SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 20, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4264 Gary Norfleet, Index 18969/06
Plaintiff-Respondent,

-against-

Deme Enterprise, Inc., et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Holly E. Peck of counsel), for appellants.

Law Office of Michael T. Ridge, Port Washington (Michelle S. Russo of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about January 25, 2008, which denied defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

We reject defendants' argument that plaintiff's chiropractor failed to satisfactorily address their radiologist's conclusions relating to his opinion that plaintiff's condition is due to preexisting, degenerative changes, where plaintiff's chiropractor specifically opined that plaintiff's injuries may contribute to "future degenerative processes" and that the trauma sustained in the accident "was the competent producing factor of the . . .

injuries" (*see Hammett v Diaz-Frias*, 49 AD3d 285 [2008]), and where defendants' radiologist's conclusions were couched in equivocal terms such as "most likely degenerative" and "may be degenerative." We have considered defendants' other arguments and find them unavailing.

All concur except Andrias, J. who dissents in a memorandum as follows:

ANDRIAS, J. (dissenting)

Plaintiff's chiropractor failed to address or even mention the findings of defendants' radiologist that plaintiff's alleged injuries were degenerative in nature. Thus, his opinion was speculative, requiring dismissal of the complaint on the ground of lack of causation. Accordingly, I would reverse and grant defendants' motion for summary judgment dismissing the complaint.

Contrary to the majority's characterization, defendants' radiologist's use of the words "most likely" and "may" in explaining his opinion that plaintiff's cervical spine pathology, as shown on an MRI taken five weeks after the accident, was degenerative in etiology, does not render his opinion equivocal or speculative, and his report served to put causation in issue (*see Pommells v Perez*, 4 NY3d 566, 579 [2005]). The radiologist's conclusions, characterized by the motion court as "suggestive rather than dispositive," were accompanied by his observation of "[d]egenerative disc dehydration . . . at each level from C2-3 through C6-7." He stated that some of these protrusions, namely, the "broad based midline posterior" ones at C4-5, C3-4 and C5-6, "are associated with degenerative disc dehydration at these levels" and thus are "most likely" degenerative in etiology. Moreover, the "protrusion/herniation" at C6-7, while "more asymmetric" and thus "of more indeterminate age and etiology" "may be degenerative in nature as well." But,

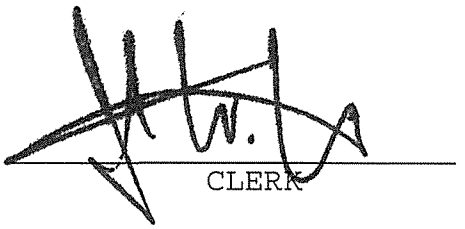
in any event, the radiologist observed, "there is no associated spinal cord compression or significant compromise of the neural foramen at C6-7 and, as such, the finding would not be expected to result in a neurologic deficit clinically." Furthermore, a "straightening of the cervical lordosis" that is "nonspecific," as here, "frequently accompanies degenerative disc disease."

On the other hand, while plaintiff's chiropractor quantified plaintiff's limitations of motion and concluded that they were significant, he failed to address, let alone refute, defendants' evidence of a preexisting degenerative condition. His statement that any injury to the disc and annulus "may contribute to future degenerative processes" and eventually "accelerate the degenerative process" is insufficient to explain why he ruled out or failed to address the foregoing findings of defendants' radiologist that plaintiff's alleged injuries were degenerative in nature, and rendered his opinion that they were caused by the accident speculative (see *Gorden v Tibulcio*, 50 AD3d 460, 464 [2008]). Thus, there is no objective basis for concluding that plaintiff's injuries are attributable to the subject accident rather than to the degenerative condition (*see Jimenez v Rojas*, 26 AD3d 256, 257 [2006]) and the complaint should have been

dismissed on the ground of lack of causation (*see Pommells v Perez*, 4 NY3d at 579-580; *DeLeon v Ross*, 44 AD3d 545, 545 [2007]).

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

ENTERED: JANUARY 20, 2009



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

4522 Natalia Anikushina, Index 117618/03
Plaintiff-Appellant,

-against-

Courtney D. Moodie,
Defendant,

Consolidated Delivery Logistics, Inc., et al.,
Defendants-Respondents.

Anthony J. Pirrotti, Ardsley, for appellant.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for respondents.

Order, Supreme Court, New York County (Deborah Kaplan, J.), entered August 7, 2007, which granted the corporate defendants' motion for summary judgment dismissing the complaint as against them, denied, as moot, their motion to strike plaintiff's notice to admit, and denied plaintiff's cross motion for leave to renew her motion to strike certain portions of defendants' answer to her second amended complaint, modified, on the law, to deny the motion for summary judgment and remand for determination of defendants' motion to strike, and otherwise affirmed, without costs.

The evidence presents a triable issue whether the corporate defendants exercised sufficient control over defendant Moodie's work to potentially render them liable for injuries plaintiff suffered when she was struck by a delivery van driven by Moodie

(*see Carrion v Orbit Messenger*, 82 NY2d 742 [1993]). Moodie performed delivery services only for Olympic Courier Systems, Inc., a subsidiary of CD&L Inc., during the years in which he worked for CD&L pursuant to an independent contractor's agreement with Olympic; he used CD&L forms; he made deliveries and pick-ups at times specified by CD&L; his whereabouts were tracked by CD&L by means of a prepared schedule and regular contact through a CD&L computer and CD&L dispatchers; he was paid 57% of the gross billing receipts for work performed; he was obligated to procure insurance in an amount dictated by the independent contractor's agreement; he always wore a shirt bearing defendants' logo (*see id*; *Devlin v City of New York*, 254 AD2d 16 [1998]).

The court correctly denied plaintiff's cross motion to renew her motion to strike, since the evidence she submitted, even if new, was not addressed to the issues raised either in her original motion or in defendants' motion for summary judgment.

All concur except Catterson, J. who dissents in a memorandum as follows:

CATTERSON J. (dissenting)

Because I believe that the evidence in this case clearly demonstrates that the corporate defendants lacked the requisite degree of control necessary to an employer-employee relationship with the defendant driver and therefore, are not vicariously liable, I must respectfully dissent.

This action results from an automobile accident which occurred on August 1, 2003. The plaintiff alleges that a van driven by the defendant Courtney D. Moodie struck her as she was attempting to cross the street. At the time of the accident, Moodie was delivering packages for defendant Olympic Courier Systems, Inc., the subsidiary of defendant CDL.

In October 2003, the plaintiff commenced a personal injury action against Moodie. Subsequently, the plaintiff added the corporate defendants as parties, alleging that they were vicariously liable for Moodie's negligence.[1] On or about January 29, 2007, the corporate defendants moved for summary judgment on the grounds that Moodie was not an employee of any of the

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[1]In late October 2003, the plaintiff served a first amended complaint to include Moodie's alleged employer, Consolidated Delivery Logistics, Inc., as a defendant. Consolidated later changed its name to CD&L Inc. The plaintiff, thereafter served a second amended complaint to include, as party defendants, the remaining named corporate defendants. She argued that the corporate veil should be pierced as to the wholly owned subsidiary and alter ego of CDL, defendant Olympic. The plaintiff also argued, inter alia, that the other defendants were shell corporations controlled by CDL, and that Moodie's work on behalf of CDL was controlled by these defendants as well.

corporate defendants, but rather, an independent contractor who provided delivery services to the defendants. Therefore, they could not be held vicariously liable for his negligence.

In support of their motion, the corporate defendants relied on the "Independent Contractor Agreement" between Moodie and Olympic, as well as Moodie's payroll history and Form 1099s, and the EBT testimony of both Moodie and Curtis Hight, Olympic's Region Manager.[2] The Agreement provided, inter alia, that Moodie was free to decide his own route for deliveries; could maintain a flexible work schedule for his business; was free to work for other companies; and could accept or reject the corporate defendants' regularly scheduled deliveries.

Moodie testified that he owned his own delivery van[3], and paid for the vehicle's registration, insurance, gas and upkeep. He described his work for CDL as "flexible." His weekly pay from CDL was based on commission, and it was variable depending on the number of deliveries and time worked. Moodie was required to file a W-4 form with CDL's payroll department and he identified Form 1099's from Olympic for the years 2000-2003.

Hight testified that Moodie was not an employee of either

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[2]The Form 1099 is the Internal Revenue Service's tax form used for independent contractors to report income. Income reported on the Form 1099 does not have taxes taken out of it.

[3]It is undisputed that the markings on the van contained Moodie's name and address.

Olympic or CDL, that he never received employee-related benefits, that he was not treated as an employee for tax purposes, that Moodie paid his own work costs, and that he performed delivery services pursuant to an independent contractor's agreement.

By order entered August 7, 2007, the court granted the corporate defendants' motion for summary judgment dismissing the action as against them upon finding that Moodie was an independent contractor rather than an employee.

On appeal, the plaintiff asserts that the motion court had no basis to rule that an independent contractor relationship existed between the corporate defendants and Moodie. She asserts that CDL controlled both the results of Moodie's work and the means used to achieve the results. Specifically, the plaintiff argues that CDL/Olympic dictated, assigned and coordinated deliveries through its computer program and dispatchers. The plaintiff also asserts that other evidence in the record demonstrates that CDL had control over Moodie, including, inter alia, that Moodie had to wear a CDL uniform, compile and timely submit completed delivery receipts, deliver packages by a certain time to recurrent customers, and leave undelivered packages at CDL warehouses. At the very least, the plaintiff argues there exists a material issue of fact as to the status of Moodie's work relationship with CDL/Olympic. For the reasons set forth below, I disagree.

As a general rule, a principal is not liable for the acts of an independent contractor because principals ordinarily do not control the manner in which independent contractors perform their work. Chainani v. Board of Educ. of City of N.Y., 87 N.Y.2d 370, 380-381, 639 N.Y.S.2d 971, 975, 663 N.E.2d 283, 287 (1995). Control of the method and means by which work is to be performed, therefore, is a critical factor in determining whether a party is an independent contractor or an employee for the purposes of tort liability. Harjes v. Parisio, 1 A.D.3d 680, 680-681, 766 N.Y.S.2d 270, 271 (2003), lv. denied, 1 N.Y.3d 508, 777 N.Y.S.2d 17, 808 N.E.2d 1276 (2004). While such a determination typically involves a question of fact, in those instances where the evidence on the issue of control presents no conflict, the matter may properly be determined by the court as a matter of law. Lazo v. Mak's Trading Co., 199 A.D.2d 165, 166, 605 N.Y.S.2d 272, 273-274 (1st Dept. 1993), aff'd, 84 N.Y.2d 896, 620 N.Y.S.2d 794, 644 N.E.2d 1350 (1994). I believe that this presents just such a case.

Recently, the Court of Appeals has reaffirmed that "the critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer." Bynog v. Cipriani Group, 1 N.Y.3d 193, 198, 770 N.Y.S.2d 692, 694-695, 802 N.E.2d 1090, 1092-1093 (2003). The factors relevant to assessing control include

whether the worker (1) works at his own convenience, (2) is free to engage in other employment, (3) receives fringe benefits, (4) is on the employer's payroll and (5) is on a fixed schedule. Id. at 198; 770 N.Y.S.2d at 695. Moreover, "incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship." Matter of Ted Is Back Corp. (Roberts), 64 N.Y.2d 725, 726, 485 N.Y.S.2d 742, 743, 475 N.E.2d 113, 114 (1984).

In the instant case, there is overwhelming evidence that Moodie was an independent contractor. The following facts are undisputed: Moodie owned his own vehicle; he paid all the costs associated with his vehicle; he was free to make his own hours; he could work for others; his contract was not exclusive to Olympic; he could accept or decline jobs as he decided; no taxes were withheld from his pay; no Social Security was withheld from his pay; he was not required to put a CDL mark on his vehicle; he could hire his own employees to assist him; he had to pay for the phone he used; he received no fringe benefits from the corporate defendant; and he was not provided worker's compensation by any of the corporate defendants. Furthermore, there is no evidence that Moodie was required to wear a shirt with the CDL logo. Indeed, it is undisputed that Moodie only wore a CDL shirt because he received a bonus for wearing it. Moreover, Moodie

testified that he wore the CDL-logo shirt to assist CDL's customers in identifying him so that he could gain quick access to delivery locations. He also testified that the route he took between his delivery location in New York City and his delivery location on Long Island was not dictated by Olympic, but rather, given the traffic conditions on Long Island, it was the only sensible route to take.

Contrary to the plaintiff's contention, the fact that Moodie called a company dispatcher, that he received text messages to obtain information as to pickups and deliveries, or that he was asked to make a delivery to Uniondale by a specific time are all insufficient to raise a triable issue of fact with respect to the employment status. See Defeo v. Frank Lambie, Inc., 146 A.D.2d 521, 536 N.Y.S.2d 459 (1st Dept. 1989) (where manufacturer was entitled to summary judgment since there was no evidence to support claim that delivery company was agent of manufacturer, rather than independent contractor, notwithstanding fact that district manager of manufacturer occasionally instructed delivery company as to whether shipped goods were to be delivered, and as to how they should be segregated according to type); see also Irrutia v. Terrero, 227 A.D.2d 380, 642 N.Y.S.2d 328 (2nd Dept. 1996) (noting that while car service corporation did provide dispatches for the drivers who agreed to certain rules and standards, such rules merely related to incidental control and

the exercise of general supervisory power).

Equally without merit is the plaintiff's contention that Bermudez v. Ruiz (185 A.D.2d 212, 586 N.Y.S.2d 258 (1st Dept. 1992)) requires reversal. In Bermudez, this Court found that the motion court erred in making a determination that, as a matter of law, an operator of a delivery truck was an independent contractor and not an agent of a furniture company. In reaching that conclusion, we relied upon the fact that there was no evidence of an independent contractor agreement between the driver and the company. In this case, however, it is undisputed that Moodie and the corporate defendants had just such an agreement. The plaintiff's position that a signed, authenticated agreement attested to by all the parties has no probative value, is simply untenable. See Gfeller v. Russo, 45 A.D.3d 1301, 846 N.Y.S.2d 501 (4th Dept. 2007) (the fact that a contract exists designating a person as an independent contractor is to be considered, but is not dispositive).

It is also worth noting that the plaintiff's reliance on Devlin v. City of New York (254 A.D.2d 16, 678 N.Y.S.2d 102 (1st Dept. 1998)), is misplaced. In Devlin, this Court determined that the record presented a question of fact about whether a car company controlled its drivers so as to give rise to vicarious liability. In reaching this conclusion, we relied on the facts that the car company required drivers to drive certain cars, wear

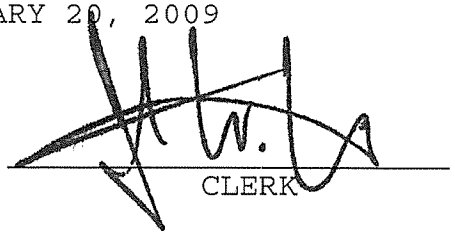
certain clothing, charge fares set by the company, pay membership dues, attend a three-day orientation course taught by the company, follow company by-laws and working rules, and display the company name and logo in their vehicle in an open and obvious manner. Here, the facts are very different. Even a cursory look at the record reveals that the only indicia of control exerted over Moodie by the corporate defendants were purely incidental. See e.g. Abouzeid v. Grgas, 295 A.D.2d 376, 743 N.Y.S.2d 165 (2nd Dept. 2002) (where a limousine driver, who struck and injured a person, received radio dispatches from the company to pick up customers, was free to reject pick-ups, set his own hours, owned his own car, payed for gasoline and EZ passes, maintained insurance, was responsible for maintenance of his limousine, could hire drivers to work for him, and the company withheld no taxes for the driver, the court concluded that the control exercised by the company over the driver was only incidental, and was insufficient to give rise to an employment relationship).

In my view, even under the most generous interpretation of the relationship between Moodie and the corporate defendants, it cannot be said that they had an employer-employee relationship.

Therefore, I would affirm the order of the motion court in its entirety.

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

ENTERED: JANUARY 20, 2009



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

4473N-
4473NA Troy Garced, Index 8960/07
Plaintiff-Appellant,

-against-

Clinton Arms Associates, et al.,
Defendants-Respondents.

Morton Buckvar, New York, for appellant.

Weiner, Millo & Morgan, LLC, New York (Alissa A. Mendys of counsel), for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 16, 2008, which, insofar as appealable, denied plaintiff's motion to renew a prior order, same court and Justice, entered on or about September 5, 2007, insofar as appealed from as limited by the briefs, granting the motion of defendant Clinton Arms Associates (Clinton) to change venue from Bronx County to Nassau County, affirmed, without costs. Appeal from the September 5, 2007 order, unanimously dismissed, without costs, as superseded by the appeal from the January 16, 2008 order.

Plaintiff sustained severe burns to his neck on premises allegedly controlled by Clinton after he passed out from a heroin overdose and came into contact with an uninsulated hot water pipe. A psychosocial assessment conducted in connection with his admission to Jacobi Hospital on March 18, 2006 states that he

"lives in a first floor apartment with his mother . . . spent four years in prison on drug charges and has been on parole for the last two years." Department of Correctional Services records, however, reflect that plaintiff had been released from custody the previous day, having been committed for a parole violation on December 29, 2005. Plaintiff was again in custody at the time he commenced this action by filing a summons and complaint on March 16, 2007. He placed venue in Bronx County on the basis of his residence immediately prior to his latest period of incarceration, purportedly the apartment occupied by his mother where his injury was sustained.

Clinton moved to change venue to Nassau County, its principal place of business (CPLR 503[d]), on the ground that venue was improperly laid. Clinton's application was supported by its own records as well as the affidavits of plaintiff's mother dated April 1, 2005 and April 6, 2007, her letter dated April 27, 2006 and section 8 housing assistance certifications dating back to 1999, all of which reflect that she was the only person residing in the apartment.

In opposition, plaintiff submitted records from Jacobi Hospital, where he was admitted for five days of treatment, including a skin graft, and his affidavit stating that, prior to incarceration, he had been residing in his mother's apartment. He argued that the motion should be denied because Clinton failed

to prove that he lived elsewhere.

In reply, Clinton countered that the full extent of its burden was to demonstrate plaintiff's lack of residence in the county designated for trial. Clinton portrayed plaintiff's affidavit as unsupported and self-serving, noting that, on admission to Jacobi Hospital, plaintiff had given the name "Troy Pagan," not "Troy Garced." Finally, Clinton contended that plaintiff had failed to rebut his mother's numerous statements that she resided alone.

Plaintiff submitted further papers, denominated a sur-reply, including additional records from Jacobi Hospital and records from Lenox Hill Hospital, where he was briefly admitted in early April 2006 for treatment for a skin infection at the site of his skin graft. He maintained that any confusion over his identity in Jacobi Hospital records was attributable to his brother's surname, which is "Pagan." Plaintiff noted that those records had been corrected to reflect his true name.

Following Supreme Court's grant of a change of venue "for good cause shown," plaintiff brought a motion to renew and reargue, attaching a New York State identity card issued July 22, 2003 that had expired in October 2003, a pharmacy receipt dated April 10, 2006 and a mobile phone bill dated July 1, 2005. Plaintiff stated that his mother had been unable to locate these documents for him because she had been ill at the time he was

preparing his response to the original motion.

Supreme Court denied plaintiff's motion in all respects. The court noted that he had failed either to demonstrate that the additional documents were previously unavailable to him or to offer a reasonable excuse for his omission to submit them in opposition to Clinton's original motion.

There is no dispute that the evidence submitted by Clinton in support of its motion demonstrated that plaintiff failed to establish residency in the Bronx. What divides us is whether the evidence adduced by plaintiff in opposition to the motion is sufficient to raise a question of fact concerning his residence at his mother's apartment.

As the parties recognize, the proper venue is the county in which plaintiff resided prior to his incarceration in the spring of 2007 (*see Matter of Corr v Westchester County Dept. of Social Servs.*, 33 NY2d 111, 115 [1973]; *Farrell v Lautob Realty Corp.*, 204 AD2d 597, 598 [1994]). The difficulty with plaintiff's allegation that he lived with his mother is the highly regulated nature of the apartment in which she resides. In particular, the approval of the relevant housing authority is required "to add any other family member as an occupant of the unit" (24 CFR 982.551[h][2]), as mandated by Department of Housing and Urban Development regulations (24 CFR 966.4[a][1][v]; *see Matter of Abdil v Martinez*, 307 AD2d 238, 239 [2003]). Even assuming that

plaintiff is not legally barred from claiming the apartment as his residence (*see Katz Park Ave. Corp. v Jagger*, 11 NY3d 314, 317 [2008] [nonresident status under Immigration and Nationality Act precludes New York primary residence]), the record is devoid of any indication that plaintiff sought the necessary approval to occupy the apartment, such as an application by his mother to add him as a relative and member of her household. The record is also bereft of affidavits from neighbors or building personnel that might support plaintiff's presence in the apartment (*cf. Morrisania II Assoc. v Harvey*, 139 Misc 2d 651, 654 [1988]). Indeed, the documentary evidence concerning his mother's tenancy flatly contradicts plaintiff's residence in the apartment, specifically, her own sworn and unsworn statements and the recertification statements required to be obtained by Clinton in the course of its participation in the section 8 program (*see id.* at 660-661).

Plaintiff's opposition to the original motion consisted merely of his conclusory affidavit and a single page from the hospital records indicating that he arrived at, and was admitted to, Jacobi Hospital on March 18, 2006 and that he provided the hospital with his mother's address. Neither the fact that plaintiff sustained injury while at his mother's apartment nor his occasional presence in the Bronx for treatment during the following month is dispositive of the determination of residence

and, thus, venue. The first page of the hospital record establishes, at most, that he was present at his mother's apartment on the date of injury. But an isolated visit to his mother upon release from custody does not suffice to overcome her consistent averments that she was the sole occupant of the apartment (*see Furlow v Braeubrun*, 259 AD2d 417 [1999]). As to plaintiff's contention that Clinton failed to establish that he resided in a different county, we note that a defendant's burden on an application to change venue is limited to establishing that the designated county is improper (CPLR 510[1]); the movant is not obliged to offer proof of the plaintiff's actual abode.

The practice of filing a sur-reply was repudiated by this Court in *Ritt v Lenox Hill Hosp.* (182 AD2d 560, 562 [1992]; *see also Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1995]), which has been applied to bar consideration of such submissions (*see e.g. Pinkow v Herfield*, 264 AD2d 356 [1999]; *cf. Sanford v 27-29 W. 181st St. Assn.*, 300 AD2d 250, 251 [2002]). Even if we were to accept plaintiff's additional evidence, which we decline to do (CPLR 2214[b], [c]), it establishes only that he was admitted for five days of treatment at Jacobi Hospital and, several weeks later, for two days of treatment at Lenox Hill Hospital, again supplying his mother's address and naming her as his "primary contact."

To the extent plaintiff's subsequent application can be

deemed a motion to renew, the additional evidence submitted is uncompelling. A pharmacy receipt dated April 10, 2006 is the only documentary evidence remotely contemporaneous with plaintiff's post-accident incarceration, predating it by nearly a year. That plaintiff may have used the subject apartment as a billing address hardly serves to demonstrate residence.

All concur except McGuire, J. who dissents in a memorandum as follows:

McGUIRE, J. (dissenting)

On March 18, 2006, plaintiff allegedly suffered burn injuries when he passed out in the bathroom and came into contact with hot water pipes in apartment 1L in a building at 2160 Clinton Avenue in the Bronx. The building is owned by defendant Clinton Arms Associates. Plaintiff was subsequently arrested and convicted of a drug offense and incarcerated. While incarcerated, plaintiff commenced this action in March 2007 against the building's owner to recover damages for the injuries he sustained as a result of the incident. Plaintiff, asserting in both the summons and the complaint that he resided in the Clinton Avenue apartment, commenced the action in the Bronx.

The owner moved to change venue as of right, arguing that plaintiff did not reside in the Clinton Avenue apartment (*see* CPLR 510[1]); the owner sought to change venue from the Bronx to Nassau County, the county in which it has its principal office (*see* CPLR 503[d]). In support of its motion, the owner submitted public housing (Section 8) documents executed by plaintiff's mother that indicated that she was the only occupant of the apartment. The owner also submitted the affidavit of the president of its general partner who averred that, upon a search of the general partner's records, the only tenant listed in the apartment was plaintiff's mother. Included in the owner's motion papers were plaintiff's medical records regarding the treatment

he received following the incident.

In opposition, plaintiff submitted his own affidavit in which he stated that

> "I am currently incarcerated [in an upstate] Correctional Facility. Prior to my incarceration, I last resided at 2160 Clinton Ave., Apt. 1L, Bronx, New York, with my mother. I resided at that location on the date of the accident, March 18, 2006, until later in the year, when I was arrested and incarcerated. When admitted to Jacobi Hospital on the day of the accident with severe burns, I gave my address as 2160 Clinton Ave., Apt. 1L, Bronx, NY."

The medical records submitted by the owner indicate that plaintiff did give the hospital staff the address of the Bronx apartment as his residence. Notations in those records also indicate that plaintiff told a social worker at the hospital that he resided in the apartment with his mother. While most of the records are labeled as being for "Troy Pagan," a notation in the social worker's discharge plan and patient assessment states that the "correct name" of the patient is "Troy Garced."

Supreme Court granted the motion and directed that venue be changed to Nassau County. Plaintiff subsequently moved for leave to renew the owner's motion, submitting documents indicating that he resided in the apartment. Supreme Court denied plaintiff's motion, finding that plaintiff failed both to demonstrate that the documents were not known to him when the owner's motion was made and to offer a valid excuse for failing to produce those documents in opposition to the owner's motion. Plaintiff

appealed from both orders.

A defendant seeking to change venue as of right under CPLR 510(1) has the burden of demonstrating that, at the time the action was commenced, the plaintiff did not reside in the county plaintiff designated (*see Clarke v Ahern Prod. Servs.*, 181 AD2d 514 [1992]; *see generally* CPLR 503[a]). Since plaintiff was incarcerated at the time he commenced this action, for the purposes of determining his residence we must look to the residence he had prior to his incarceration (*see Farrell v Lautob Realty Corp.*, 204 AD2d 597 [1994]; *see also Corr v Westchester County Dept. of Social Servs.*, 33 NY2d 111 [1973]).

The Section 8 paperwork and affidavit of the president of the owner's general partner were sufficient to satisfy the owner's initial burden of demonstrating that plaintiff did not reside in the Bronx apartment prior to his incarceration.

In opposition, plaintiff raised an issue of fact warranting a hearing. Plaintiff, who consistently asserted that he had only one residence (the apartment), expressly averred that he lived in the apartment with his mother on the date of the accident in March 2006 through the date he was arrested and incarcerated later in 2006. He also averred that he told the hospital staff that he resided in the apartment. Under these circumstances, I fail to see how this affidavit is conclusory (*cf. Furlow v Braeubrun*, 259 AD2d 417, 417 [1999] ["Plaintiffs' conclusory

affidavits attesting to the Bronx residency of one of them, unsupported by documentation probative of such residency, were insufficient to rebut defendant's proof in the form of hospital and motor vehicle records showing that both plaintiffs reside in Westchester County"] [internal citation omitted]; *Martinez v Semicevic*, 178 AD2d 228 [1991] [plaintiff's conclusory affidavit that he had two residences, one of which was in the county in which he commenced the action, was insufficient to raise an issue of fact because it was unsupported by documentary evidence and lacking details as to how long he resided in the designated county and how he divided his time between the two alleged residences]).

In any event, plaintiff's affidavit is not the only evidence substantiating his claim that he resided in the apartment. Plaintiff's medical records, submitted by the owner in support of its motion, indicate that he resided in the apartment with his mother prior to his incarceration. Notably, moreover, the incident giving rise to this action occurred in the apartment. The majority exalts form over substance with its apparent conclusion that plaintiff's medical records should not be considered because he submitted a few such records in sur-reply. As noted above, in its initial motion papers Clinton Arms submitted portions of plaintiff's medical records, including records that indicate that he resided in his mother's apartment

at the time he was injured. Obviously, no purpose is served by requiring plaintiff to submit the same records in his opposition that were submitted by Clinton Arms in its motion papers.

The majority's conclusion that the Section 8 documents submitted by defendant establish, as a matter of law, that plaintiff did not reside in the apartment prior to his incarceration is simply wrong. Included within the Section 8 documents is an unsworn letter by the mother dated April 27, 2006, asserting that she "[l]ives alone in the apartment." The documents also include sworn letters from plaintiff's mother, dated April 1, 2005, approximately one year prior to both the accident and plaintiff's subsequent incarceration, and April 6, 2007, more than a year after the accident and plaintiff's incarceration, asserting that she lived alone in the apartment. As discussed above, given plaintiff's incarceration after the accident, the central issue is not whether plaintiff was residing in the apartment consistently or inconsistently with Section 8 requirements, but whether, as plaintiff swore in his affidavit, he was residing in the apartment prior to his incarceration. Unfortunately, the majority simply credits the mother's Section 8 documents, which plaintiff did not sign, because such housing is "highly regulated." Of course, that someone other than an authorized tenant might reside in a Section 8 unit is not only

possible but rather unremarkable.[1] The decisive point is that the mother's Section 8 documents do not conclusively establish anything, let alone that plaintiff was not residing in the apartment at the time of the accident through his subsequent incarceration.

The majority's most glaring and crucial error is its characterization of plaintiff's affidavit as conclusory. As discussed above, in that affidavit he swore that "[p]rior to my incarceration, I last resided at 2160 Clinton Ave., Apt. 1L, Bronx, New York, with my mother. I resided at that location on the date of the accident, March 18, 2006, until later in the year, when I was arrested and incarcerated." Obviously, this affidavit makes factual assertions about where plaintiff resided and when he resided there. That the affidavit itself was not accompanied by documentary evidence is irrelevant. Similarly, that plaintiff did not submit "affidavits from neighbors or

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[1]The majority's insinuation that plaintiff might be barred from claiming that he lived in the apartment is wrong. Plaintiff did not sign any of the Section 8 documents submitted by Clinton Arms in support of its motion and there is no suggestion that he reviewed (let alone agreed with) those documents before his mother tendered them to Clinton Arms. The majority's reliance on *Katz Park Ave. Corp. v Jagger* (11 NY3d 314 [2008]) is woefully misplaced. The issue there was whether a person was barred from claiming that her primary residence was a Manhattan rent stabilized apartment given that she was a foreign national who was in the United States on a tourist's visa. In contrast, the issue here is whether one who claims to have resided in a particular apartment is barred from so claiming based on the representations of another who lived in the unit.

building personnel that might support [his] presence in the apartment" is irrelevant. No principle of law requires plaintiff to bear that burden and the majority's only support for its conclusion that he was so required is a "cf." citation to a Civil Court decision in a landlord-tenant matter. Moreover, there is no basis in the law -- the majority unsurprisingly cites nothing -- for concluding that plaintiff's sworn assertions were conclusively refuted by the sworn and unsworn assertions to the contrary submitted by the owner.

At bottom, based on the submissions before it on the owner's motion, Supreme Court should have held a hearing prior to determining whether venue was properly laid (*see generally Collins v Glenwood Mgt. Corp.*, 25 AD3d 447 [2006]; *Rivera v Jensen*, 307 AD2d 229, 230 [2003]). The majority therefore errs in making several credibility determinations, e.g., that plaintiff was injured in the apartment during "an isolated visit to his mother upon [his] release from custody," that the mother was the sole occupant of the apartment, based on the paper submissions. The majority's disposition is at odds with settled precedent, which dictates that "[w]here resolution of . . . a factual issue ultimately depends on evaluating the credibility of the affiants, a hearing should be held to resolve any inconsistencies" (*Rivera*, 307 AD2d at 230). Concomitantly, the majority errs in disturbing plaintiff's statutory right to lay

venue in the county of his residence (*see* CPLR 503[a]; *Baccigalupi v Michel*, 170 AD2d 635, 635 [1991]).

Since I believe that the order granting the owner's motion should be reversed, I need not and do not decide the issue of whether the order denying plaintiff's motion for leave to renew was properly denied; under my view the appeal from the order denying plaintiff's motion for leave to renew would be rendered academic.

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

ENTERED: JANUARY 20, 2009

CLERK

Gonzalez, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4500 Kambousi Restaurant, Inc., trading as Royal Coach Diner, Plaintiff-Appellant, Index 18235/04

-against-

Burlington Insurance Company, Defendant-Respondent.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellant.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Adrian M. Szendel of counsel), for respondent.

Order and judgment (one paper), Supreme Court, Bronx County (John A. Barone, J.), entered October 13, 2006, which denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment declaring that it is not obligated to defend and indemnify plaintiff in an underlying personal injury action, unanimously reversed, on the law, with costs, plaintiff's motion granted, defendant's motion denied, and it is declared defendant is so obligated.

The issue before this Court is whether plaintiff insured's five- or six-month delay in notifying its liability insurer about an incident may be excused based on a reasonable belief of nonliability. Defendant Burlington Insurance Company issued a liability insurance policy to plaintiff, the owner of a diner, which required it to notify Burlington "as soon as practicable of an 'occurrence' or an offense which may result in a claim." The

manager of the diner attested that, on October 25, 2003, an unknown person entered the diner and informed him that a woman had fallen in the parking lot. The manager went outside and saw a woman sitting on the ground with her husband next to her. When the manager asked the woman if she wanted help or if he should call an ambulance, the husband indicated that he had already called, and told him "not to worry" because his wife had tripped over her shoelaces. The injured wife said "she was clumsy and fell." The manager told the couple he needed to get a pen and paper from the diner to get information "to make a report," but when he returned they were gone and he "was never able to write a report." There is no evidence that an ambulance appeared.

On April 2, 2004, the injured party commenced a personal injury action against plaintiff alleging that she had injured her ankle by tripping on a defect in the parking lot pavement. On April 24, plaintiff filed a notice of occurrence and claim with Burlington and provided it with a copy of the summons and complaint for the personal injury action. By letter dated May 11, 2004, Burlington disclaimed coverage on the ground of late notice. Thereafter, plaintiff brought this action for a declaratory judgment seeking coverage, and, upon plaintiff's motion for summary judgment, the trial court searched the record and instead granted Burlington summary judgment, finding as a matter of law that plaintiff's notice was untimely.

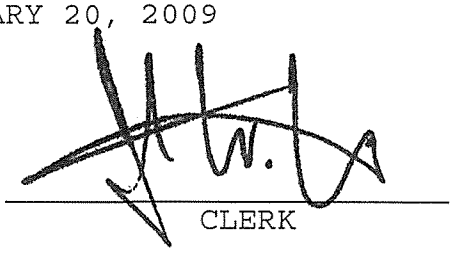
When an insurance policy requires the insured to notify the insurer of an occurrence "as soon as practicable," the insured's noncompliance "constitutes a failure to satisfy a condition precedent to coverage" (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005] [internal quotation marks and citation omitted]). However, if the insured has established a good-faith belief of nonliability, said belief may excuse the claimed untimely notice (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 [1972]). The insured's belief of non liability must be objectively reasonable (*id.*).

The husband's statement to the manager that he should not "worry" and that his wife had tripped over her shoelaces, and the wife's statement the she was "clumsy," followed by the couple's departure without giving the manager an opportunity to obtain further information, led the manager to reasonably believe that the couple would not seek to hold the diner's owner liable for the mishap (*see 426-428 W. 46th St. Owners, Inc. v Greater N.Y. Mut. Ins. Co.*, 23 AD3d 207 [2005], *lv dismissed* 7 NY3d 741 [2006]). The uncontroverted evidence as to what occurred in

plaintiff's parking lot establishes as a matter of law plaintiff's good-faith belief in its nonliability and therefore excuses its failure to give timely notice.

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

ENTERED: JANUARY 20, 2009



CLERK

Mazzarelli, J.P., Friedman, Nardelli, Buckley, Freedman, JJ.

4686 The People of the State of New York, Ind. 5496/05
Respondent,

-against-

Jose Antonio,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), entered June 13, 2006, convicting defendant, after a jury trial, of attempted kidnapping in the second degree and endangering the welfare of a child, and sentencing him to an aggregate term of 3½ years, unanimously affirmed.

Defendant encountered the complainant, an 11-year-old girl, in a restaurant. He offered to pay for the girl's food, told her she was pretty and asked about her grades at school. The girl ignored him and left the restaurant, but defendant followed her. Sensing his presence, she began to run up the street calling for help, and defendant ran after her. The girl ran, screaming, towards an adult bystander, who grabbed her protectively and, at the same time, attempted to ward off defendant. Undeterred, defendant went behind the bystander and grabbed at the girl's hand. The bystander asked defendant if he was the girl's father,

and he falsely claimed that he was. When a police car passed by, defendant fled the scene.

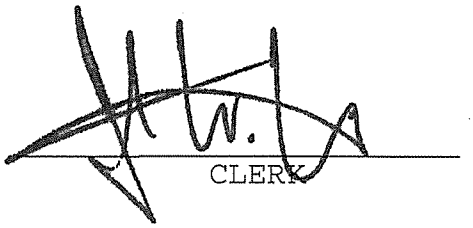
The evidence was legally sufficient. To obtain a conviction for attempted kidnapping in the second degree, the People are required to establish that defendant intended to "abduct" the complainant (Penal Law § 135.20). "Abduct" is defined as "restrain[ing] a person with intent to prevent [her] liberation by . . . secreting or holding [her] in a place where [she] is not likely to be found." (Penal Law § 135.00[2][a]).

The jury could reasonably have inferred from defendant's actions that he attempted to abduct the child. By telling the man who was trying to protect the girl that he, defendant, was the girl's father, defendant evinced his desire to gain control over the girl. By reaching out for the girl's hand, he demonstrated his intention to restrain her. And, because he knew that the girl not only did not welcome his advances, but had run from him and screamed for help, it was not unreasonable for the jury to conclude that whatever defendant intended to do with the girl once she was restrained would not be done in public (*see People v Cassano*, 254 AD2d 92 [1998] *lv denied* 92 NY2d 1029 [1998]).

We also find that the verdict was not against the weight of the evidence.

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

ENTERED: JANUARY 20, 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 20, 2009.

Present - Hon. Peter Tom, Justice Presiding
Eugene Nardelli
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse, Justices.

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551 West Chelsea Partners LLC,
Plaintiff-Respondent,

Index 602306/06

-against-

4723

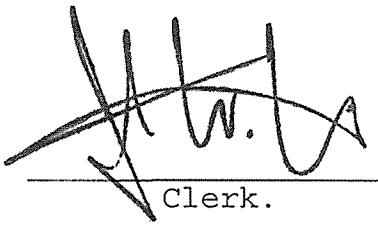
556 Holding LLC,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered on or about February 20, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 3, 2008,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTER:



Clerk.

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

4889 The People of the State of New York, Ind. 726/94
Respondent,

-against-

John Vera Moreno,
Defendant-Appellant.

Michael A. Young, New York, for appellant.

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

Judgment, Supreme Court, New York County (Leslie Crocker Snyder, J.), rendered December 17, 1997, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Although defendant was in Texas during the relevant events, we reject his contention that the evidence was legally insufficient to establish that he possessed in New York the 417 kilograms of cocaine. The evidence established that the undercover agent actually possessed the cocaine in New York, i.e., that the undercover agent had "engage[d] in conduct which constitutes [the] offense" (Penal Law § 20.00) of criminal possession of a controlled substance in the first degree, and that defendant arranged for the shipment of the cocaine to the undercover agent in New York. By virtue of that conduct, the jury rationally could have concluded both that defendant had

acted with the mental state necessary for the crime of criminal possession of a controlled substance in the first degree and that defendant "intentionally aid[ed] [the undercover agent] to engage in . . . conduct" (Penal Law § 20.00) constituting that offense. Thus, regardless of whether the evidence established that defendant constructively possessed the cocaine in New York, it clearly was legally sufficient to establish defendant's accessorial liability for the undercover agent's actual possession of the cocaine in New York. That the undercover agent did not and could not commit the crime is irrelevant to defendant's accessorial liability (Penal Law § 20.05[1]; *see People v Coleman*, 104 AD2d 778 [1984], *lv denied* 64 NY2d 888 [1985]). Defendant's reliance on *People v Manini* (79 NY2d 561 [1992]) is misplaced as the undercover agent here did not obtain the cocaine from defendant in Texas on credit or otherwise purchase the cocaine from defendant.

To be sure, when charging the jury on accessorial liability, the court instructed that the People had to prove that defendant: (1) intentionally aided the undercover in the commission of the conduct constituting the crime, and (2) had the mental state of "knowingly possess[ing] the drugs in question." The latter instruction erroneously combined the requirement that a defendant charged with accessorial liability acted with the mental state necessary for the crime charged with a requirement that the

People also prove the actus reus of possession. As the People did not object to this instruction, it is the "law of the case" (*People v Sala*, 95 NY2d 254, 261 n 2 [2000]). The evidence nonetheless was legally sufficient to establish defendant's accessorial liability as the jury rationally could have concluded that defendant constructively possessed the cocaine in Texas with the requisite mens rea. In determining defendant's accessorial liability, nothing in the court's instructions prevented the jury from considering whether defendant constructively possessed the cocaine in Texas.

We also reject as meritless defendant's contention that the trial court erred in not granting his motion at the end of the People's case to dismiss the indictment on the ground that the People had failed to prove territorial jurisdiction. As the trial court noted, CPL 20.20(1)(b) alone is sufficient to establish territorial jurisdiction. Relatedly, defendant contends that the trial court erred in not submitting the issue of territorial jurisdiction to the jury and in not instructing the jury that territorial jurisdiction had to be proven beyond a reasonable doubt. This claim is not preserved for review and we decline to review it in the interest of justice. Defendant's claim that his counsel was ineffective for failing to request such an instruction is unreviewable on direct appeal as it

involves matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Particularly given the provisions of CPL 20.60(2), counsel may have had strategic reasons for not wanting the issue of territorial jurisdiction to be submitted to the jury. After all, had the jury been instructed in accordance with CPL 20.60(2), it would have been charged that defendant was deemed to have personally delivered the cocaine in New York if he caused it to be transferred to New York from Texas. Such an instruction could have undermined the defense argument that defendant did not possess the cocaine.[1]

The court properly determined, as a matter of law, that the defense of duress (Penal Law § 40.00) was not available in this case. Defendant's duress claim, which he presented by way of his own trial testimony and an offer of proof, was based on alleged threats from drug dealers that occurred long before the crime. Defendant did not show that the threat of harm was imminent, nor did he promptly seek the assistance of law enforcement authorities (*see United States v Bailey*, 444 US 394, 410 [1980]; *People v Staffieri*, 251 AD2d 998 [1998]). Accordingly, the court properly precluded defendant from calling witnesses to support a duress defense and instructed the jury that it had made a legal

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[1]We need not address the issue of whether the provisions of CPL 20.60 operate to expand the definition of possession in the Penal Law (Penal Law § 10.00[8]).

determination that this defense did not apply. Defendant's constitutional claims regarding this issue are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Defendant's claim that he is entitled to summary reversal, or a remand for reconstruction proceedings, based on the court reporters' failure or inability to transcribe the minutes of a series of calendar calls is procedurally defective because, during the 10 years that elapsed between his taking and perfection of this appeal, defendant never sought any intervention by this Court in obtaining these minutes. In any event, defendant has not shown any reason to believe that events of any legal significance occurred during any of these calendar calls. We note that defendant's request for minutes included many dates on which this case was not even on the calendar.

We have reviewed defendant's remaining contentions and find them without merit.

M-5600 ***People v John Vera Moreno***

Motion seeking leave to file a reply brief and supplemental appendix granted to the extent of accepting point 3 of reply brief and otherwise denied.

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

ENTERED: JANUARY 20, 2009

CLERK

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5058 The People of the State of New York, Case 62277C/05
Respondent

-against-

Elvis Martin,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Mary Jo L. Blanchard of counsel), for respondent.

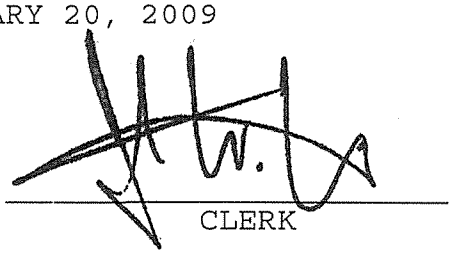
Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered November 1, 2006, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

When the court ordered a joint trial over defendant's objection, and permitted the People to introduce the nontestifying codefendants' statements, without redacting references to defendant, this was error under *Bruton v United States*, 391 US 123 [1998]). However, we find the error harmless (*see People v Crimmins*, 36 NY2d 230 [1975]) in that there was overwhelming evidence of defendant's guilt based upon the testimony of his cousin. The references to defendant in the codefendants' statements could not have affected the verdict. These brief references merely placed defendant at the scene, and his presence at the scene was essentially consistent with the

defense theory of the case. Defendant's argument that the court should have delivered a limiting instruction is unpreserved and we decline to review it in the interest of justice. With regard to defendant's independent Confrontation Clause claim under *Crawford v Washington* (541 US 36 [2004]) based on the testimonial nature of the statements (*see generally United States v Lung Fong Chen*, 393 F3d 139, 150 [2004]), we likewise find any error harmless.

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

ENTERED: JANUARY 20, 2009



CLERK

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5060 In re Malik L.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Steven Banks, The Legal Aid Society, New York (Gary Solomon of counsel), and Davis Polk & Wardwell, New York (John B. Gaffney of counsel), for appellant.

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

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about April 1, 2008, which adjudicated appellant a juvenile delinquent, upon his admission that he committed acts which, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree (two counts), and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. The totality of the circumstances supports the conclusion that the police possessed the requisite reasonable suspicion for a stop and frisk (*see People v Benjamin*, 51 NY2d 267, 271 [1980]). A police lieutenant testified that the police were responding to a radio call of shots fired in the area. This radio call described the location and direction of travel of a large group

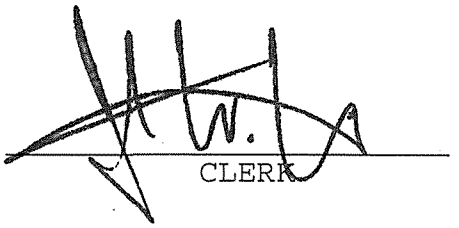
of juveniles, and the police encountered a corresponding group that included appellant. The lieutenant also spoke to another youth who had come from that group, and who implied that one or more members of the group were armed. Upon approaching the group, the lieutenant heard the sound of metal hitting the pavement, and discovered a box cutter in the area of the group. At this point, the lieutenant ordered the group against the wall, and they were frisked. We conclude that under these circumstances, the lieutenant had reason to be concerned for the safety of himself and the other officers present, especially in light of the crime they were investigating (*see e.g. People v Rivera*, 165 AD2d 756 [1990], *lv denied* 77 NY2d 842 [1991]).

Appellant also argues that the information in the lieutenant's possession was irrelevant because it was not conveyed to the officer who actually frisked appellant and found firearms on his person. Appellant claims this officer acted on his own accord and with insufficient information to support a frisk. This line of argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Contrary to appellant's characterization of the testimony, the evidence supports the conclusion that it was the lieutenant who ordered the group of juveniles against a wall, effectuating the seizure of appellant

and the others, and that the officer who conducted the frisk of appellant acted lawfully pursuant to the fellow officer rule (*see People v Ketcham*, 93 NY2d 99 [1996]).

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

ENTERED: JANUARY 20, 2009



CLERK

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5062 In re William Kyle, et al., Index 110838/07
Petitioners-Appellants,

-against-

Hon. Gerald Lebovits, etc.,
Respondent-Respondent,

736 Riverside Dr., LLC,
Respondent.

Kyle Law Firm, New York (Robin H. Kyle of counsel), for appellants.

Andrew M. Cuomo, Attorney General, New York (Richard Dearing of counsel), for Hon. Gerald Lebovits, respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered November 1, 2007, insofar as it denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking a writ in the nature of mandamus directing respondent judge to disqualify himself, nunc pro tunc to June 4, 2007, from all matters relative to two pending nonpayment proceedings, unanimously affirmed; appeal from the part of the order that imposed sanctions in the amount of $1,000 upon nonparty attorney Robin H. Kyle for engaging in frivolous conduct, unanimously dismissed; all with costs.

The record does not support a finding that Judge Lebovits was "interested" in the proceeding and thus required to recuse himself pursuant to Judiciary Law § 14. Absent a legal disqualification under Judiciary Law § 14, petitioners had no

clear right to the remedy of mandamus (*see Matter of Alizia* McK., 25 AD3d 429 [2006]). Moreover, they had and have other adequate remedies at law by which to seek the retroactive disqualification of the judge (*see Matter of Herskowitz v Tompkins*, 184 AD2d 402, 402-403 [1992], *appeal dismissed* 80 NY2d 1023 [1992]).

The appeal from the part of the order that imposed sanctions against nonparty attorney Kyle must be dismissed because Kyle did not file an appeal from the order within the 30-day period established by CPLR 5513 (*see Steinhardt Group v Citicorp*, 303 AD2d 326 [2003], *lv denied* 100 NY2d 506 [2003]), and petitioners are not aggrieved by that part of the order (*see Scopelliti v Town of New Castle*, 92 NY2d 944 [1998]). Were we to consider the issue, we would perceive no basis for disturbing the court's exercise of discretion in sanctioning Kyle.

We have considered petitioners' remaining arguments and find them unavailing.

M-6033 *In re Kyle, et al. v Hon. Gerald Lebovits, etc., et al.*

Motion seeking leave for judicial notice denied.

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

ENTERED: JANUARY 20, 2009

CLERK

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5063 The People of the State of New York, Ind. 3251/03
Respondent,

-against-

Jacob Reyes,
Defendant-Appellant.

Randall D. Unger, Bayside, for appellant.

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered August 9, 2006, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 25 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and 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, including its resolution of inconsistencies in testimony.

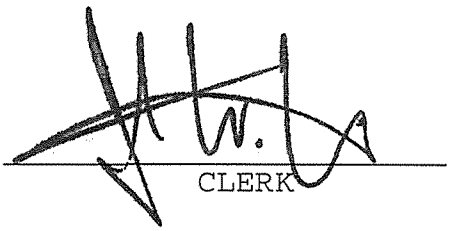
The court properly denied defendant's CPL 330.30(3) motion to set aside the verdict on the ground of newly discovered evidence relating to an incident in which the People's eyewitness possessed a small quantity of drugs. This evidence would not have created any reasonable possibility of changing the result, let alone the "probability" required by the statute (*see e.g.*

People v Taylor, 246 AD2d 410 [1998], *lv denied* 91 NY2d 978 [1998]). Although defendant argues that, under the circumstances of the case, this incident was not mere impeachment material, but related to the witness's alleged motive to falsely inculpate him, we find that argument unpersuasive. In any event, even under defendant's theory of relevance, the new evidence was entirely cumulative to trial testimony concerning the same incident. To the extent that defendant is raising a constitutional claim, such claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 20, 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 20, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
John T. Buckley
Rolando T. Acosta
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 1609/07
Respondent,

-against- 5064

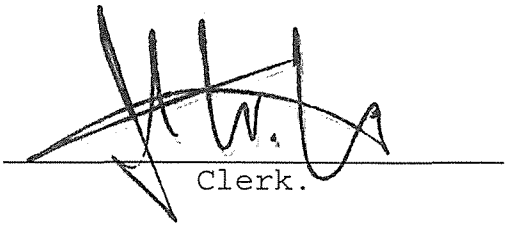
David Owens,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about February 6, 2008,

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.

ENTER:



Clerk.

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

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5065 In re Trinity Sade C., etc.,

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

Draymond C.,
Respondent-Appellant,

The New York Foundling Hospital,
Petitioner-Respondent.

The Center for Family Representation, Inc., New York (Karen F. McGee of counsel), for appellant.

Law Office of Jeremiah Quinlan, Hastings-on-Hudson (Daniel Gartenstein of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Sara P. Schecter, J.), entered November 28, 2007, unanimously affirmed, without costs or disbursements.

Application by appellant's assigned counsel to withdraw is granted (*see Matter of Louise Wise Servs.*, 131 AD2d 306 [1987]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

ENTERED: JANUARY 20, 2009

CLERK

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5066 The People of the State of New York, ex rel. Daniel Matos,
Petitioner-Appellant,

-against-

Warden, Rikers Island Correctional Facility, et al.,
Respondents-Respondents.

Index 51497/07

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Patrick J. Walsh of counsel), for respondents.

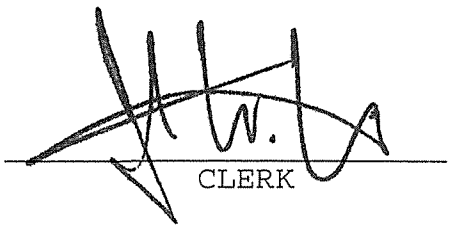
Judgment (denominated order), Supreme Court, Bronx County (Ethan Greenberg, J.), entered July 17, 2007, denying the petition for a writ of habeas corpus and dismissing the proceeding, unanimously affirmed, without costs.

As this Court has repeatedly held, failure to comply with the three-day limit for giving notice of parole violations does not affect the right to be restored to parole absent a showing of prejudice (*People ex rel. Wise v New York State Div. of Parole*, 50 AD3d 303 [2008]; *People ex rel. Thompson v Warden of Rikers Is. Correctional Facility*, 41 AD3d 292 [2007]; *People ex rel. Washington v New York State Div. of Parole*, 279 AD2d 379 [2001]),

which was not even claimed. In view of the foregoing, it is unnecessary to consider the other grounds urged for affirmance.

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

ENTERED: JANUARY 20, 2009



Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5067 American Guarantee & Liability Insurance Company, Plaintiff-Respondent, Index 600992/06

-against-

Perry A. Lerner, et al., Defendants-Appellants.

Latham & Watkins LLP, New York (Blair Connelly of counsel), for appellants.

Steinberg & Cavaliere, LLP, White Plains (Ronald W. Weiner of counsel), for respondent.

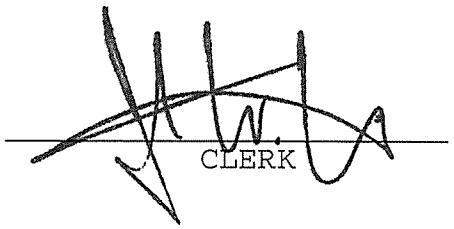
Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 10, 2007, which granted plaintiff's motion for summary judgment, unanimously affirmed, without costs.

Summary judgment was properly granted to plaintiff after it demonstrated that the allegations of the underlying complaint fell within an exclusion. The policy clearly and unambiguously provides that it "shall not apply to any Claim based upon or arising out of, in whole or in part . . . the Insured's capacity

or status as . . . [a] director." The claims in the underlying lawsuit arise, in part, out of the individual defendant's status as a director of the plaintiff in the underlying action.

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

ENTERED: JANUARY 20, 2009



Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5068 The People of the State of New York, Ind. 1370/07
Respondent,

-against-

Steven Wright,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered on or about September 28, 2007, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

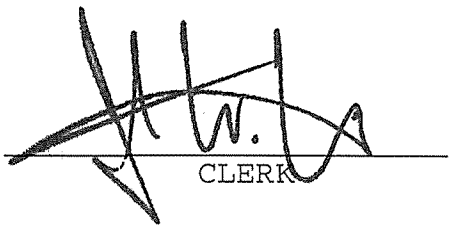
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JANUARY 20, 2009



Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5069 The People of the State of New York, Ind. 522/06
Respondent,

-against-

Adedayo Ilori, etc.,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Alice Wiseman of counsel), for respondent.

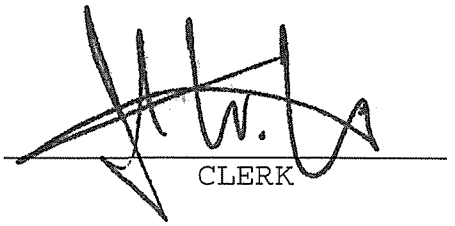
Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered May 7, 2007, convicting defendant, upon his plea of guilty, of forgery in the second degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously modified, on the law, to the extent of reducing the sentence to a term of 2 to 4 years, and otherwise affirmed.

As the People concede, since the plea agreement did not contain a no-arrest or no-misconduct condition, or any other conditions, the court erred in enhancing, on the basis of a subsequent crime, the sentence it had promised defendant at the time of his plea (*see People v Spina*, 186 AD2d 9 [1992]). Therefore, the court should have imposed the promised sentence or

granted defendant's motion to withdraw his plea. Accordingly, we reduce the sentence to the term to which defendant had agreed.

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

ENTERED: JANUARY 20, 2009



Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5070 Anthony Gronowicz, et al., Index 115995/06
Plaintiffs-Appellants,

-against-

Nissan Perla,
Defendant-Respondent.

Lance S. Grossman, New York, for appellants.

Belkin, Burden, Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondent.

Order, Supreme Court, New York County (Marcy Friedman, J.), entered October 26, 2007, which, insofar as appealed from, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

In a prior article 78 proceeding, plaintiffs unsuccessfully argued that defendant had obtained a permit to demolish the building in which they reside, and a certificate of eviction from the Division of Housing and Community Renewal, based on a false, bad-faith representation that he was going to demolish the building. When plaintiffs failed to vacate the rent-controlled apartment after the article 78 proceeding, defendant commenced a holdover proceeding. Plaintiffs, represented by the same experienced counsel as before, settled the holdover in a stipulation in which they admitted that the allegations in the holdover petition were true and that they had no defenses thereto, and agreed to vacate the apartment and withdraw all

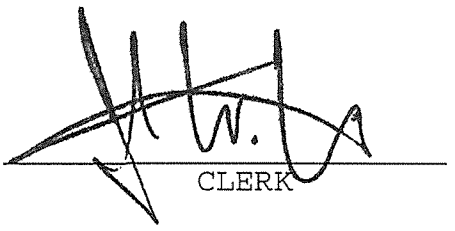
their administrative and judicial challenges to their eviction. In exchange, defendant agreed to pay plaintiffs $275,000, considerably more than the $77,826.24 that defendant was directed to pay plaintiffs, as an alternative to relocating them, under DHCR's certificate of eviction. Three months later, upon vacating the apartment, plaintiffs also executed individual affidavits releasing defendant from any liability to them in connection with the premises or their tenancy, including "any claims that [we] have vacated the apartment by any other than voluntary surrender of possession." This action, which challenges the stipulation as fraudulent, was commenced by plaintiffs when, eight months after they had vacated the apartment, defendant still had not commenced demolition.

No issue of fact exists as to whether plaintiffs, in entering into the stipulation, justifiably relied on defendant's alleged representation that he was going to demolish the building (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Any such claim of reliance is foreclosed by the history of the litigation between the parties (*see Eastbrook Caribe, A.V.V. v Fresh Del Monte Produce, Inc.*, 11 AD3d 296 [2004], *lv denied in part and dismissed in part* 4 NY3d 844 [2005]), the terms of the stipulation settling the holdover proceeding and subsequent releases (*see Citibank v Plapinger*, 66 NY2d 90, 95 [1985]). At the time of the stipulation, plaintiffs had answered the holdover

proceeding and moved to dismiss it, and had appealed their article 78 proceeding against DHCR and moved to reargue it, all based on the claim that defendant had falsely represented his intention to demolish the building. "In a climate of discord and dissension [and] with legal counsel" (*Shea v Hambros PLC*, 244 AD 39, 47 [1998]), the stipulation withdrew all these proceedings and waived any defenses to eviction in exchange for some $200,000 more than plaintiffs would have received had they continued to challenge the bona fides of defendant's representation. As the motion court pointed out, had plaintiffs truly relied on such representation in entering into the stipulation, they would have made demolition a condition subsequent to the settlement.

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

ENTERED: JANUARY 20, 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 20, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
John T. Buckley
Rolando T. Acosta
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 259/06
Respondent,

-against- 5071

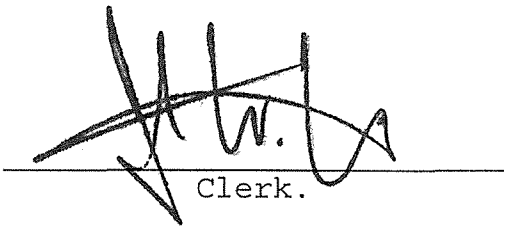
Shawn P. Barrera,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James A. Yates, J.), rendered on or about September 14, 2006,

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.

ENTER:



Clerk.

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

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5072 Unclaimed Property Recovery Service, Inc., Plaintiff-Appellant, -against- UBS PaineWebber Inc., Defendant-Respondent. Index 601069/07

Mazzei & Blair, Blue Point (Joseph Scalia of counsel), for appellant.

Schindler Cohen & Hochman LLP, New York (Daniel E. Shaw of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered November 20, 2007, which granted defendant's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint, unanimously affirmed, without costs.

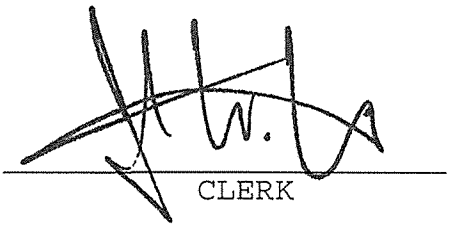
The breach of contract cause of action was properly dismissed since the parties' agreement, which provided that defendant would pay plaintiff a fee of ten percent of all unclaimed property recovered, neither specified the "nature of the property" nor "disclose[d] the name and address of the holder" (Abandoned Property Law § 1416[1][b], [c]). The court properly refused to incorporate by reference a 36-page list of properties held by the New York State Office of Unclaimed Funds, as the list was not "referred to and described in the instrument as issued so as to identify the referenced document 'beyond all

reasonable doubt'" (*Shark Information Servs. Corp. v Crum & Forster Commercial Ins.*, 222 AD2d 251, 252 [1995], quoting *Matter of Board of Commrs. of Washington Park of City of Albany*, 52 NY 131, 134 [1873]), and the agreement contained a merger clause. The court also properly did not admit the list as parol evidence since the agreement was "complete and clear and unambiguous upon its face" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990] [internal quotation marks and citation omitted]).

Dismissal of the unjust enrichment claim was appropriate as it was duplicative of the breach of contract cause of action (*see Unclaimed Prop. Recovery Serv., Inc. v Chase Manhattan Bank*, 25 AD3d 688, 689 [2006], *lv denied* 7 NY3d 713 [2006]). In the absence of a claim establishing underlying liability, the account stated claim was not viable (*see M. Paladino, Inc. v Lucchese & Son Contr. Corp.*, 247 AD2d 515, 516 [1998]).

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

ENTERED: JANUARY 20, 2009



CLERK

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5074-
5075 The People of the State of New York, Ind. 1918/02
Respondent,

-against-

Delroy Fleming,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Jennifer Eisenberg of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

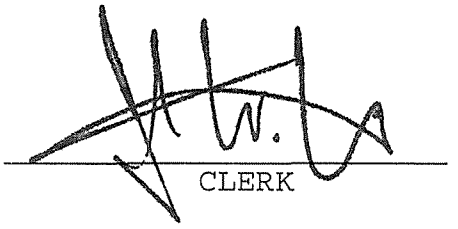
Judgment, Supreme Court, Bronx County (Ira R. Globerman, J.), rendered April 8, 2003, as amended April 20, 2006, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first degree, sentencing him to a term of 8 years, unanimously reversed, on the law, and the matter remanded for a new trial.

Defendant did not receive effective assistance of counsel. The existing record establishes that trial counsel's overall performance was prejudicially deficient (*see People v Droz*, 39 NY2d 457 [1976]). Counsel's demonstrated her lack of basic comprehension of criminal law and procedure through her persistent frivolous conduct at multiple stages of the proceeding, including, among other things, pretrial motion practice, a purported interlocutory appeal, the suppression hearing, requests for jury instructions, posttrial motions and

sentencing. Counsel's woeful lack of knowledge approached the traditional "farce and a mockery of justice" standard (*see People v Tomaselli*, 7 NY2d 350, 353-354 [1960]). This case presented an issue of whether defendant was aware of the illicit contents of a package he accepted in a controlled postal delivery. Counsel completely and prejudicially misunderstood and mishandled this issue, and defendant was deprived of a fair trial as a result. We find counsel's unfamiliarity with the sentencing parameters for defendant's crime particularly troubling in view of the fact that before trial defendant received a beneficial plea offer of three to nine years.

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

ENTERED: JANUARY 20, 2009



CLERK

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5077 The People of the State of New York, Ind. 4038/04
Respondent,

-against-

Rasheem Tartt,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Bryan C. Hughes of counsel), for respondent.

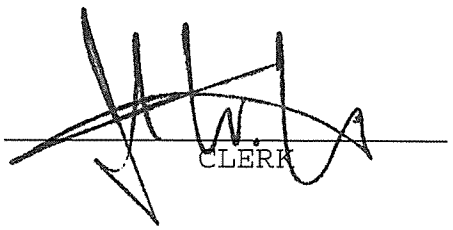
Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered October 18, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of 8 years, unanimously affirmed.

The court properly allowed the People to impeach their witness with his grand jury testimony because a portion of his trial testimony on redirect examination affirmatively damaged the People's case (*see* CPL 60.35 [1]; *People v Fitzpatrick*, 40 NY2d 44, 51-52, [1976]). In any event, we conclude that any error in allowing that impeachment was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). To the extent that defendant is raising a

constitutional claim, such claim is both unpreserved and without merit.

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

ENTERED: JANUARY 20, 2009



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 20, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
John T. Buckley
Rolando T. Acosta
Helen E. Freedman, Justices.

The People of the State of New York, SCI 4647/05
Respondent,

-against- 5078

Tim William,
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 (Rena K. Uviller, J.), rendered on or about August 21, 2006,

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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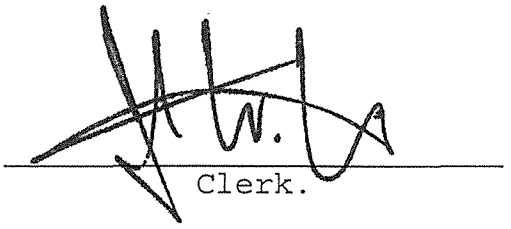


Clerk.

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

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5079N John Phillips, Index 106495/07
Plaintiff-Appellant,

-against-

Katharine T. Carter, etc.,
Defendant-Respondent.

Todd B. Sollis, New York, for appellant.

Amos Weinberg, Great Neck, for respondent.

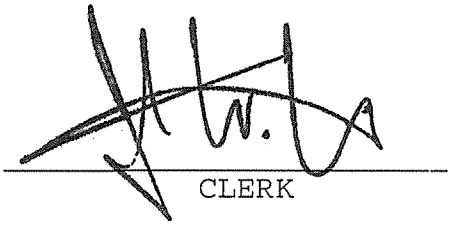
Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered January 2, 2008, which granted defendant's motion to dismiss the amended complaint, unanimously affirmed, with costs.

Plaintiff's claim of tortious interference with prospective economic advantage is insufficient as a matter of law because the allegations in the amended complaint fail to establish that defendant acted solely to harm plaintiff by unlawful means beyond mere self-interest or other economic considerations (*Carvel Corp. v Noonan*, 3 NY3d 182 [2004]; *Jacobs v Continuum Health Partners, Inc.*, 7 AD3d 312 [2004]). The allegations in the amended complaint clearly establish that plaintiff had a fee dispute with defendant, and that defendant was advancing her own self-interest in urging a third party, described in the complaint as an "occasional associate" of defendant, not to conduct business with plaintiff until the fee dispute was resolved.

Nor does the amended complaint allege facts showing that defendant's conduct was otherwise unlawful (*cf. Carvel Corp.*, 3 NY3d at 189). While the complaint alleges defendant falsely told the third party that plaintiff had breached his contract and "could not be trusted as a contract partner," it fails to state a claim for defamation, the only possible tort on the facts alleged. The factual allegations demonstrate that defendant's statements were either true or unactionable opinion (*see Manfredonia v Weiss*, 37 AD3d 286 [2007]; *Silverman v Clark*, 35 AD3d 1, 12-13 [2006]).

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

ENTERED: JANUARY 20, 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 20, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
John T. Buckley
Rolando T. Acosta
Helen E. Freedman, Justices.

In re Shahram David Lavian,
Petitioner,

Index 123089/01
115301/01

-against-

5080
[M-5687]

Hon. Herman Cahn, etc.,
Respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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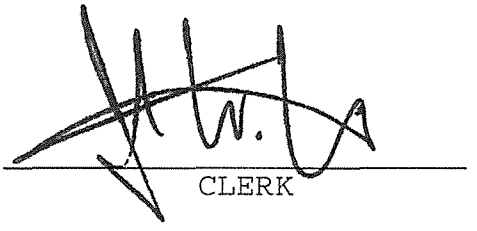

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JAN 20 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
Luis A. Gonzalez
Karla Moskowitz
Rolando T. Acosta
Dianne T. Renwick, JJ.

4666N-
4667N-
4668N-
4668NA
Ind. 600926/07

x

Ficus Investments, Inc., et al.,
Plaintiffs-Appellants-Respondents,

-against-

Private Capital Management, LLC, et al.,
Defendants,

Thomas B. Donovan, et al.,
Defendants-Respondents-Appellants.

- - - - - - - - - - -

Ficus Investments, Inc., et al.,
Plaintiffs-Respondents,

-against-

Private Capital Management, LLC, et al.,
Defendants-Appellants,

Gerard M. Bambrick, Esq., et al.
Defendants.

- - - - - - - - - - - - -

Ficus Investments, Inc., et al.,
Plaintiffs-Respondents,

-against-

Private Capital Management, LLC, et al.,
Defendants,

Thomas B. Donovan,
Defendant-Appellant.
_____x

Appeals from an order of the Supreme Court, New York County (Bernard J. Fried, J.), entered May 14, 2007, which converted temporary restraining orders into a preliminary injunction; from an order, same court and Justice, entered April 4, 2008, which directed that certain mortgage assets be placed in escrow; from an order, same court and Justice, entered April 24, 2008, which granted defendant Donovan's motion for reimbursement and advancement of legal expenses but denied such relief to defendants Chalavoutis and Kamran; and from order, same court and Justice, entered July 8, 2008, which denied defendant Donovan's motion for appointment of a temporary receiver for plaintiff Private Capital Group LLC.

Alston & Bird, LLP, New York (John F. Cambria, Craig Carpenito, Jill C. Barnhart and Betty Weinberg Ellerin of counsel), for Ficus Investments, Inc. and Private Capital Group, LLC, appellants-respondents/ respondents/respondents.

Schlam Stone & Dolan LLP, New York (David J. Katz, Richard H. Dolan, Michael C. Marcus, Jeffrey M. Eilender, John M. Lundin and Andrew S. Harris of counsel), for Thomas B. Donovan, respondent-appellant/ appellant/appellant.

Nitkewicz & McMahon, LLP, Commack (Edward J. Nitkewicz of counsel), for Christopher Chalavoutis and Peter Kamran, respondents-appellants; Private Capital Management, LLC, Christopher Chalavoutis, Chalavoutis & Co. CPA's P.C., Virginia Donovan, Pamela Donovan, Scott Burgwin, Alissa Gladstone, Peter Kamran, Kirby Enterprises I Corp., and LTC Realty Corp., appellants.

Port & Sava, Floral Park (Gary Port of counsel), for Michael Bode and Private Lender Services Corp., appellants.

Daniels S. Torchio, New York, for John Kiley, appellant.

LIPPMAN, P.J.

This action arises out of allegations that Thomas Donovan and other named defendants misappropriated millions of dollars in funds and assets from plaintiff Private Capital Group, LLC. There have been extensive pretrial proceedings, and the parties are appealing four orders granting various forms of relief. The primary issue we address is whether certain individual defendants are entitled to advancement of their expenses under the company's Operating Agreement.

Plaintiff Ficus Investments, Inc. is a Florida corporation with its principal place of business in Florida. Ficus is the managing member and 80% owner of plaintiff Private Capital Group, LLC (the Company), a Florida limited liability company with its principal place of business in New York. The Company is in the business of buying, managing and selling non-performing real estate mortgages. Defendant Private Capital Management (PCM), a New York limited liability company with its principal place of business in New York, is the Company's minority member and holds the remaining 20% ownership. PCM is owned equally by defendant Thomas B. Donovan and former defendant Lawrence A. Cline.[1]

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[1] Cline settled with plaintiffs in July 2007. In connection with the settlement, he returned Company assets worth millions of dollars and agreed to cooperate with Ficus's investigation.

The Company began operations in December 2005, capitalized by a series of documented loans provided by Ficus totaling approximately $314 million. Plaintiffs allege that Donovan and Cline soon became dissatisfied with their compensation and, in July 2006, began transferring money from the Company to PCM in a series of undocumented loans. In January 2007, Donovan and Cline transferred $9.872 million from the Company to PCM. Donovan and Cline freely admit that they took this money but assert that, despite the absence of any type of security agreement, the distribution had been authorized by a Ficus representative. When Ficus discovered the transfer, it demanded that the money be returned. Donovan and Cline refused and instead apparently attempted to negotiate changes to the Operating Agreement.

Ficus representatives met with Donovan and Cline on March 20, 2007 to advise them that, as manager, Ficus would be taking control of the Company's accounts, funds and any major new commitments. Since Donovan and Cline maintained the position that they had the authority to manage the Company, Ficus adopted resolutions giving itself authority over the Company's operations and advised Donovan, Cline and the Company's banks of the change.

Plaintiffs commenced this action on or about March 21, 2007, asserting several causes of action, including breach of fiduciary duty, conversion and unjust enrichment. That same morning,

plaintiffs allege that defendants began removing books, records and financial information from the Company's Jericho, New York office. The complaint asserts that when Ficus representatives arrived at the premises and began their review of the Company's operations, Donovan and other named defendants were evasive and uncooperative.

During this time, plaintiffs allege, Donovan continued to transfer Company funds to accounts under his control. In support of this allegation, Cline provided an affidavit stating that approximately $12.5 million in Company funds, along with about $3 million remaining from the disputed $9.872 million "loan," were transferred to a bank account in the name of defendant Private Lender Warehouse Corp. After the balance was transferred to another Private Lender Warehouse Corp. account, about $12.5 million of the money was deposited into an account in the name of Private Capital Management Corp. (a separate entity from PCM, the LLC with 20% membership interest in the Company). Plaintiffs allege that the $12.5 million was disbursed to defendants, or to entities under their control - many with confusingly similar names. The balance was apparently disbursed to some of the individual defendants and was used to pay for defendants' litigation expenses.

On March 26, 2007, Supreme Court granted plaintiffs a temporary restraining order preventing defendants from making transfers or distributions in contravention of the resolutions that gave Ficus operational authority, preventing them from removing, destroying, concealing or altering Company books and records or documents pertaining to Company business, and requiring defendants to cooperate with Ficus and give Ficus free access to the premises, books and records.

On April 10, 2007, nearly every Company employee resigned and went to work for Donovan at his new business, Private Capital Management Group of New York, LLC. Ficus then obtained another temporary restraining order giving it control over the Company's day-to-day operations and assets, directing that defendants provide information and Company records pertaining to another entity, Copperfield Investments, Inc.,[2] and preventing defendants from removing or destroying such records. Several days later, the court issued yet another temporary restraining order, requiring the return of any Company assets that had been transferred to Copperfield without full consideration. The court noted, however, that it did not have the power to enjoin

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[2] Copperfield was an entity owned by Cline that was allegedly occupying office space on the Company's Jericho premises.

Copperfield itself, as Copperfield had not yet been made a party. The court also denied PCM's motion for the appointment of a temporary receiver to run the Company. Later that night, before the complaint was amended to include Copperfield as a defendant, Donovan and Cline placed Copperfield into bankruptcy.

On May 14, 2007, the three temporary restraining orders were consolidated into a preliminary injunction without objection. A few weeks later, Supreme Court issued another injunction - this time preventing defendants from transferring, concealing or otherwise disposing of the "approximately $9,000,000" that Donovan and Cline had taken as an undocumented "loan" and requiring defendants to post a $1 million undertaking.

After Cline settled with plaintiffs in July of 2007, certain other named defendants also settled, and each agreed to provide information pertaining to the Company. Cline provided an affidavit stating that a portion of the funds that Donovan had taken from the Company and deposited in an account under the name of Private Capital Management Corp. were subsequently used to acquire nonperforming mortgages from North Fork Bank. In addition, the former defendants represented that "[t]here were no active 'separate Donovan businesses'" being run from the Company's Jericho location. Rather, the Donovan-controlled "shell" entities had been completely funded by Company assets.

In December 2007, Supreme Court issued an order preventing defendants from taking any action on specific mortgages without 48 hours' advance written notice to plaintiffs' counsel, including the mortgages purchased from North Fork and various other "missing mortgages" that plaintiffs were unable to locate, which were all allegedly procured with Company funds. The court later clarified the May 2007 preliminary injunction, finding it necessary to turn the mortgages funded with Ficus monies (North Fork and missing mortgages) over to an escrow agent to maintain the status quo and prevent dissipation of the proceeds before the question of who was entitled to the mortgages could be resolved. The court then signed plaintiffs' proposed order designating PHH Corporation escrow agent for the 85 mortgages at issue and directing that defendants deliver the mortgages, all documents pertaining to the mortgages, and any funds received on account of any of the mortgages.

During the course of these proceedings, defendants Donovan, Chalavoutis and Kamran moved by order to show cause for reimbursement and advancement of their fees and expenses related to the litigation. In support of the motion, each defendant included an affirmation and undertaking as required by the Operating Agreement. Defendants also provided invoices documenting their litigation expenses from three law firms, which

totaled more than $2.7 million. Supreme Court granted the motion for advancement as to Donovan, but denied it as to Chalavoutis and Kamran, finding that advancement of their expenses was discretionary with the Company since they were not officers under the Operating Agreement. The court also referred the issue of the reasonableness of Donovan's expenses to a referee.

Most recently, in May 2008, Donovan again moved for the appointment of a temporary receiver, asserting that Ficus had been mismanaging the Company. Supreme Court denied the motion, finding that Donovan failed to demonstrate that the drastic remedy of a temporary receiver was necessary.

We address first the order concerning the advancement of litigation expenses. To determine whether advancement is appropriate, it is necessary to review relevant portions of the Company's Operating Agreement. The agreement designated Donovan its initial chief executive officer and Cline its initial president. Ficus, as manager, had sole authority to manage and control the Company's business and affairs, including the power to appoint individuals to serve as officers, to delegate authority and to remove officers. The agreement gave Donovan and Cline general supervision over the Company's business and allowed them, on behalf of the Company, to execute and deliver contracts and certain other documents not requiring approval by the

manager. As compensation, the agreement permitted Donovan and Cline to take loans in the amount of $300,000 per year, as draws against their potential future profits. The order of distribution of the Company's net income was repayment of the Ficus loans, return of each member's capital and, finally, distribution to each member in proportion to his or her membership interest. The agreement provides that it will be construed under and governed by Florida law.

The Operating Agreement provides for advancement of expenses and indemnification for members, managers and officers of the Company when certain criteria are satisfied. Officers under the Operating Agreement include the CEO, president, "and such other officers as the Manager may determine." Section 3.4.3 of the Operating Agreement, entitled "Advance for Expenses," provides that

> "[t]he Company must, before final disposition of a Proceeding, advance funds to pay for or reimburse the reasonable Expenses incurred by a Person who is a Party to a Proceeding because he or she is a Member, Manager or Officer if such Person delivers to the Company a written affirmation of his or her good faith belief that his or her conduct does not constitute behavior that would result in Liability for (i) intentional misconduct or a knowing violation of law, or (ii) any transaction for which such Member, Manager or Officer received a personal benefit in violation or breach of any provision of this Agreement; and such Member, Manager or Officer furnishes the Company a written undertaking, executed personally or on his or her behalf, to repay any advances if it is ultimately determined that he or she is not entitled to indemnification under this Section 3.4 or the Florida [Limited Liability Company] Act" (subd [a]).

Although the undertaking must be an unlimited obligation of the officer, the Operating Agreement states that the obligation need not be secured and shall be accepted without reference to the officer's ability to repay.

The provision entitled "Obligation to Indemnify; Limits" contains similar language. Section 3.4.2 relieves the Company of the obligation to indemnify a member, manager or officer who "is adjudged liable to the Company or is subjected to injunctive relief in favor of the Company" for intentional misconduct or a knowing violation of law or for any transaction for which the individual received an unauthorized personal benefit.

The Operating Agreement allows, but does not require, the Company to indemnify for or advance expenses to other (non-officer) employees or agents. The agreement also permits officers to apply to a court for indemnification for or advancement of expenses. The court reviews the application de novo and can grant indemnification for or advance expenses if the officer is entitled to same or if, under the relevant circumstances, it would be fair and reasonable. Finally, the agreement provides that the Company is not liable to make a payment "to the extent such Person has otherwise actually received payment (under any insurance policy, agreement or otherwise) of the amounts otherwise payable hereunder."

Plaintiffs argue that Donovan's request for advancement should have been denied based on the Operating Agreement because defendants were the subject of multiple injunctions - reasoning that if Donovan would not be entitled to indemnification under the agreement, then the issue of whether he is entitled to advancement of expenses is academic. Supreme Court properly determined that the prior injunctive relief does not foreclose defendants from seeking advancement of their expenses.

As noted above, the Operating Agreement is governed by Florida law, which requires that an agreement be read as a whole to determine its meaning, rather than as isolated sections or paragraphs (*see Jones v Warmack*, 967 So2d 400, 402 [Fla App 2007]; *see also Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Here, as plaintiffs argue, the agreement excuses the Company from the duty to indemnify when an officer has been subjected to injunctive relief in the Company's favor on the basis of intentional conduct, a knowing violation of law or a transaction for which the person received an unauthorized personal benefit. However, the section referring to injunctive relief pertains solely to indemnification. It is separate and distinct from section 3.4.3, which imposes the obligation to advance funds. Advancement is contingent only upon the person's submission of a written affirmation that he or she has not engaged in prohibited

conduct and an undertaking to repay any funds disbursed.

Delaware courts have had ample opportunity to address these issues of indemnification for and advancement of expenses and, although not binding as to either Florida or New York law, their holdings can be instructive. Under Delaware law, a clear distinction is drawn between the two provisions: whether an officer is entitled to advancement is determined in a summary proceeding, while the right to indemnification is delayed until the conclusion of the matter (*see Kaung v Cole National Corp.*, 884 A2d 500, 509 [Del 2005]). The rights are recognized as independent of one another, in that "an advancement proceeding is summary in nature and not appropriate for litigating indemnification or recoupment. The detailed analysis required of such claims is both premature and inconsistent with the purpose of a summary proceeding" (*id.* at 510). Delaware has also noted that one of the beneficial purposes behind both indemnification and advancement is to help attract capable individuals into corporate service by easing the burden of litigation-related expenses (*see Homestore, Inc. v Tafeen*, 888 A2d 204, 211 [Del 2005]). In particular, "[a]dvancement provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal

proceedings" (*id.*).

Given the separate purposes of indemnification and advancement, Supreme Court properly determined that the Operating Agreement distinguishes between the relief available to a corporate officer at the conclusion of the proceedings and that which is available while the proceedings are ongoing. Although the indemnification provision in the agreement does not specify that the injunctive relief must be final or permanent, the intent is clear when the agreement is read as a whole. The advancement provision does not refer to injunctive relief at all. Rather, it states that advancement applies "before final disposition of a Proceeding" and that the officer must repay the advanced funds "if it is *ultimately* determined that he or she is not entitled to indemnification" (emphasis added). This language clearly indicates that advancement does not depend on whether or not the officer will eventually be indemnified.

Thus, the reference to injunctive relief in the indemnification paragraph of the Operating Agreement can best be understood to refer to injunctive relief that is final or permanent in nature. That the provision precludes indemnification when the officer is "adjudged liable . . . or is subjected to injunctive relief" under certain specific circumstances does not indicate that indemnification is

foreclosed whenever an officer has been subject to any type of injunction during the course of a proceeding. Such an interpretation would defeat the purpose of the advancement provision. Although ultimately Donovan may not be entitled to indemnification, the issuance of injunctive relief against him during this litigation does not bar him from receiving advancement of his expenses under the terms of the Operating Agreement.

Plaintiffs also argue that the Company should not be required to advance expenses under the section of the Operating Agreement prohibiting duplication of payments. As Supreme Court found, this section of the agreement pertains to funds received as "amounts otherwise payable hereunder" - i.e., amounts that would qualify under the agreement as indemnification for or advancement of expenses that have been received from another source. The funds Donovan allegedly took from plaintiffs and then used to pay legal expenses do not qualify, as they were in no way connected with indemnification or advancement or intended to be used for any such purpose. Moreover, at this stage of the litigation, plaintiffs have yet to prove that Donovan has taken these funds improperly. Mere allegations of theft will not relieve the Company of its obligation to advance expenses, and a request for advancement is not meant to become an adjudication of

the merits of the case against the officer. Since Donovan has satisfied the requirements under the Operating Agreement, Supreme Court properly determined that he is entitled to advancement of his expenses.

The remaining issue is whether defendants Chalavoutis and Kamran also are entitled to advancement. Plaintiffs' Third Amended Verified Complaint alleges, on information and belief, that Chalavoutis was the Company's former chief financial officer. In addition, although Chalavoutis was never officially appointed CFO of the Company through the Operating Agreement or otherwise, officers of Ficus have specifically referred to him as CFO, and a Ficus representative acknowledged in a sworn statement that Chalavoutis was held out, was referred to and functioned as the chief financial officer. The complaint refers to Kamran as an employee, but in his own affidavit he indicates that he was designated the sole vice president of the Company by resolution and that he signed thousands of documents for the Company in that capacity. Significantly, the complaint seeks to hold Chalavoutis and Kamran, among other individual defendants, liable for breach of fiduciary duty.

These representations are informal judicial admissions, constituting some evidence of the facts admitted, which may be

explained at trial (*see Chock Full O'Nuts Corp. v NRP LLC I*, 47 AD3d 189, 192 [2007]; *Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [2006]; Prince, Richardson on Evidence § 8-219 [Farrell 11th ed]). Parties to a contract are able to alter or waive portions of an agreement by their course of conduct (*CT Chems. [U.S.A.] v Vinmar Impex*, 81 NY2d 174, 179 [1993]), and the parties appear to have done so here. We reject the argument that plaintiffs' representations do not qualify as informal judicial admissions because they were made "on information and belief" (*but see Scolite Intl. Corp. v Vincent J. Smith, Inc.*, 68 AD2d 417, 421 [1979]). In addition to the allegations made "on information and belief," the individuals actually functioned as officers of the Company and were sued in their individual capacities for breach of fiduciary duty. Under these circumstances and at this stage of the litigation, Chalavoutis and Kamran should not be barred from receiving advancement. It would elevate form over substance to allow plaintiffs to hold defendants out as officers for every corporate purpose except the advancement of expenses. We likewise note that plaintiffs have failed to rebut defendants' claims of ratification.

Defendants also appeal the portion of Supreme Court's order directing that certain mortgage assets (the North Fork mortgages and the missing mortgages) be placed in escrow. The escrow order

properly preserved the status quo (*360 W. 11th LLC v ACG Credit Co. II, LLC*, 46 AD3d 367 [2007]), rather than granting the ultimate relief sought. The equitable relief was appropriate because the assets constituted a specific res that is "the subject of the action" (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 547-548 [2000] [internal quotation marks and citation omitted]).

Since Donovan is not aggrieved by the preliminary injunction, which was granted on consent, the appeal from that order is dismissed (CPLR 5511). Were we to address the merits, we would find the order clear and unambiguous.

Finally, Donovan failed to demonstrate by clear and convincing evidence that there was a danger the property would be "materially injured or destroyed," so as to justify the drastic remedy of appointment of a temporary receiver (CPLR 6401[a]; *Somerville House Mgt. v American Tel. Syndication Co.*, 100 AD2d 821, 822 [1984]). The claim that Ficus's mismanagement drove PCM, LLC to insolvency is not supported by the record.

Accordingly, the order of Supreme Court, New York County (Bernard J. Fried, J.), entered April 4, 2008, which directed that certain mortgage assets be placed in escrow, should be affirmed, without costs. The appeal from the order, same court and Justice, entered May 14, 2007, which converted temporary

restraining orders into a preliminary injunction, should be dismissed, without costs. The order, same court and Justice, entered April 24, 2008, which granted defendant Donovan's motion for reimbursement and advancement of legal expenses but denied such relief to defendants Chalavoutis and Kamran, should be modified, on the law, to grant such relief to Chalavoutis and Kamran, and otherwise affirmed, without costs. The order, same court and Justice, entered July 8, 2008, which denied defendant Donovan's motion for appointment of a temporary receiver for plaintiff Private Capital Group LLC, should be affirmed, without costs.

All concur.

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

ENTERED: JANUARY 20, 2009