed, the dissent emphasizes that appellant did not also admit the truth of other sworn allegations of the petition, i.e., that after threatening to have the complainant beaten up, appellant displayed the knife and thrust it at the complainant. Thus, the dissent contends that Family Court's decision to impose a conditional discharge -- hardly an onerous disposition -- "is deficient in that it is predicated upon sworn allegations that were never established at the Family Court proceeding." Apparently, the dissent is of the view that in determining the appropriate disposition, Family Court was required to ignore the allegations of even more serious criminal conduct by appellant.

The dissent cites no authority for that proposition.

Ironically, however, the dissent does apparently credit and rely on at least a portion of appellant's version of the disputed facts when it states that "appellant neither assaulted nor injured anyone, *and he denied committing or attempting to commit any violent act*" (emphasis added). This ignores the conflicting allegations in the petition charging petitioner with thrusting the gravity knife at the complainant after threatening to get his friends to assault him. The dissent fails to explain why it is free to credit the appellant's unsworn claims made when he was interviewed by the Probation Department but Family Court was required to discredit or ignore the complainant's sworn allegations.

Moreover, aspects of appellant's unsworn claims to the Probation Department strain credulity. Appellant claimed that he had been carrying the gravity knife in his book bag, after finding it in a park, when his friend threw a football at the complainant, causing the complainant's glasses to fall off. When the complainant approached appellant and his friend, appellant went on, his friend retrieved the knife from appellant's book bag, "pulled it out" on the complainant and then replaced it in the book bag after the complainant left. Thus, although appellant pinned the blame on his unapprehended friend, even appellant admitted that the complainant was physically threatened

with the knife. On this account, it is not at all clear why appellant's friend would have known to go into appellant's bookbag to get the gravity knife. Moreover, appellant's claim that after his friend threatened the complainant with the knife, appellant put it back in the bookbag, is at odds with the affidavit of the arresting officer, which was before Family Court and also summarized in the probation report, and stated that the officer recovered the knife from appellant's person. Finally, appellant's version of the facts requires the conclusion that the complainant for some reason falsely inculpated appellant while falsely absolving the person who actually brandished and threatened him with a knife. Certainly, the Probation Department, which recommended probation, did not state that it credited appellant's claims. Nevertheless, and despite the "the-dog-ate-my-homework" quality of appellant's claims, the dissent faults Family Court for not disregarding the complainant's account of what had happened.

The dissent also emphasizes that Family Court should have granted appellant an adjournment in contemplation of dismissal because "[t]here were no further incidents during the four months between this incident and the dispositional hearing" and appellant "insisted that he would never do anything like this again." But a Family Court judge surely is not required to be impressed by, and impose a less restrictive disposition on

account of, the mere fact that a respondent is not charged with committing another crime during the pendency of the case, let alone during a period of only four months. Similarly, although the dissent appears to accept and be impressed by appellant's "insiste[nce]," the dissent does not and cannot explain why the Family Court Judge in this case -- the Judge before whom, unlike the dissenters, appellant physically appeared -- was required to accept and be impressed by it.

As we read the record, Family Court concluded neither that the complainant's allegations that appellant thrust the knife at him and threatened an assault were true nor that they were false. Rather, Family Court simply and sensibly recognized the possibility that these serious allegations were true in determining that appellant required supervision (Family Ct Act § 352.1[1]) and that a conditional discharge was the least restrictive available alternative "consistent with the needs and best interests of the respondent and the need for protection of the community" (Family Ct Act § 352.2[2]). This disposition was prudent for another reason. As Family Court undoubtedly knew, it was more than a possibility that the complainant was physically threatened by someone with a knife; even appellant conceded that this serious act had occurred. The only uncertainty was who did it.

Finally, the dissent is unfair to Family Court, and also

falls into self-contradiction, with its repeated assertions that Family Court "relied exclusively on the nature of the crime" in denying an adjournment in contemplation of dismissal. This criticism of Family Court is contradicted by the dissent's position that Family Court also erred in relying on "sworn allegations that were never established at the Family Court proceeding." The criticism is unfair because Family Court expressly noted that appellant's school records were before it as exhibit 1. Given the enormous case loads and difficulties that Family Courts deal with day in and day out, it is hardly surprising that Family Court did not issue a written decision or elaborate at length on all the reasons for its dispositional determination. But the dissent cannot fairly assume either that Family Court did not consider appellant's troublesome school records or that Family Court did not make its determination after a thorough and reasoned review of all relevant facts and information before it (*cf. People v Nazario*, 253 AD2d 726 [1998]).

Given our conclusion that Family Court appropriately imposed a conditional discharge, we need not and do not address the presentment agency's contention that because Penal Law § 265.05 specifies that "[a] person who violates the provisions of this section *shall* be adjudged a juvenile delinquent" (emphasis added), Family Court was precluded from granting an adjournment

in contemplation of dismissal as that procedure is permissible only prior to a finding of juvenile delinquency (Family Ct Act § 315.3[1], § 352.1[1]).

All concur except Moskowitz and Renwick, JJ. who dissent in a memorandum by Renwick, J. as follows:

RENWICK, J. (dissenting)

Family Court refused to adjourn the proceeding in contemplation of dismissal solely because the allegations in the petition were "very serious." The majority finds that such exclusive reliance on the nature of the crime as alleged in the petition was proper. I dissent because, by relying exclusively on the nature of the crime as alleged in the petition, Family Court abdicated its responsibility to consider the needs and best interests of the juvenile, as well as the need for protection of the community, in determining the least restrictive available disposition (Family Ct Act § 352.2[2]).

Preliminarily, it should be pointed out that Family Court's decision to adjudicate appellant a juvenile delinquent, rather than to adjourn the proceeding in contemplation of dismissal (ACD), is deficient in that it is predicated upon sworn allegations that were never established at the Family Court proceeding. Even if Family Court could have properly considered the allegations of the petition in denying ACD, it could not properly rely exclusively on the nature of the crime. A juvenile delinquency adjudication requires more than a determination that the juvenile committed a delinquent act. To avoid unnecessarily "brand[ing a child] as a juvenile delinquent" (*Matter of Justin Charles H.*, 9 AD3d 316, 317 [2004]), a preponderance of the evidence must also show that the juvenile needs supervision,

treatment or confinement (Family Ct Act §§ 352.1, 350.3). In addition, the court must order "the least restrictive available alternative [disposition] which is consistent with the needs and best interests of the respondent and the need for protection of the community" (Family Ct Act § 352.2[2][a]; *see also* § 301.1; *cf.* § 353.6).

By permitting the nature of the crime to dictate the restrictiveness of the disposition, the majority ignores this mandate and seems to equate a juvenile proceeding with a criminal proceeding in which the predominant function of sentencing is not the defendant's needs and best interests but punishment. By relying exclusively on the nature of the crime, *i.e.*, the community's need for protection, to dictate the restrictiveness of the disposition, the majority weakens the Family Court Act's mandate to consider the juvenile's needs and best interests as well, and to avoid unnecessarily "branding a child as a juvenile delinquent" (*Justin Charles H.*, 9 AD3d 316, *supra*).

A proper review of all the relevant circumstances ineluctably leads to the conclusion that an ACD is "the least restrictive available alternative [disposition] consistent with the needs and the best interests of the respondent and the need for the protection of the community." While the crime appellant admitted committing, possession of a dangerous knife, is not to be condoned, appellant neither assaulted nor injured anyone, and

he denied committing or attempting to commit any violent act. In addition, the record reflects that appellant comes from a stable home environment and had no prior history of criminality; that this incident was his first contact with the juvenile justice system; and that he had no record of getting into trouble at home, at school, or in the community. There were no further incidents during the four months between this incident and the dispositional hearing and no indication that appellant ever used drugs or alcohol or was affiliated with a gang. Appellant accepted full responsibility for his illegal possession of the gravity knife and insisted that he would never do anything like this again.

Although it is undisputed that appellant's possession of the knife was an isolated incident and that appellant receives adequate supervision by his parents, the majority makes much of appellant's poor record of school attendance. However, "the court could have, and should have, under the terms and conditions of an ACD, required the probation department to monitor appellant 'to assure that he attends school regularly'" (*Matter of Anthony M.*, 47 AD3d 434 [2008] *quoting Justin Charles H.*, 9 AD3d at 317; *see* Family Ct Act § 315.3[2]; Uniform Rules for Family Ct [22 NYCRR] § 205.24 [a][1][14][b]). Indeed, this Court on numerous occasions has reversed an adjudication of juvenile delinquency and imposition of a conditional discharge or probation where, as

here, the juvenile had no prior court contact, had no record of trouble at home or school, had no history of drug or alcohol abuse, and did not pose a threat to the community (*see Justin Charles H.*, 9 AD3d 316, *supra* [error to impose 12-month conditional discharge instead of an ACD, where juvenile committed an act that, if committed by an adult, would constitute the crime of reckless endangerment in the second degree, had not previously been in trouble at home or in school, his home was stable, and the underlying incident did not involve any intentional or malicious conduct]; *Matter of Anthony M.*, [error to impose nine-month conditional discharge instead of an ACD, where juvenile committed an act that, if committed by an adult, would constitute the crime of petit larceny, took full responsibility for the theft, came from a stable home environment, had no prior court contact, had no record of getting into trouble at home, at school, or in the community, and there was no indication that appellant ever used drugs or alcohol or was affiliated with a gang]; *Matter of Joel J.*, 33 AD3d 344 [2006] [error to impose 12-month placement instead of an ACD, where juvenile committed an act that, if committed by an adult, would constitute the crime of criminal possession of marijuana in the fifth degree, had no prior record, posed no threat to the community, and made significant progress between arrest and disposition]; *Matter of Letisha D.*, 14 AD3d 455 [2005] [error to impose 12-month

probation instead of an ACD, where juvenile committed an act that, if committed by an adult, would constitute the crime of false impersonation, had no prior court record, had good school attendance and a stable and supportive family, obeyed her curfew, expressed remorse for her conduct, and insisted she learned her lesson]).

Finally, we reject the presentment agency's argument that Family Court had no discretion in determining whether to adjudicate appellant a juvenile delinquent once he admitted violating Penal Law § 265.05. That section, entitled "Unlawful possession of weapons by persons under sixteen," is the only Penal Law section specifically relating to juveniles. Although generally a person cannot be adjudicated a juvenile delinquent unless that person has committed an act that would have constituted a crime if performed by an adult (Family Ct Act § 301.2 [1]), section 265.05 reflects a specific legislative intent to proscribe certain conduct when engaged in by juveniles, and by defining such conduct as juvenile delinquency the Legislature has provided Family Court with appropriate jurisdiction (Family Ct Act § 302.1; *Matter of Thomas RR.*, 64 NY2d 1062, 1063-1064 [1985]).

After setting forth the elements of the offense the statute provides that "[a] person who violates the provisions of this section shall be adjudged a juvenile delinquent." The

presentment agency argues that the above language removes any discretion to impose an ACD instead of adjudicating such person a juvenile delinquent. That argument, however, is at odds with Family Court Act § 352.1[2], which requires Family Court to dismiss a case, or order an ACD (Family Ct Act § 315.3[1]), even after a finding that the juvenile committed a delinquent act, if, upon conclusion of the dispositional hearing, it determines that the juvenile does not require supervision, treatment or confinement. Considering the scheme and rehabilitative purposes of the Family Court Act, it is not apparent why Family Court should be stripped of its discretion to dismiss a case in the single instance of a Penal Law § 265.05 violation. Under the presentment agency's interpretation, juveniles found to have committed offenses that are more serious than Penal Law § 265.05 would remain eligible, going into the dispositional hearing, to receive ACDs, or to have their cases dismissed as further court involvement is not required, whereas a more deserving juvenile found to have violated section 265.05 would be barred from receiving such treatment. This is irrational.

"[A] statute should be given a rational interpretation consistent with achieving its purpose and with justice and common sense" (McKinney's Cons Laws of NY, Book 1, Statutes § 96, Comment, at 207) and a literal construction is to be avoided when it results in objectionable consequences, unreasonableness,

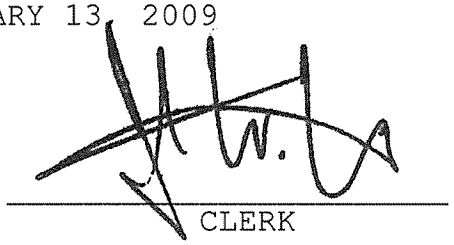
absurdity, hardship, or injustice (McKinney's Cons. Laws of N.Y., Book 1, Statutes §§ 141, 143, 145 and 146). Further, since Penal Law § 265.05 applies to juvenile proceedings it must be construed together with the Family Court Act such that the two statutes are construed as "though forming part of the same statute" (*id.* § 221[b]) and should be "applied harmoniously and consistently" (*id.*, Comment, at 378). Significantly, although not binding on this Court, several courts have interpreted Penal Law § 265.05 as incorporating the Family Court Act and have found that a violation of that section is simply the predicate for a dispositional hearing (*see e.g. Matter of Paul R.*, 151 Misc 2d 790 [Fam Ct, Kings County 1991]; *Matter of Alicia P.*, 112 Misc 2d 326, 328 [Fam Ct, NY County 1982]. We concur. The words, "shall be adjudicated a juvenile delinquent," in section 265.05, cannot be read literally. It is at the conclusion of the dispositional hearing, not upon admission of guilt, that the court decides whether a delinquency adjudication is necessary (Family Ct Act § 352.1[1]), and, if so, what type of disposition strikes the proper balance between the juvenile's best interests and the community's need for protection (Family Ct Act § 352.2[2]).

For the foregoing reasons, it is clear that Family Court improvidently exercised its discretion in finding appellant to be a juvenile delinquent and not adjourning the proceeding in contemplation of dismissal as the least restrictive alternative

consistent with appellant's needs and best interests and the community's need for protection. Thus, the order of the Family Court, which adjudicated appellant a juvenile delinquent and imposed a conditional discharge for a period of 12 months, should be vacated and the matter remanded with the direction to order an adjournment in contemplation of dismissal pursuant to Family Court Act § 315.[1].

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



CLERK

Tom, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

4720 Estela De Los Santos, Index 101499/06
Plaintiff-Respondent,

-against-

4915 Broadway Realty LLC,
Defendant-Appellant.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for appellant.

Goldhaber, Weber & Goldhaber, New York (Robert Goldhaber of counsel), for respondent.

Order, Supreme Court, New York County (Martin Shulman, J.), entered July 11, 2008, which denied defendant's motion for summary judgment dismissing the complaint, affirmed, without costs.

Defendant failed to demonstrate its entitlement to judgment as a matter of law based on the "storm in progress" defense, since the evidence raised an issue of fact as to when the storm ended (*see Calix v New York City Tr. Auth.*, 14 AD3d 583, 584 [2005]). Even if defendant had conclusively established that the storm was still in progress at the time of plaintiff's slip and fall, it would not be entitled to judgment as a matter of law, because the evidence of its employees' snow-removal activities

raised an issue of fact whether defendant created or exacerbated the condition that caused the accident (*see Kasem v Price-Rite Off. & Home Furniture*, 21 AD3d 799, 801-802 [2005]).

All concur except McGuire and DeGrasse, JJ. who dissent in part in a memorandum by DeGrasse, J. as follows:

DeGRASSE, J. (dissenting in part)

I agree with the majority that Supreme Court properly denied that portion of defendant's motion seeking summary judgment on the ground that the "storm in progress" rule precluded liability. I disagree, however, that a triable issue of fact exists regarding whether defendant created or exacerbated a dangerous condition through its snow removal efforts, and would grant partial summary judgment to defendant on that issue.

In support of its motion for summary judgment, defendant submitted the deposition testimony of both plaintiff and the superintendent of the building. Plaintiff testified that she slipped on the second step of an exterior staircase as she exited the building. She also testified that the stairs were covered with snow, which was ankle-deep. Plaintiff stated that she slipped on ice below the snow, but did not see any ice and later stated that she "slipped on something that felt almost like soap." The superintendent testified that he and the doorman shoveled snow and spread salt on the stairs late in the evening until approximately 1:00 in the morning on the night of the storm, and that he later spread salt on the stairs at 6:30 A.M. Plaintiff's accident occurred later that morning, between 8:00 and 8:30.

The deposition testimony of plaintiff and the superintendent demonstrated that defendant merely shoveled and salted the stairs

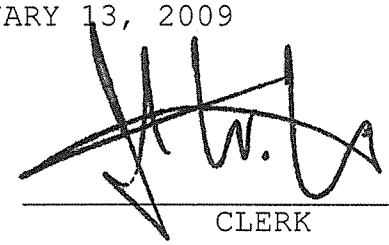
in an effort to clear them of snow, and this constituted a prima facie showing that defendant neither created nor exacerbated a hazardous condition through its snow removal efforts (*cf. Santiago v New York City Hous. Auth.*, 274 AD2d 335 [2000] [snow piled on both sides of pathway melted, refroze and formed icy condition]; *Rector v City of New York*, 259 AD2d 319 [1999] [preexisting ice exposed as a result of defendant's snow-clearing efforts]). In opposition, plaintiff submitted the affirmation of her counsel and a black and white photograph of the staircase that does not depict the condition of the stairs on the day of the accident. Plaintiff's claim that defendant's snow removal efforts made the condition of the sidewalk more hazardous is unsupported by any evidence, consists only of rank speculation, and is thus insufficient to defeat defendant's entitlement to partial summary judgment (*see Fung v Japan Airlines Co., Ltd.*, 51 AD3d 861 [2008]; *Williams v KJAEL Corp.*, 40 AD3d 985 [2007]; *Zabbia v Westwood, LLC*, 18 AD3d 542 [2005]; *Nadel v Cucinella*, 299 AD2d 250 [2002]; *Yen Hsia v City of New York*, 295 AD2d 565 [2002]; *see also Bonfrisco v Marlib Corp.*, 30 AD2d 655 [1968], *affd* 24 NY2d 817 [1969]).

Accordingly, partial summary judgment should be granted to defendant dismissing the claim that it created or exacerbated a hazardous condition (*see Janos v Peck*, 21 AD2d 529, 531 [1964], *affd* 15 NY2d 509 [1964] ["the partial summary judgment procedure

affords the opportunity of promptly settling issues which can be disposed of as a matter of law, and furthermore, furnishes a means for the withdrawing from the case of sham and feigned issues of fact and of law which might have a tendency to confuse and complicate the trial"]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



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Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4969N All American Crane Service Inc., et al., Plaintiffs-Respondents, -against- Ashraf Omran, etc., et al., Defendants-Appellants. Index 108032/08

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for appellants.

Alvy & Tablante, LLP, Lake Success (Michael C. Marcus of counsel), for respondents.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered July 2, 2008, which granted a preliminary injunction against enforcing a law limiting crane operators with Class C1 licenses to "single control station" cranes, unanimously affirmed, without costs.

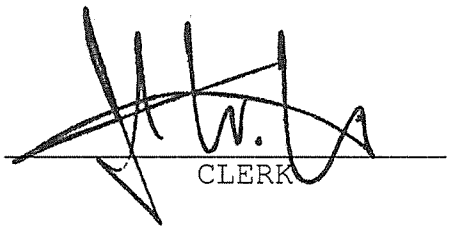
The recent enactment (Local Law No. 33 [2007]) of the new City Construction Codes (title 28, Administrative Code of the City of New York), effective July 1, 2008, contains a provision governing operator licenses for hoisting machines. Section 28-405.2(3) limits crane operators with Class C1 licenses to the operation of cranes with a single control station. A legislative enactment normally carries with it a strong presumption of constitutionality and is presumed to be supported by facts known to the legislative body. However, plaintiffs have demonstrated a likelihood of success on the merits of their constitutional

challenge to this provision, irreparable injury absent injunctive protection, and a balancing of the equities in their favor (*see Karabatos v Hagopian*, 39 AD3d 930 [2007]). A preliminary injunction against enforcement of the provision in question was thus warranted, based on the evidence adduced at the hearing.

The injunction sought is prohibitory in nature and merely serves to preserve the status quo pending a full hearing on the merits (*see 360 W. 11th LLC v ACG Credit Co. II, LLC*, 46 AD3d 367 [2007]). On the other hand, failure to enforce the provision immediately will not result in an imminent threat to the public safety. To the contrary, maintaining the injunction will simply permit plaintiffs and others who own dual-cab cranes with load capacities of 50 tons or less to continue operating them under their existing Class C1 licenses.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5014 The People of the State of New York, Respondent, Ind. 3951/04 4858/04 5665/04

-against-

Charles Frazier, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jody Ratner of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Eleanor J. Ostrow of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at competency hearing; Charles J. Tejada, J. at jury trial and sentence), rendered April 10, 2007, convicting defendant of burglary in the second degree (three counts), grand larceny in the third degree (two counts) and bail jumping in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 16 years to life for the burglary convictions consecutive to concurrent terms of 2 to 4 years for the larceny convictions and consecutive to a term of 2 to 4 years for the bail jumping conviction, unanimously modified, on the law, to the extent of directing that the sentences for the larceny convictions be served concurrently with the sentences for the burglary convictions, and otherwise affirmed.

The hearing court properly found that the People had established, by a preponderance of the evidence, that defendant

was competent to stand trial (*see People v Mendez*, 1 NY3d 15, 19-20 [2003]; *see also Pate v Robinson*, 383 US 375 [1966]). There is no basis for disturbing the court's evaluation of expert testimony (*see People v McMillan*, 212 AD2d 445 [1995], *lv denied* 85 NY2d 976 [1995]). The evidence at the hearing established that defendant's psychiatric illness did not prevent him from understanding the legal process or assisting his attorney in his defense.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]).

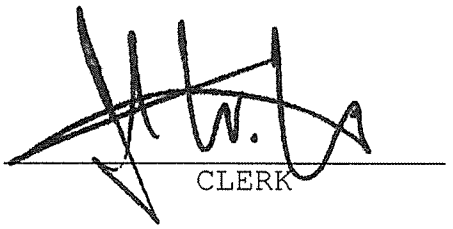
The procedure under which defendant was sentenced as a persistent violent felony offender was not unconstitutional (*see Almendarez-Torres v United States*, 523 US 224 [1998]; *People v Leon*, 10 NY3d 122, 126 [2008], *cert denied* __US__, 128 S Ct 2976 [2008]).

The sentencing court erred in imposing consecutive sentences for the burglary and larceny convictions. Concurrent sentences must be imposed "for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and was also a material element of the other" (Penal Law § 70.25[2]; *see also People v Laureano*, 87 NY2d 640, 642 [1996]). In each of the incidents at issue, the evidence established that larceny was the only

intended crime that satisfied the "intent to commit a crime" element of burglary (Penal Law § 140.25). Thus, in each incident, the two acts - the entering of a dwelling for the sole purpose of stealing, and the actual taking of the property - cannot logically be considered separate and distinct acts.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



CLERK

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5015 Art Finance Partners, LLC, et al., Index 600845/07
Plaintiffs-Appellants,

-against-

Christie's Inc.,
Defendant-Respondent.

- - - - -

Christie's Inc.,
Counterclaim Plaintiff-Respondent,

-against-

Art Finance Partners, LLC, et al.,
Counterclaim Defendants-Appellants.

Barton Barton & Plotkin LLP, New York (Mathew E. Hoffman of counsel), for appellants.

Hughes Hubbard & Reed LLP, New York (Michael E. Salzman of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 18, 2008, which denied the motion of plaintiffs and counterclaim defendants (collectively the Rose entities) for summary judgment on the complaint for monies paid to defendant Christie's and to dismiss Christie's defenses and counterclaims, unanimously affirmed, with costs.

This case arises from an alleged attempt to manipulate an art auction at Christie's by the Rose entities, acting in concert with the art dealers at Berry-Hill Galleries, the owner of the artwork. Andrew Rose consigned the artwork to Christie's for auction, claiming he was acting for an unnamed divorcing couple,

then bid on the artwork himself. Christie's standard consignment agreement prohibits a consignor (both principal and agent) from bidding on the consigned property at the auction. Berry-Hill also bid on the artwork. When Christie's discovered that Coram Capital LLC, a special purpose entity formed by the owners of Berry-Hill, was the true owner of the artwork and that Berry-Hill knew in advance of the auction that Andrew Rose had misrepresented the ownership, Christie's canceled all sales of the artwork, offered rescission to purchasers of artwork from the consignment that also had been bid on by Andrew Rose or Berry Hill, and, inter alia, withheld proceeds to mitigate its anticipated damages. After Berry-Hill and Coram filed for bankruptcy protection, they commenced an adversary proceeding against Andrew Rose alleging fraud. Berry-Hill agreed to a settlement with Christie's, pursuant to which Christie's retained a claim for $3 million for the canceled sale of a particular painting and a claim for $1 million for actual damages related to the auction. The settlement agreement contained mutual releases of the named parties and, inter alia, their "agents" from any and all claims.

Andrew Rose tried unsuccessfully to reach his own settlement with Christie's for the return of funds he paid for items at the May 19, 2005 auction for which he was the highest bidder. Ultimately, plaintiffs, which are entities owned by Andrew Rose,

commenced this action alleging breach of contract and unjust enrichment. In its answer, Christie's asserted counterclaims alleging, inter alia, fraud and breach of contract, including a cause of action against all counterclaim defendants styled, "Fraud As An Agent." In moving for summary judgment on the complaint for the return of money paid to Christie's and to dismiss Christie's counterclaims, the Rose entities argued that the settlement agreement between Berry-Hill and Christie's released them from Christie's counterclaims as Berry-Hill's "agent."

The court correctly rejected this argument. The mutual releases were not "clear and unambiguous as to the intention of the parties to cover the amount in dispute" (*NAB Constr. Corp. v City of New York*, 276 AD2d 388, 389 [2000]). Thus, as to the scope of the releases, "reference to parol evidence to discern the intentions of the parties [was] appropriate" (*id.*). The purpose of the agreement was to resolve the disputes between Berry-Hill and Christie's in the context of the Berry-Hill bankruptcy. Berry-Hill paid consideration to Christie's in addition to granting the releases. Further, Berry-Hill had no authority to release Andrew Rose's claim against Christie's, as Rose stated in an affidavit, and Christie's made clear that it had no intention of resolving the dispute with Rose for no consideration; it wanted to pursue its legal claims against him.

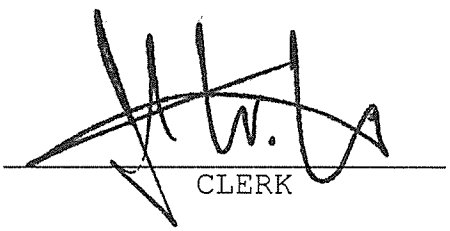
Thus, at a minimum, factual issues exist whether the agreement between Berry-Hill and Christie's operated to release the counterclaim defendants as Berry-Hill's "agent."

There is no evidence that Rose actually acted as an agent for Berry-Hill. A principal-agent relationship may be established by evidence of the "consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act" (*Fils-Aime v Ryder TRS, Inc.*, 40 AD3d 917, 918 [2007] [internal quotation marks and citation omitted]), even where the agent is acting as a volunteer (*see* Restatement [Second] of Agency § 225). However, the artwork that was consigned to Christie's was collateral for a loan to Berry-Hill from Rose through plaintiff ARCK Credit Company, and Rose was acting for his own benefit - to inflate collateral proceeds - when he contacted Christie's with a proposal to sell Berry-Hill's inventory, purportedly on behalf of a divorcing couple.

We have considered counterclaim defendants' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



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Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5016 In re Aisha C.,

A Dependent Child Under
the Age of Eighteen Years, etc.,

Eleanor C.,
Respondent-Appellant.

Leake & Watts Services, Inc.,
Petitioner-Respondent.

Nancy Botwinik, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

Order of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about July 25, 2007, which, upon a finding of permanent neglect, terminated respondent's parental rights to the subject child and committed custody of the child to petitioner agency and the Commissioner of Administration of Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence of respondent's failure to plan for the child's future, notwithstanding the petitioning agency's diligent efforts (Social Services Law § 384-b[7][a]; *see Matter of Sheila G.*, 61 NY2d 368 [1984]). The agency referred respondent for alcohol abuse treatment, mental health services and parenting

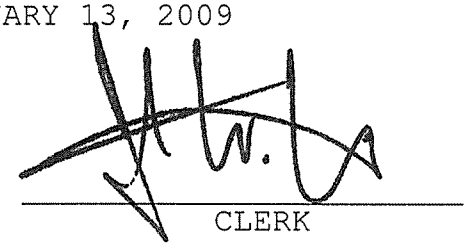
skills training, provided letters to assist her in having her name added to the lease on the apartment she shared with her adult son, scheduled weekly visitation, changed the visitation location to accommodate her, and met with her to review her service plan and discuss the importance of compliance (*see Matter of Lady Justice I.*, 50 AD3d 425 [2008]; *Matter of Gina Rachel L.*, 44 AD3d 367 [2007]). Respondent failed to maintain contact with the child through consistent and regular visitation, which alone constitutes permanent neglect (*see Matter of Kimberly Carolyn J.*, 37 AD3d 174 [2007], *lv dismissed* 8 NY3d 968 [2007]; *Matter of Lamikia Shawn S.*, 276 AD2d 279 [2000]). In addition, respondent failed to complete mental health and alcohol abuse programs, attend a parenting skills class, and secure adequate housing after her attempt to be added to her son's lease proved unsuccessful (*see Lady Justice L., supra; Matter of Racquel Olivia M.*, 37 AD3d 279 [2007], *lv denied* 8 NY3d 812 [2007]).

A preponderance of the evidence supported the finding that it was in the child's best interests to terminate respondent's parental rights and transfer custody and guardianship of the child to the agency and free her for adoption by her foster

mother, in whose home she had resided since 2003 and was doing well (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Travis Devon B.*, 295 AD2d 205, 205-206 [2002]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



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Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5018 Sdhari Cason-Payano, Index 21419/04
Plaintiff-Respondent,

-against-

Thomas G. Damiano, et al.,
Defendants-Respondents,

G.S. D'Antona Landscaping, Inc.,
Defendant-Appellant.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Gregory A. Cascino of counsel), for appellant.

Norman Liss, New York, for Sdhari Cason-Payano, respondent.

Brill & Associates, P.C., New York (Corey M. Reichardt of counsel), for Thomas G. Damiano, Mary Anne Damiano and Thornwood Ltd, LLC, respondents.

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for Beth Israel Medical Center, respondent.

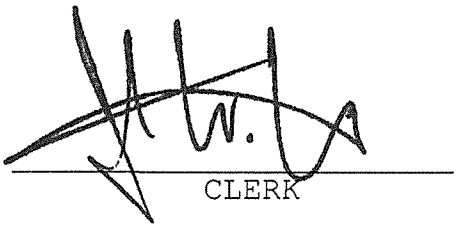
Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about April 9, 2008, which, in an action for personal injuries sustained in a slip and fall on ice in a parking lot, insofar as appealed from, denied defendant-appellant's snow removal contractor's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as against the contractor. The Clerk is directed to enter judgment in favor of defendant G.S. D'Antona Landscaping, Inc. dismissing the complaint as against it.

Plaintiff's theory is that the contractor negligently created or exacerbated a snow-related hazard by piling snow on the sides of the parking lot, rather than removing it, thereby permitting it to melt, trickle into the depressed, uneven area of the lot, and freeze. We reject that theory because it is not supported by the contract or the testimony. While the contractor's contract with defendants property owners obligated the contractor to initiate snow plowing and sanding/salting in the event of "a minimum accumulation of one inch of snow" and to apply sand/salt in the event of "hazardous icy weather conditions" without snow, it expressly relieved the contractor of responsibility "for the uneven pavement areas that continuously retain water/ice" and did not obligate the contractor to inspect the uneven area of the lot to see if melting and refreezing snow were creating a hazardous condition. Given the parameters of the contract, combined with the testimony that the last snowfall was three or four days prior to the accident, no icy weather conditions existed on the day of the accident, and there was no snow piled up in the lot, only patchy areas on the sides of the lot near the stores, it is speculation to assert that the ice on which plaintiff slipped was formed by snow or ice that the contractor negligently piled up or failed to remove. "By merely plowing the snow, [the contractor] cannot be said to have created

or exacerbated a dangerous condition" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 142 [2002]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



CLERK

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5020 The People of the State of New York, Ind. 2844/06
Respondent,

-against-

William Oree,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gershon of counsel), and Simpson Thacher & Bartlett, LLP, New York (Brittania C. Stewart of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered March 12, 2007, convicting defendant, after a jury trial, of assault in the second degree, robbery in the third degree, and escape in the first degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 12 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The injured detective testified that he tackled defendant, who was trying to escape, and that as a result defendant caused the detective's hand and knee to strike the pavement with a force equivalent to that of a fist hitting a wall. The detective testified that this caused pain, a deep abrasion to the middle finger of the hand resulting in bleeding, and swelling and bruising to the thumb requiring pain medication and icing for a period of a week. The detective

also testified that he sustained an injury to his knee which persisted for 10 to 12 days, hampered his ability to go up and down stairs, and also required pain medication and icing. The detective was treated at the scene by an emergency medical technician, and his injuries were also described by a fellow officer who testified that blood was dripping down the detective's arm to his elbow.

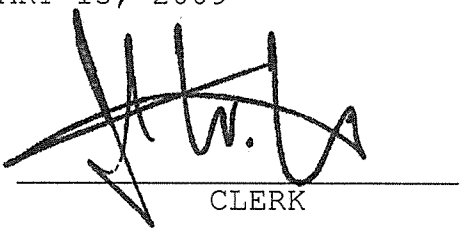
This testimony established the element of physical injury beyond a reasonable doubt (*see e.g. People v Harvey*, 309 AD2d 713 [2003], *lv denied* 1 NY3d 573 [2003]). To establish that element, the People need only establish that a victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]). Relatively minor injuries causing moderate, but "more than slight or trivial pain" may suffice (*see People v Chiddick*, 8 NY3d 445, 447 [2007][fingernail injury]), as may injuries that did not lead to any medical treatment (*see People v Guidice*, 83 NY2d 630, 636 [1994]). There is no basis for disturbing the jury's finding that the statutory threshold was met.

The procedure under which defendant was sentenced as a

persistent violent felony offender was not unconstitutional (*see Almendarez-Torres v United States*, 523 US 224 [1998]; *People v Leon*, 10 NY3d 122, 126 [2008], *cert denied* __US__, 128 S Ct 2976 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



CLERK

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5021 Brian Siegel, Index 105307/07
Petitioner-Appellant,

-against-

Board of Education of the City School District of the City of New York, et al.,
Respondents-Respondents.

James R. Sandner, New York (Aileen C. Naughton of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for respondents.

Order, Supreme Court, New York County (William A. Wetzel, J.), entered September 5, 2007, which denied the petition brought pursuant to CPLR article 78 seeking to annul the determination of respondents terminating petitioner's employment as a tenured teacher and to restore petitioner to his position with back pay, interest and lost benefits as of the effective date of his termination, unanimously affirmed, without costs.

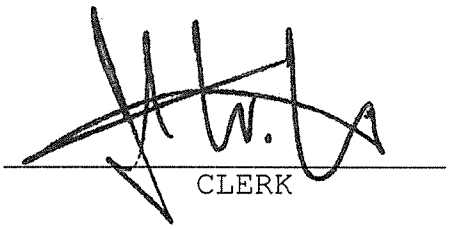
The court properly held that respondents did not act arbitrarily and capriciously when rejecting petitioner's belated request for a hearing pursuant to Education Law § 3020-a(2)(c) (*see e.g. Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Respondents had a rational basis for concluding that petitioner's explanation that his mental condition which had particularly manifested itself in May

and June 2006, the time when he was served with the notice of the charges against him, did not constitute a valid excuse for failing to timely request a hearing. The record reveals that petitioner was served with the charges personally and by mail, he had been represented by counsel during the investigation and had been told that charges were forthcoming, and, during the period in which he claimed he was too stressed to properly function, he was able to function by managing his day-to-day activities, including reporting to his assigned work location, and signing time sheets so he could be paid.

We have considered petitioner's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



CLERK

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5022 Carolyn Thomas French, Index 100207/98
Plaintiff-Appellant,

-against-

Alfred L. Schiavo, et al.,
Defendants-Respondents.

Ronemus & Vilensky, Garden City (Lisa M. Comeau of counsel), for appellant.

Mauro Goldberg & Lilling LLP, Great Neck (Barbara D. Goldberg of counsel), for respondents.

Judgment, Supreme Court, New York County (John E.H. Stackhouse, J.), entered December 28, 2007, in plaintiff's favor, bringing up for review an order, same court and Justice, entered on or about June 29, 2007, which, upon a jury verdict awarding plaintiff, inter alia, $94,000 for past medical expenses, $176,000 for past lost earnings, and $3,100,000 for future lost earnings, denied plaintiff's motion, inter alia, to increase the award for past medical expenses, pursuant to stipulation, to $166,371.63, and granted defendants' motion for a collateral source offset to the extent of reducing the award for past medical expenses from $94,000 to $38,559, reducing the award for past lost earnings from $176,000 to $0, and reducing the award for future lost earnings from $3,100,000 to $1,133,016, unanimously modified, on the law, to vacate the collateral source offset, reinstate the jury awards for past medical expenses and

past and future lost earnings, and increase the award for past medical expenses to $166,371.63, and otherwise affirmed, without costs.

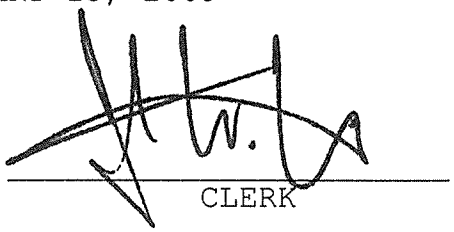
The parties' stipulation to the fair and reasonable value of past medical expenses in the amount of $166,371.63 should be enforced (*see Sanfilippo v City of New York*, 272 AD2d 201 [2000], *lv dismissed* 95 NY2d 887 [2000]).

Despite being allowed to conduct additional discovery following the first trial of this action (*see* 9 AD3d 279 [2004]), defendants failed to conduct discovery on collateral source issues at any time before the jury returned its verdict after the second trial, and they should not have been allowed to conduct posttrial collateral source discovery (*see Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 37-38 [2008], *lv denied* 11 NY3d 705 [2008]). In any event, despite plaintiff's compliance with their discovery demands, defendants failed to carry their burden of demonstrating "with reasonable certainty" that plaintiff's past medical expenses and past and future lost earnings were or would be replaced from collateral sources (CPLR 4545[c]; *see generally Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81 [1995]).

We have not considered plaintiff's remaining argument, which is not properly before us.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



CLERK

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5023 The People of the State of New York, Ind. 6702/06
Respondent,

-against-

Michael Joyce,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 7, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Late at night, police officers received a radio transmission about a gunpoint robbery which contained the location of the crime and a description of the robber. Shortly after the robbery the officers saw defendant, who approximately matched the description, near the site of the robbery. The circumstances provided, at least, an objective credible reason (*see People v De Bour*, 40 NY2d 210, 223 [1976]) to ask defendant for information. Since the lighting was dim, the officers asked defendant to come closer. As defendant approached, the officers observed that he

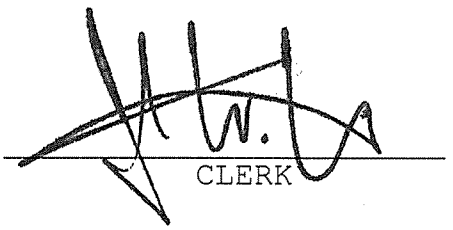
was walking at an angle, that his left bicep was stiff by his side while his left forearm was held at his waist, and that he was shifting his body weight to his left side. An officer testified that, based on his experience, this pattern of conduct signified an attempt to conceal a handgun. We conclude that defendant's behavior, coupled with the circumstances suggesting his possible involvement in the robbery, provided reasonable suspicion to justify a frisk (*see People v Soto*, 266 AD2d 74 [1999], *lv denied* 94 NY2d 925 [2000]; *compare People v Powell*, 246 AD2d 366 [1998], *appeal dismissed* 92 NY2d 886 [1998]).

M-5781 People v Michael Joyce

Motion seeking leave to file pro se brief denied.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5024-
5025 Efraim Rivera, et al., Index 8503/05
Plaintiffs-Appellants,

Michael Ortiz,
Plaintiff,

-against-

Gelco Corporation, et al.,
Defendants-Respondents.

- - - - -

Efraim Rivera, et al.,
Plaintiffs,

Michael Ortiz,
Plaintiff-Appellant,

-against-

Gelco Corporation, et al.,
Defendants,

Jose J. Arbuleda,
Defendant-Respondent.

Arnold E. DiJoseph, III, New York, for Efraim Rivera and Julia Rivera, appellants.

The Edelsteins, Faegenburg & Brown, LLP, New York (Evan M. Landa of counsel), for Michael Ortiz, appellant.

Malapero & Prisco, LLP, New York (Yana M. Siegel of counsel), for respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered October 30, 2007, which granted defendants' motion for summary judgment dismissing the complaints, unanimously affirmed, without costs.

Defendants carried their prima facie burden of demonstrating

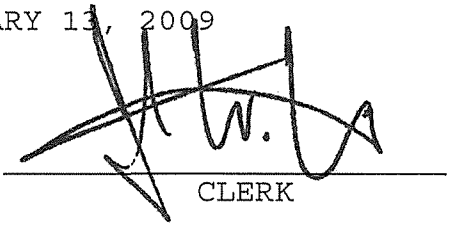
that the injured plaintiffs did not sustain serious injuries (Insurance Law § 5102[d]) by submitting physician reports based on physical examinations of plaintiffs and reviews of their medical records, in both instances attesting to normal findings (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). In response, plaintiff Ortiz failed to raise an issue of fact. Having ceased medical treatment more than two years before the summary judgment motion, he failed to submit a physician's affirmation to explain that further treatment would have been unavailing (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]), which was fatal to his claim (*Otero v 971 Only U, Inc.*, 36 AD3d 430, 431 [2007]). With respect to his claim of incapacity for 90 of the first 180 days after the accident, which the motion court failed to address, his assertion that he was unable to lift heavy items was insufficient in the absence of competent medical evidence of his claimed restrictions (*see Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [2008]; *Rossi v Alhassan*, 48 AD3d 270 [2008]).

In the face of evidence of a prior accident and injury, and in opposition to defendants' expert opinions that his claimed injuries were not caused by the accident and were the result of age, plaintiff Efraim Rivera failed to raise an issue of fact. His physician's affirmation did not even mention the prior injury

or address degeneration (*see Sky v Tabs*, 2008 NY App Div LEXIS 9171, 2008 WL 5083699). The affirmation was based on an examination conducted long after the accident and failed to raise an issue of fact as to incapacity under the 90/180-day test (*Uddin v Cooper*, 32 AD3d 270, 272 [2006], *lv denied* 8 NY3d 808 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



CLERK

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5026 The People of the State of New York, Respondent, Ind. 976/06

-against-

Earl Berring, Defendant-Appellant.

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J. at suppression hearing; Edward J. McLaughlin, J. at jury trial and sentence), rendered June 5, 2007, convicting defendant of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony offender whose prior felony conviction was a violent felony, to an aggregate term of 6 years, unanimously affirmed.

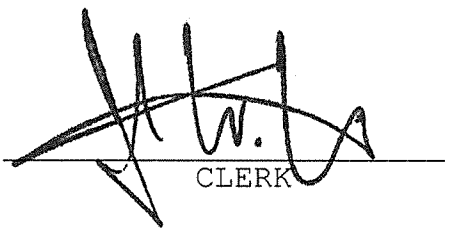
The hearing court properly denied defendant's request to call the undercover officer at the suppression hearing since the hearing evidence did not raise any substantial question as to the legality of the arrest (*see People v Petralia*, 62 NY2d 47 [1984], *cert denied* 469 US 852 [1984]; *People v Medina*, 9 AD3d 251 [2004], *lv denied* 3 NY3d 739 [2004]). In this unusual "buy and bust" case, the undercover officer who bought the drugs seized

defendant himself and held him for the arresting officer. The arresting officer testified that he observed the undercover officer struggling with defendant, who wore the same color shirt as one of the described sellers, and also testified that the undercover officer pointed out a bag on the ground containing numerous individual drug packages and stated that defendant had dropped it. The chain of events, viewed as a whole, clearly warranted the conclusion that there was a drug transaction and that defendant was one of the sellers (*see People v Quezada*, 305 AD2d 207 [2003], *lv denied* 100 NY2d 586 [2003])

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on January 13, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
Eugene Nardelli
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, SCI 545/07
Respondent,

-against- 5028

Wessppim Wilman,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about August 9, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

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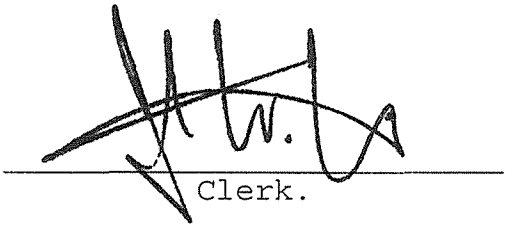


Clerk.

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5029 Citicorp Leasing, Inc., Index 603254/04
Plaintiff-Respondent,

-against-

U.S. Auto Leasing, Inc., et al.,
Defendants,

Bahig F. Bishay,
Defendant-Appellant.

Bahig F. Bishay, appellant pro se.

Schickler & Schickler, L.L.P., New York (Arnold S. Schickler of counsel), for respondent.

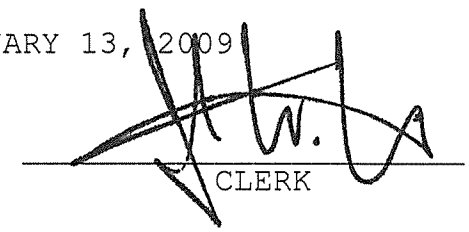
Order and judgment (one paper), Supreme Court, New York County (Herman Cahn, J.), entered September 10, 2007, which granted plaintiff creditor's motion to confirm the Special Referee's report computing damages and assessing attorneys' fees against defendant-appellant guarantor, and awarded plaintiff $3,090,965.36, inclusive of interest, costs and disbursements, unanimously affirmed, without costs.

The Special Referee's findings on the issues of the amount of defendant car leasing company's outstanding indebtedness to plaintiff, and the amount defendants realized from dealings involving plaintiff's collateral that was not deposited into an escrow account as required by a preliminary injunction, have ample support in the record (*see Merchants Bank of N.Y. v Dajoy Diamonds*, 5 AD3d 167 [2004]). Indeed, they are based on evidence

that was largely uncontested. Appellant's evidence of an alleged oral agreement to settle the underlying indebtedness was properly excluded as barred by the parol evidence rule (*see Peacock Holdings v Keefe & Keefe*, 232 AD2d 331 [1996]; *Tilden of N.J. v Regency Leasing Sys.*, 230 AD2d 784 [1996]), and also because it was not pleaded as an affirmative defense (CPLR 3018[b]; *see Pallette Stone Corp. v Mangino*, 217 AD2d 738 [1995]). Concerning the award of attorneys' fees (*see Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705 [1985]), there is no support in the record for appellant's claim that plaintiff and its attorneys engaged in a fraudulent "two-tiered billing system" involving a claim by plaintiff for attorneys' fees for more than it actually paid. Counsel never represented that plaintiff had paid the entire amount that had been billed, provided invoices at the hearing reflecting that plaintiff had not yet paid the entire amount that had been billed, and promptly disclosed to the court the credit, or discount, that was given plaintiff some six weeks after the attorney's testimony at the hearing. We have considered appellant's other arguments, and his counterclaims, and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



CLERK

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5030 The People of the State of New York, Ind. 5093/04
Respondent,

-against-

Sergio Parra,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered April 9, 2007, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 23 years to life, unanimously affirmed.

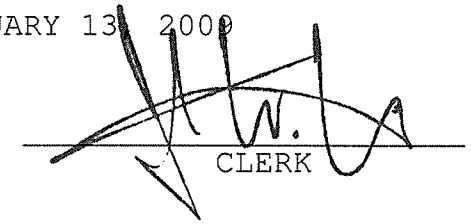
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant failed to prove by a preponderance of the evidence that he was acting under an extreme emotional disturbance (Penal Law § 125.25[1][a]) when he stabbed his estranged wife. The jury had an ample basis on which to reject the claim that defendant's discovery of the fact that his wife was living with another man provided a reasonable explanation or excuse for his claimed mental state (*see People v Maher*, 89 NY2d 456, 463 [1997]; *People v Piquion*, 283 AD2d 233, 234 [2001], *lv denied* 96 NY2d 906 [2001]). Furthermore, there was extensive evidence of conduct by

defendant before and after the crime that not only contradicted his defense, but also undermined the testimony of defendant's expert witness, who was impeached by his lack of awareness of important parts of this evidence (*see People v Maher*, 89 NY2d at 463).

Defendant's challenges to the court's jury instructions concerning the requirement of unanimity and the definition of the term preponderance of the evidence are unpreserved. We do not find any mode-of-proceedings error exempt from preservation requirements (*see People v Thomas*, 50 NY2d 467, 472 [1980]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we also reject them on the merits. The court sufficiently instructed the jury on both matters, and the differences between the court's phrasing, which followed the New York Criminal Jury Instructions, and the phrasing suggested by defendant amounts, in each instance, to a difference in form rather than substance. The absence of objections by trial counsel did not deprive defendant of effective assistance, since nothing in the instructions at issue was constitutionally deficient or caused defendant any prejudice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2000



Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5031 Double C Realty Corp., Index 7601/07
Plaintiff-Appellant,

-against-

Craps, LLC,
Defendant-Respondent.

Finkelstein Newman Ferrara LLP, New York (Barry Gottlieb of counsel), for appellant.

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Lawrence Schiro of counsel), for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered July 11, 2008, which, in an action by a tenant against its landlord involving the validity of tenant's exercise of an option to renew the subject lease, denied plaintiff-tenant's motion for summary judgment, unanimously modified, on the law, to the extent of granting plaintiff's motion to dismiss the fourth affirmative defense based upon the Rule Against Perpetuities and otherwise affirmed, without costs.

By its terms, the lease provides that plaintiff's options to extend the term of the lease "shall be exercised by written notice given to the Lessor at least one (1) year before the expiration of the Initial Term hereof, or, in the event Lessee has previously exercised one or more options herein given, such notice shall be given at least six (6) months before the expiration of such option term." Such options clearly originate

in one of the lease provisions, are not exercisable after lease expiration, and are incapable of separation from the lease. Thus, as options "appendant" or "appurtenant" to the lease, they are valid even though the holder's, in this case plaintiff's, interest may vest beyond the perpetuities period and are not contemplated by EPTL 9-1.1(b) (*Symphony Space v Pergola Props.*, 88 NY2d 466, 480 [1996]). We have considered plaintiff's other arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009

CLERK

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5032N Daniel Ryan, Index 601909/05
Plaintiff-Respondent,

-against-

Kellogg Partners Institutional Services,
Defendant-Appellant.

Peckar & Abramson, P.C., River Edge, NJ (Elana Ben-Dov of counsel), for appellant.

Thomas S. Rosenthal, New York, for respondent.

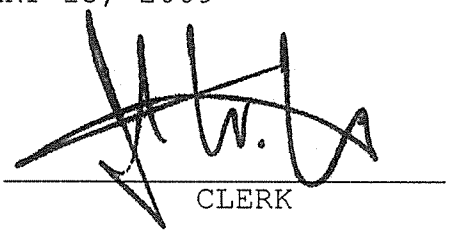
Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 26, 2008, which, in an action arising out of a securities industry employment relationship, denied defendant former employer's motion to compel arbitration before the Financial Industry Regulatory Authority (FINRA, f/k/a NAS), unanimously affirmed, with costs.

Defendant waived any right to arbitration by failing to raise it as a defense in its answer, asserting counterclaims, making a dispositive motion, and otherwise actively participating in this litigation for almost three years through the completion of extensive disclosure proceedings and the filing of a note of issue, all to the prejudice of plaintiff (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 371-372 [2005]; *see Matter of Advest, Inc. v Wachtel*, 253 AD2d 659 [1998] [NASD arbitration subject to FAA]). It does not avail defendant that plaintiff did not timely respond to defendant's untimely arbitration demand.

Once waived, the right to arbitration cannot be regained (*Tengtu Intl. Corp. v Pak Kwan Cheung*, 24 AD3d 170, 172 [2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



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Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5033N Boi To Go, Inc., Index 601473/07
Plaintiff-Appellant,

-against-

Second 800 No. 2 LLC,
Defendant-Respondent.

Stephen H. Finkelstein, New York, for appellant.

Howard J. Peltz, New York, for respondent.

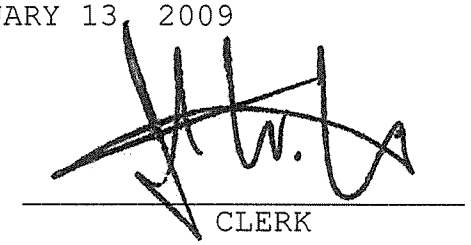
Order, Supreme Court, New York County (Louis B. York, J.), entered June 4, 2008, which, insofar as appealed from, denied plaintiff's motion for a *Yellowstone* injunction, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff restaurant established its entitlement to a *Yellowstone* injunction. In addition to demonstrating that it held a commercial lease, had received a notice to cure from defendant landlord, and had requested injunctive relief prior to the expiration of the cure period, plaintiff showed that it was prepared and maintained the ability to cure the alleged default (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]). Although denying responsibility for the defaults set forth in defendant's notice, i.e., that plaintiff permitted offensive odors to emanate from its establishment to other areas of the building, plaintiff has nonetheless evinced a willingness to cure any defaults, if found

by the court (*see TSI W. 14, Inc. v Samson Assoc., LLC,* 8 AD3d 51, 52-53 [2004]; *compare Cemco Rests. v Ten Park Ave. Tenants Corp.*, 135 AD2d 461 [1987], *lv dismissed* 72 NY2d 840 [1988]). Here, there has yet to be a determination that odors were indeed coming from plaintiff's establishment, or, if so, whether plaintiff was responsible for them. Accordingly, there is no basis to evaluate whether plaintiff is in violation of its lease (*see E.C. Elecs., Inc. v Amblunthorp Holding, Inc.*, 38 AD3d 401 [2007]), and the application seeking injunctive relief should have been granted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Eugene Nardelli
Karla Moskowitz
Rolando T. Acosta
Leland G. DeGrasse, JJ.

4008
Index 603665/06

Arnold Wandel, Derivatively on Behalf
of Nominal Defendant, Bed Bath & Beyond, Inc.,
Plaintiff-Appellant,

-against-

Warren Eisenberg, et al.,
Defendants-Respondents,

Bed Bath & Beyond, Inc.,
Nominal Defendant-Respondent.

Plaintiff appeals from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered May 18, 2007, which granted defendants' motion to dismiss the amended complaint.

Federman & Sherwood, Oklahoma City, OK (William B. Federman of counsel); Pomerantz Haudek Block Grossman & Gross, LLP, New York (H. Adam Prussing and Jeremy A. Lieberman of counsel); and Law Offices of Marc S. Henzel, Lawrence (Marc S. Henzel of counsel), for appellant.

Proskauer Rose LLP, New York (David M. Lederkramer, Karen E. Clarke and John H. Snyder of counsel), for respondents.

SAXE, J.P.

Following this Court's recent reinstatement of a shareholder derivative action based upon claims that a majority of the board of directors knew or had enough specific information that they should have known of the company's practice of backdating stock options (*see Matter of Comverse Tech., Inc. Derivative Litig.*, 56 AD3d 49 [2008]), we must now further consider the amount of knowledge and information necessary to establish demand futility.

In the wake of a wave of publicity disclosing that numbers of public companies had been backdating stock option grants, in June of 2006 two securities analysts, Merrill Lynch and Deutsche Bank, issued reports identifying nominal defendant Bed Bath & Beyond as a company whose stock option grant dates aroused suspicion of backdating. On June 19, 2006, the board of directors of Bed Bath & Beyond appointed a special committee of two independent directors to conduct an investigation.

On September 20, 2006, counsel for the special committee notified the SEC of its review, and the SEC commenced its own informal inquiry. On October 10, 2006, Bed Bath & Beyond made public the findings of its special committee, which had "identified various deficiencies in the process of granting and documenting stock options." The report acknowledged that "[s]ome hindsight was used in selecting some annual grant dates." Specifically, "[e]xcluding grants only to Form 4 filers beginning

in 2003, almost all annual grant dates in 1998-2004 likely were selected with some hindsight," although this "hindsight" was relatively slight, in that grant dates were selected within a few trading days after the recorded date, and the individuals who selected the dates did not "appreciate the accounting or disclosure implications of the practices used for selecting those dates." Similarly, the special committee found that the people responsible for accounting and disclosure functions at the company were unaware of any of the improper date selection practices. It concluded that no person involved in the grant process had engaged in willful misconduct and, in particular, that the co-chairmen and chief executive officer believed that they were acting in the best interests of the company with the purpose of attracting and retaining employees.

Following the issuance of the report, the company adopted new controls in its stock option awards process. It also performed a financial analysis of the effect of adjusting for the option misdating. It determined that the adjustment of compensation charges for those years would have no material effect on its past financial statements, but that adjustment of the equity section of its consolidated balance sheet would be necessary. In addition, it reset the prices of unvested options to the appropriate levels.

Approximately nine days after Bed Bath & Beyond made public

the special committee's findings, plaintiff brought the instant derivative action. Defendants moved to dismiss the complaint for failure to adequately plead demand futility, and the motion was granted. This appeal followed.

Business Corporation Law § 626(c) requires that a shareholder bringing a derivative action seeking to vindicate the rights of the corporation allege, with particularity, either that an attempt was first made to get the board of directors to initiate such an action or that any such effort would be futile. "The demand requirement rests on basic principles of corporate control--that the management of the corporation is entrusted to its board of directors, who have primary responsibility for acting in the name of the corporation and who are often in a position to correct alleged abuses without resort to the courts" (*Bansbach v Zinn*, 1 NY3d 1, 8-9 [2003] [internal quotation marks and citation omitted]). Therefore, the demand requirement is excused only when the complaint's specific allegations support the conclusion that "(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction" (*Marx v Akers*, 88 NY2d 189, 198 [1996]).

The pertinent question here is whether the complaint alleges

with the requisite particularity any of the grounds for excusing demand on the board of directors as futile. As to the first test for demand futility under *Marx v Akers*, the complaint fails to support the assertion that a majority of the directors should be treated as interested in the transaction. It is conceded that of the 10 individuals on the board of directors during the relevant period, three inside directors are alleged to have received backdated options and must therefore be treated as interested. However, the allegations as to the actions of the other directors are insufficient to establish that any of them were interested. There is nothing from which to infer that any of the other directors were controlled by the inside directors. The bare claim that the directors who served on the stock option and compensation committees should be viewed as interested because they are "substantially likely to be held liable" for their actions is not enough. The assertion that directors are interested because they are "substantially likely to be held liable" applies a standard employed in Delaware (*see, e.g. Stone v Ritter*, 911 A2d 362, 370 [Del 2006]); however, New York's Court of Appeals has declined to adopt "the Delaware approach to demand futility" (*Marx*, 88 NY2d at 198). Indeed, if we were to find demand futility wherever it was asserted that a majority of directors were "substantially likely to be held liable," then

> "all well-pled complaints would be able to establish demand futility. If facts outside of the pleadings may

> be considered in determining 'likelihood of liability,' a trial on the merits would be needed to determine whether to apply the futility exception"

(*see In re InfoSonics Corp. Derivative Litig.*, 2007 WL 2572276, *7, 2007 US Dist LEXIS 66043, *20 [SD Cal, Sept. 4, 2007]). Nor is the assertion that these directors "completely disregarded or abdicated their responsibilities to manage the stock option plan" sufficient to fill the void.

The second ground on which demand futility may be established under *Marx v Akers* (88 NY2d at 198) is that "the directors failed to inform themselves to a degree reasonably necessary about the transaction." In this Court's recent decision in *Matter of Comverse Tech., Inc. Derivative Litig.* (56 AD3d 49 [2008], *supra*), we reinstated a shareholder derivative complaint involving the issuance of backdated stock options, concluding that the allegations established demand futility under the second test of *Marx v Akers.* In holding that the board and its compensation committee had failed to exercise reasonably appropriate oversight of the stock option granting process, we relied upon such specific assertions as (1) "unanimous written consents" for grants of stock options were sometimes presented to the compensation committee for signature more than a month after the grant date in circumstances where the stock price had risen dramatically in the intervening period, and yet were approved without question or inquiry; (2) compensation committee members

orally approved option grants in direct violation of the company's bylaws; and (3) the compensation committee had a list of individuals who received option grants in 2001 that contained more than two dozen names of individuals who were not Comverse employees, which names were used for options placed in a "slush fund" for later use, yet not even a cursory check or inquiry was made by the compensation committee.

Here, in contrast, the amended complaint fails to plead with the requisite particularity that the directors had specific information or reason to inform themselves about the details of the issuance of stock options, and failed to do so.

The third test of *Marx* authorizes a finding of demand futility "when [the] complaint alleges with particularity that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors" (88 NY2d at 200-201). In this respect, too, the complaint now before us is distinguishable from that which we considered in *Matter of Comverse Tech., Inc.* (*supra*), where the factual allegations drew a picture of a backdating process so open and egregious as to preclude the possibility that issuance and approval of those options could constitute an appropriate exercise of business judgment on the part of the board of directors.

In *Comverse*, we adopted the Delaware Chancery Court's

observation that "[b]ackdating options qualifies as one of those 'rare cases [in which] a transaction may be so egregious on its face that board approval cannot meet the test of business judgment'" (*Ryan v Gifford,* 918 A2d 341, 355-356 [Del Ch 2007], quoting *Aronson v Lewis*, 473 A2d 805, 815 [Del 1984]). While we do not dispute the continued validity of that assertion, it may not be relied upon to eliminate the particularity requirement. The allegations here, based on a report acknowledging backdating but indicating that the misdating was generally by a matter of mere days, do not rise to the level required by the *Marx* test.

Indeed, after the *Ryan v Gifford* (*supra*) decision, the Delaware Court of Chancery was faced with a complaint charging the backdating of options but lacking sufficient specificity (*see Desimone v Barrows*, 924 A2d 908 [Del Ch 2007]). As in the matter before us, the plaintiff in *Desimone* did not specifically allege that the members of the board who served on the compensation committee knowingly approved improperly backdated options while possessed of specific reason to question the date selection process; the court declined to find demand futility based on the fact of backdating without more (*see id.* at 915).

The complaint here lacks the particularity required to support a finding of demand futility. Unlike the complaint in *Comverse*, it fails to allege with sufficient specificity a purposeful and egregious backdating scheme where the directors

had significant reason to question or investigate the process of stock option issuance and failed to do so. Moreover, unlike the company in *Comverse*, which failed to take action to correct the damage to it even after the scheme came to light, Bed, Bath & Beyond remedied the error by resetting the price of unvested options, and adopted a number of other recommended new controls.

Plaintiff makes no arguments on appeal as to why he should be allowed to serve and file a second amended complaint, and we therefore deem that request abandoned. Were we to consider that claim, we would find that the motion court did not improvidently exercise its discretion in failing to grant the plaintiff's request to replead.

Accordingly, the order of the Supreme Court, New York County (Charles Edward Ramos, J.), entered May 18, 2007, which granted defendants' motion to dismiss the amended complaint, should be affirmed, without costs.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2009

CLERK