SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 22, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Saxe, Nardelli, Catterson, JJ.

1636 The People of the State of New York, Ind. 3191/03
Respondent,

-against-

Kenneth Rivers,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Eric Rosen of counsel), for respondent.

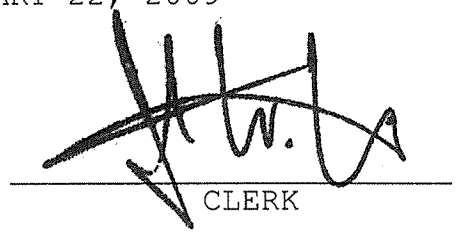
Judgment, Supreme Court, New York County (James A. Yates, J. at CPL article 730 proceedings; Ronald A. Zweibel, J. at jury trial and sentence), rendered July 14, 2004, convicting defendant of robbery in the second degree, and sentencing him, as a second felony offender, to a term of 15 years, unanimously reversed, on the law, and the matter remanded to Supreme Court, New York County for a new trial.

The matter was remanded to Supreme Court, New York County for a hearing as to whether defendant was an incapacitated person at the time of his trial (44 AD3d 391 [2007]), and the People failed to reconstruct defendant's competency at the time of his

trial as per order of Supreme Court, New York County (Gregory Carro, J.), entered on or about October 15, 2008. Accordingly, the conviction must be vacated.

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

ENTERED: JANUARY 22, 2009



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

4689N Richard F. Braun, Index 150195/07
Plaintiff-Respondent,

-against-

Sid's 2nd Avenue Bike Shop, Inc., et al.,
Defendants-Appellants.

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for appellants.

Tolmage, Peskin, Harris and Falick, New York (Matthew C. Lombardi of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered March 21, 2008, which granted plaintiff's motion pursuant to CPLR 510(2) for a change of venue from New York County to Kings County, unanimously modified, on the facts, and venue transferred to Westchester County, and otherwise affirmed, without costs.

Plaintiff was injured in Orange County allegedly because of a defective custom-made bicycle he had purchased from defendants. Plaintiff, an active Justice of the Supreme Court, New York County, commenced the instant action in New York County, where all parties reside. After joinder of issue, plaintiff moved to change venue to Kings County in order "to avoid even a possible appearance of impropriety." In opposition, defendants stated that they had "no objection" to the New York County venue, but if appearances required a change of venue, then, in view of

plaintiff's apparent City-wide personal and professional relationships with judges, the change should be to a county outside of New York City, in particular, Westchester, the closest suburban county to Manhattan and well served by trains from Manhattan. In reply, plaintiff stated that he too had "no objection" to retaining the New York County venue, but, if appearances required a change, continued to urge Brooklyn as more convenient than Westchester. Under all of the circumstances presented herein, we agree with defendants that the transfer of this matter to Westchester County is appropriate (*see Saxe v OB/GYN Assoc.*, 86 NY2d 820 [1995]).

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

ENTERED: JANUARY 22, 2009

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Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4871.1 M. R., Index 6751/07
Plaintiff-Appellant,

-against-

2526 Valentine LLC,
Defendant-Respondent,

Magaw Management LLC,
Defendant.

Roth & Roth, LLP, Bronx (Audra R. Roth of counsel), for appellant.

Doyle & Broumand, LLP, New York (Michael B. Doyle of counsel), for respondent.

Order, Supreme Court, New York County (Howard H. Sherman, J.), entered on or about February 28, 2008, which vacated the default judgment entered against defendant 2526 Valentine, unanimously reversed, on the law, without costs, and the judgment reinstated.

In November 2006, plaintiff was sexually assaulted in her apartment by the apartment building's superintendent. Ten weeks later, she commenced this action against the building (Valentine) and its managing agent (Magaw), claiming that they had negligently failed to screen the superintendent prior to hiring him, and had negligently supervised him. On January 29, 2007, plaintiff served Valentine with the summons and complaint through the Secretary of State (*see* Limited Liability Company Law § 303[a]), which gave that defendant until February 28, 2007 to

interpose a timely answer (*see* CPLR 320[a]). Valentine did not answer the action, and on March 26, 2007 plaintiff sent Valentine a letter notifying it that if it did not answer or appear within 10 days, plaintiff would seek a default judgment. In May 2007, plaintiff moved for a default judgment, to which Valentine did not respond. The motion was granted on July 13, 2007.

By an order to show cause, Valentine moved in September 2007 to vacate the default judgment, submitting the affidavit of its managing member who averred, among other things, that "Until I received a copy of the motion [for a default judgment] I thought [Valentine's] insurance company had appeared and answered to defend [Valentine] as there can be no claim against [Valentine], or so my attorney has informed me. It appears that the insurance company has disclaimed and for that same reason there is no liability against [Valentine], all the injuries are as a result of the criminal actions of [the superintendent] . . . There was no intent to default; to the contrary, we had thought the matter was being taken care of by the insurance company." The Court granted the motion and gave Valentine additional time to answer.

"A person served with a summons other than by personal delivery . . . may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment . . . upon a finding . . . that [it] did not personally receive notice of the summons in time to defend and has a meritorious defense"

(CPLR 317). Valentine cannot seek relief under this statute, which requires only a showing of a potentially meritorious defense (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138 [1986]), because it failed to establish that it had not received notice of the summons and complaint in time to interpose a timely appearance or answer (*see Commissioners of State Ins. Fund v Nobre, Inc.*, 29 AD3d 511 [2006]; *Metropolitan Steel Indus. v Rosenshein Hub Dev. Corp.*, 257 AD2d 422 [1999]). Therefore, Valentine must satisfy the requirements of CPLR 5015(a)(1), wherein a defendant seeking to vacate a default judgment must demonstrate both a reasonable excuse for its default and a potentially meritorious defense.

Valentine failed to demonstrate a reasonable excuse for its default. Plaintiff demonstrated that she served Valentine through the Secretary of State on January 29, 2007 and sent Valentine a letter two months later informing it that plaintiff would seek a default judgment if Valentine did not answer or appear within 10 days. Plaintiff also demonstrated that on January 8 and April 13, 2007, Valentine's insurer sent Valentine letters stating the insurer's disclaimer of coverage for the assault. In his conclusory affidavit, Valentine's managing member did not deny receiving the summons and complaint from the Secretary of State, plaintiff's letter or the disclaimer letters from Valentine's insurer, all of which had been sent to Valentine

before plaintiff sought and obtained the default judgment. In light of the disclaimer letters, which, again, Valentine never denied receiving, its managing member's stated belief that the insurance company had appeared and answered was patently insufficient to establish a reasonable excuse for the default (*see Rosario v Beverly Rd. Realty Co.*, 38 AD3d 875 [2007]). Because Valentine failed, as a matter of law, to proffer a reasonable excuse for its default, which is a necessary precondition to relief under CPLR 5015(a)(1), its motion to vacate the judgment must be denied, regardless of whether Valentine demonstrated a potentially meritorious defense.

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

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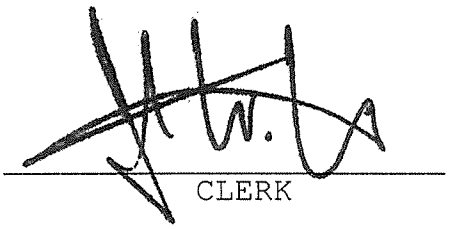

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Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4945N Robert J. A. Zito, Index 602308/04
Plaintiff-Respondent,

-against-

Fischbein Badillo Wagner Harding, et al.,
Defendants.
- - - - - -
Nimkoff Rosenberg & Schechter, LLP,
Nonparty Appellant.

Nimkoff, Rosenfeld & Schechter, LLP, New York (Ronald A. Nimkoff of counsel), for appellant.

Bracken & Margolin, LLP, Islandia (Linda U. Margolin of counsel), for respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered March 11, 2008, which denied nonparty appellant's motion to vacate a prior order, same court and Justice, instead directing turnover of appellant's files to plaintiff on condition the latter agrees to pay fees and disbursements as determined by a special referee and to retain and maintain the files pending such determination, unanimously modified, on the law, to the extent of granting appellant a retaining lien to be set by the referee, and directing that such amount be paid or secured as a condition to appellant's release of the files, and otherwise affirmed, without costs.

Plaintiff Zito had been a contract partner with the now-defunct defendant Fischbein firm. He retained the nonparty appellant Nimkoff firm to bring a claim against Fischbein, a

successor firm and its former partners for compensation allegedly due. Appellant was hired on contingency, with a $25,000 retainer. Under the retainer agreement, invoices unpaid for more than 30 days would accrue 1% interest per month, compounded monthly. If an invoice remained unpaid for more than 30 days, appellant could withdraw.

By December 7, 2007 order to show cause, appellant sought to withdraw based on its deteriorating relationship with plaintiff (under the rules of professional conduct) and the failure to pay disbursements (under the retainer agreement), and asserted a retaining lien in the amount of disbursements. By order entered March 7, 2008, Justice Cahn allowed appellant to withdraw and directed a referee hearing to determine the quantum meruit amount of fees and disbursements owed. Since the amount of appellant's fees was being referred to a special referee, the court denied a retaining lien without prejudice to renewal following the determination.

By show cause order on March 10, plaintiff sought immediate turnover of the files. Justice Cahn declined to sign that order and deemed it withdrawn, but sua sponte directed appellant to turn over the files to plaintiff on condition that plaintiff sign an agreement to pay disbursements owed within 30 days from the referee's determination of the amount, and to retain the files turned over to him until the proceeding ends. Appellant now

argues that the motion court erroneously denied a retaining lien, given that its disbursements remained unpaid. We agree.

"Absent evidence of discharge for cause, a court should not order turnover of an outgoing attorney's file before the client fully pays the attorney's disbursements or provides security therefor" (*Warsop v Novik*, 50 AD3d 608, 609 [2008]). The motion court improperly denied appellant a retaining lien pending the disbursement proceeding determination (*see Gonzalez v City of New York*, 45 AD3d 347 [2007], *lv denied* 10 NY3d 701 [2008]).

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

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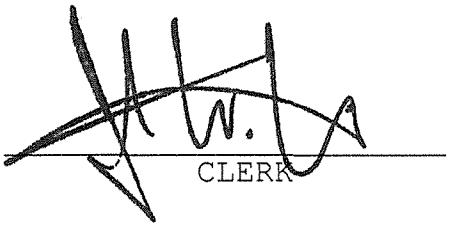

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Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5081 The People of the State of New York, Ind. 54611C/04
Respondent,

-against-

Kenny Taylor,
Defendant-Appellant.

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

Kenny Taylor, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered February 13, 2007, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second felony offender, to a term of 7 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the jury's determinations concerning credibility, including its evaluation of the criminal background of the People's main witness and the inconsistency between his trial and Grand Jury testimony, which we find to be satisfactorily explained.

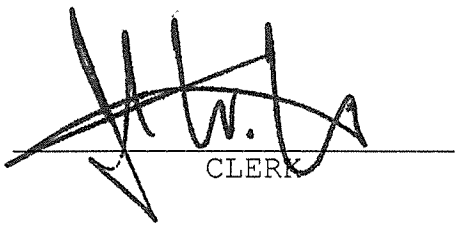
Defendant's argument that a relative of the victim gave prejudicial testimony is without merit. Defendant's remaining

pro se claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing the sentence, or directing that it be served concurrently with defendant's previously imposed sentences for unrelated convictions. Defendant's argument that the sentencing court misapprehended its discretion under Penal Law § 70.25(5)(c) to impose concurrent sentences is unpreserved (*see People v Hamlet*, 227 AD2d 203, 204 [1996], *lv denied* 88 NY2d 1021 [1996]; *see also People v Samms*, 95 NY2d 52, 56-58 [2000]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: JANUARY 22, 2009



Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5083 Empire State Fuel Corp., Index 601266/06
Plaintiff-Appellant,

-against-

Warbasse-Cogeneration Technologies Partnership, L.P.,
Defendant,

Amalgamated Warbasse Houses, Inc.,
Defendant-Respondent.

Krol & O'Connor, New York (Igor Krol of counsel), for appellant.

Baker Greenspan & Bernstein, Bellmore (Robert L. Bernstein, Jr. of counsel), for respondent.

Judgment, Supreme Court, New York County (Helen E. Freedman, J.), entered February 19, 2008, in an action to recover the price of fuel delivered to a power plant built and operated by defendant Warbasse on premises owned by defendant-respondent Amalgamated, a cooperative apartment complex, insofar as appealed from, dismissing plaintiff's cause of action against Amalgamated for quantum meruit, unanimously affirmed, with costs.

The existence of a valid contract between plaintiff and Warbasse precludes plaintiff's quantum meruit claim against Amalgamated (*see Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 592-593 [2007]). In any event, even if there were no contract, there is no evidence that Amalgamated was ever billed or paid for the fuel, and the record, including plaintiff's letter to Warbasse demanding payment, otherwise establishes that

plaintiff at all times understood that Warbasse, and only Warbasse, was the party responsible for ordering the fuel and paying for it. While some of the bills mailed to Warbasse's headquarters in Harrison, New York were addressed to "Amalgamated Co-Generation," there is no evidence of the existence of a company by that name and plaintiff fails to explain why it believed that Amalgamated went by that name and had its office in Harrison. Nor is there any evidence that Amalgamated, which timely paid Warbasse for the electricity and heat generated by the fuel delivered by plaintiff, was unjustly enriched by the delivery of fuel (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1998] [receipt of benefit alone insufficient to show unjust enrichment]). We have considered plaintiff's other arguments and find them unavailing.

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

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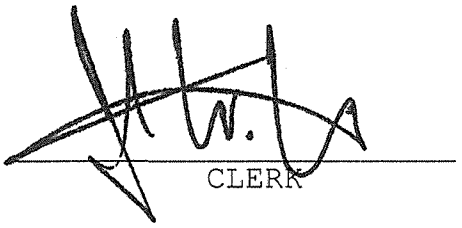

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Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5084 In re Riverside Equities, LLC, Index 106001/07
Petitioner-Respondent,

-against-

New York State Division Of Housing and Community Renewal,
Respondent,

William Brown,
Respondent-Appellant.

Beranbaum Menken Ben-Asher & Bierman LLP, New York (Mark H. Bierman of counsel), for appellant.

Sidrane & Schwartz-Sidrane, LLP, Hewlett (Steven D. Sidrane of counsel), for respondent.

Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered December 10, 2007, which granted the petition to vacate the determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated March 8, 2007, finding a rent overcharge, directing its refund and imposing treble damages, unanimously reversed, on the law, without costs, and the petition denied and the determination reinstated and confirmed.

DHCR's determination, based largely on credibility, that either the claimed improvements were not made or the costs were greatly inflated and that petitioner willfully submitted false evidence to support its claims was not arbitrary and capricious. The record establishes, inter alia, that the named certificate

holder and insured on the construction contract is not petitioner; that the contract scope of work differs significantly from the actual condition of the apartment; that apparently comparable improvements in other similar units in the building cost substantially less; that the checks submitted to demonstrate payment to the contractor do not indicate who endorsed them; and that the contractor could not be found. These discrepancies in petitioner's evidence provide support for DHCR's finding that the evidence was false and a rational basis for its conclusion that the submission of the false evidence was willful (*see Matter of 201 E. 81st St. Assoc. v New York State Div. of Hous. & Community Renewal*, 288 AD2d 89, 89 [2001]).

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

ENTERED: JANUARY 22, 2009

Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5085-
5085A Lena Lee Robertson, etc.,
Plaintiff-Appellant,

Index 20709/01

-against-

New York City Housing Authority,
Defendant-Respondent.

Joseph A. Hanshe, Sayville, for appellant.

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel) for respondent.

Judgment, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered August 28, 2007, dismissing the complaint, and bringing up for review an order, same court and Justice, entered July 19, 2007, which granted defendant's motion for summary judgment and denied plaintiff's cross motion to strike defendant's answer, unanimously affirmed, without costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff sues for personal injuries suffered by decedent in a fire in an apartment leased from defendant. The fire marshal determined the fire originated in electrical cords on the floor. Plaintiff claimed the cause of the fire was an electrical short or faulty electrical system, and decedent's injuries were exacerbated by the absence of a working smoke detector and a defect in the front door that prevented her escape.

It is undisputed that defendant met its burden of proof on its motion for summary judgment. The fire marshal's report demonstrated the absence of a factual issue as to whether defendant's wiring was defective (*see e.g. Delgado v New York City Hous. Auth.*, 51 AD3d 570 [2008], *lv denied* 11 NY3d 706 [2008]). Defendant also discharged its duty to provide smoke detectors (*see* New York City Administrative Code § 27-2045[a][1]; *see Peyton v State of Newburgh, Inc.*, 14 AD3d 51 [2004], *lv denied* 5 NY3d 705 [2005]). As to the supposed defect in the front door, defendant demonstrated its entitlement to judgment with plaintiff's testimony that the door was not jammed closed, and that decedent could not open the locks because she panicked (*see Graham v New York City Hous. Auth.*, 42 AD3d 323 [2007], *lv denied* 9 NY3d 816 [2007]).

The evidence submitted by plaintiff in opposition to the motion failed to raise a question of fact as to whether the alleged defects in the electrical system caused the fire. Her expert's affidavit was unsupported by the evidence and was speculative. The expert did not identify a specific defect in the circuit breaker or internal wiring that could have caused the fire. Moreover, plaintiff did not present evidence contradicting defendant's proof that it had installed operational smoke detectors in the apartment. Nor did plaintiff provide evidence to support the suggestion that a defect in the front door had

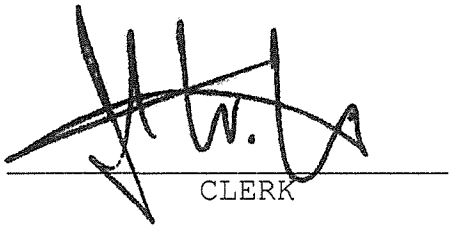
prevented decedent from exiting the apartment. Conclusory statements presuming the existence of a defect, unsupported by factual observations, are insufficient to warrant the denial of summary judgment (*see Delgado*, 51 AD3d at 571; *Graham*, 42 AD3d at 324; *Zvinys v Richfield Inv. Co.*, 25 AD3d 358, 359 [2006], *lv denied* 7 NY3d 706 [2006]).

Plaintiff also failed to meet her burden, on her cross motion to strike defendant's answer, of showing that the contents of the apartment were discarded in bad faith or that such disposal prejudiced her ability to prove her claims. There is no evidence that defendant acted in bad faith before it cleaned the apartment, which plaintiff had a prior opportunity to inspect. The record indicates that the cleaning was done after inspection by plaintiff's prospective counsel and in preparation for the apartment's rehabitation. The focus of plaintiff's claim is that there was a defect in the circuit breakers or internal wiring, which, it is undisputed, remained unchanged and available for further inspection, undermining any claim of prejudice warranting the striking of the answer (*see McMahon v Ford Motor Co.*, 34 AD3d 263 [2006]).

We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: JANUARY 22, 2009



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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 22, 2009.

Present - Hon. Peter Tom, Justice Presiding
Richard T. Andrias
Eugene Nardelli
James M. Catterson
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 1518/07
Respondent,

-against- 5086

Demetrius Fuller,
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 (Ellen M. Coin, J. at plea; Patricia Nunez, J. at sentence), rendered on or about December 20, 2007,

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

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

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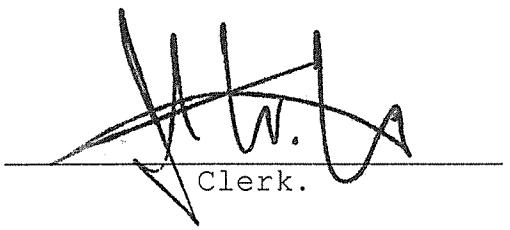

Clerk.

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

Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5087 In re Walter C.,
Petitioner-Respondent,

Jovanka F.,
Respondent-Appellant.

Dora M. Lassinger, East Rockaway, for appellant.

Anne Reiniger, New York, for respondent.

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

Order, Family Court, Bronx County (Sue Levy, Ref.), entered on or about April 27, 2006, which, after a hearing, denied the mother's application for a modification of an order of custody of the parties' daughter, unanimously affirmed, without costs.

Although the mother presented evidence of her own personal progress since the father was granted custody, she failed to demonstrate that the totality of the circumstances warranted a change in custody in the best interests of the child (*see Friederwitzer v Friederwitzer*, 55 NY2d 89, 96 [1982]).

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

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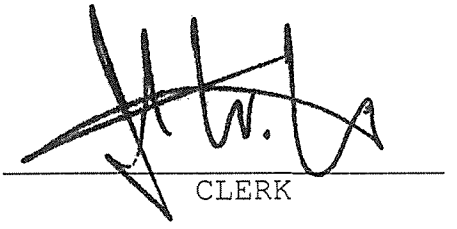

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Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5089 Illinois National Insurance Company, et al., Plaintiffs-Appellants, -against- American Alternative Insurance Corporation, Defendant-Respondent. Index 119440/03

Lester Schwab Katz & Dwyer, LLP, New York (Ellen M. Spindler of counsel), for appellants.

Faust Goetz Schenker & Blee LLP, New York (Lisa L. Gokhulsingh of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 1, 2007, which granted plaintiffs' motion for reargument of their motion for summary judgment and, upon reargument, adhered to a prior order and judgment (one paper), same court and Justice, entered May 9, 2007, denying plaintiffs' motion and granting defendant's cross motion for summary judgment declaring that it has no obligation to defend or indemnify plaintiffs in the underlying personal injury action, unanimously affirmed, without costs.

The insurance contract issued by defendant to the nonparty asbestos abatement subcontractor includes as an insured "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be

added as an additional insured on your policy." Plaintiffs concede that the subcontractor's contract with the City plaintiffs' general contractor does not contain an agreement that the City parties be named as additional insureds. Contrary to their contention, the provision in the bid documents of plaintiff New York City School Construction Authority stating that the performance of asbestos abatement work "shall be governed by" certain terms and conditions, among which was a requirement to name the City plaintiffs as additional insureds, does not constitute an "agree[ment] [between the subcontractor and the City plaintiffs] in writing in a contract or agreement that [the latter] be added as an additional insured on [the former's] policy."

The certificate of insurance generated by the subcontractor's broker, by its terms, confers no rights upon the certificate holder (*see Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [2003]).

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

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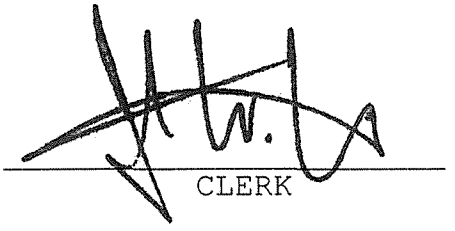

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Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5090 The People of the State of New York, Ind. 4973/06
Respondent,

-against-

Mustafa Hadiouche,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered on or about March 8, 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
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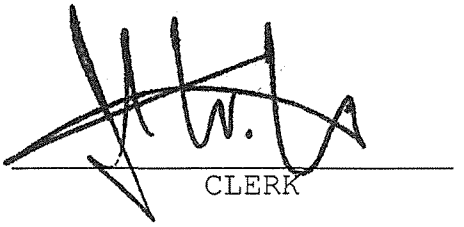

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Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5093 The People of the State of New York, Ind. 2302/05
Respondent,

-against-

Steven Placek,
Defendant-Appellant.

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

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

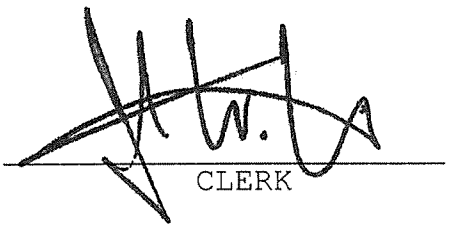
Judgment, Supreme Court, New York County (Marcy L. Kahn, J. at suppression hearing; Ronald A. Zweibel, J. at plea and sentence), rendered September 27, 2007, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of 1½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. Incident to a lawful arrest, the police recovered a bag of drugs from defendant's person. The record supports the hearing court's factual determination that there was no body cavity search requiring a warrant, because the bag was between defendant's

underwear and his buttocks, and was not in his rectum (*see People v Walker*, 27 AD3d 899, 901 [2006], *lv denied* 7 NY3d 764 [2006]; *People v Butler*, 27 AD3d 365, 369 [2006], *lv dismissed* 6 NY3d 893 [2006]).

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

ENTERED: JANUARY 22, 2009



CLERK

Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5094 Berkman Bottger & Rodd, LLP, Index 600943/07
Plaintiff-Appellant,

-against-

Stephanie O'Hara Moriarty,
Defendant-Respondent.

Berkman Bottger & Rodd, LLP, New York (Elizabeth A. Fox of counsel), for appellant.

James T. Moriarty, New York, for respondent.

Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered January 9, 2008, which, in an action for unpaid legal fees, denied plaintiff law firm's motion for summary judgment on its first cause of action for account stated, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in plaintiff's favor in the amount of $83,150.53, with statutory interest from March 23, 2007.

Summary judgment on the account stated cause of action should have been granted. Plaintiff's procedural error in submitting an attorney's affirmation in support of its motion, as opposed to an affidavit as required by CPLR 2106, was timely remedied when the same affirmation was submitted in affidavit form in reply papers (*see e.g. Wester v Sussman*, 304 AD2d 656 [2003], *lv denied* 100 NY2d 510 [2003]), and there is no indication that defendant client was prejudiced by the technical

defect in opposing the motion.

Evidence in the form of detailed monthly invoices addressed to defendant, together with affidavits submitted by plaintiff and defendant, indicating that the invoices were regularly and timely forwarded to and received by defendant, established plaintiff's compliance with the retainer agreement's regular billing requirements. Defendant's contention that she often orally objected to the bills by making general complaints to plaintiff that the bills were high was self-serving, not time specific, and otherwise contradicted by her actions in failing to avail herself of the offered arbitration (*see Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]; *Manhattan Telecom. Corp. v Best Payphones*, 299 AD2d 178 [2002], *lv denied* 100 NY2d 507 [2003]). Furthermore, defendant's undated letter to the court, complaining that the bills were "too high" and that plaintiff continuously assured her that her husband would have to pay the bills generated in the matrimonial action, was vague and belated since it appears to have been drafted months after plaintiff had moved to be relieved as defendant's counsel.

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

ENTERED: JANUARY 22, 2009

CLERK

Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5095 The People of the State of New York, Ind. 5757/06
Respondent,

-against-

Rodney Brown,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered August 7, 2007, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

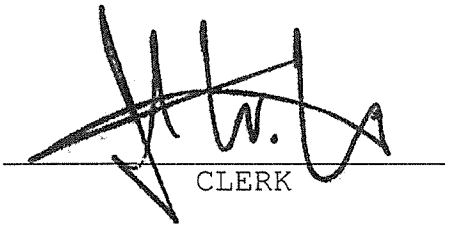
Defendant claims that his guilty plea was involuntary because the court allegedly promised to order him enrolled in the comprehensive alcohol and substance abuse treatment (CASAT) program, a promise that went unfulfilled since court-mandated CASAT is only available for persons convicted of drug offenses (Penal Law § 60.04[6]). However, while defendant moved to withdraw his plea, he did so on different grounds from those he advances on appeal, and while he raised his present claim in a CPL article 440 motion to vacate the judgment, the court denied that motion, and this Court denied leave to appeal. Accordingly,

this issue is unpreserved (*see People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record does not establish that a guarantee of CASAT was part of the court's sentence promise. Instead, the record reflects that, as defendant specifically acknowledged, the only promise upon which the plea was actually conditioned was a sentence of 2 to 4 years, that defense counsel additionally asked the court to recommend CASAT, and that defendant's plea was not induced by the court's promise to "place" him in CASAT. Furthermore, the fact that, at sentencing, the court purported to direct defendant's enrollment in CASAT did not render the sentence illegal or entitle defendant to withdraw his plea. The purported direction was essentially a recommendation made by the court to the Department of Correctional Services, which chose, instead, to place defendant in a different therapeutic program.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 22, 2009



CLERK

Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5097 In re Consolidated Flooring Corp., Index 601146/08
Petitioner,

-against-

The Environmental Control Board
of the City of New York, et al.,
Respondents.

Mazur, Carp & Rubin, P.C., New York (Brian G. Lustbader of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondents.

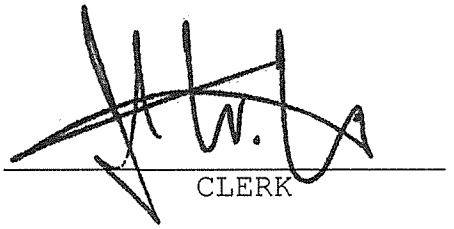
Determination of respondent Environmental Control Board, dated December 6, 2007, finding that petitioner contractor violated Asbestos Control Program regulations of respondent Department of Environmental Protection by disturbing asbestos without taking proper steps to contain it and to protect the public and its workers, and imposing a fine, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Kibbie F. Payne, J.], entered August 11, 2008), dismissed, without costs.

The record shows that petitioner, hired to remove and replace a wood floor in a public elementary school gym, was engaged in asbestos "abatement activities" within the meaning of the Asbestos Control Program regulations (15 RCNY 1-01[c]; 1-02), and, as such, is subject to those regulations even if it had no

reason to suspect the presence of asbestos under the floor (*see Matter of Vision Envtl. Servs. Corp. v New York City Dept. of Envtl. Protection*, 242 AD2d 431 [1997], *lv denied* 91 NY2d 805 [1998]). We have considered petitioner's other arguments and find them unavailing.

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

ENTERED: JANUARY 22, 2009



CLERK

Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5098 The People of the State of New York, Ind. 6417/06
Respondent,

-against-

John Springs,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Craig A. Ascher of counsel), for respondent.

Judgment, Supreme Court, New York County (Micki A. Scherer, J. at suppression motion; Charles H. Solomon, J. at nonjury trial and sentence), rendered June 12, 2007, convicting defendant of burglary in the third degree, and sentencing him to a term of 2½ to 5 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 was ample evidence, including, among other things, a surveillance videotape and defendant's own statements to the police, to establish that he knowingly entered a basement unlawfully, and did so with the intent to steal property.

The trial court properly declined to consider criminal trespass in the second and third degrees as lesser included offenses, as there was no reasonable view of the evidence, viewed

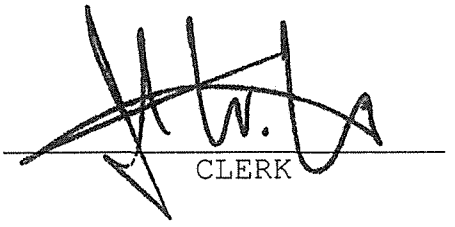
most favorably to defendant, to support those charges (*see e.g. People v Jones*, 33 AD3d 461 [2006], *lv denied* 7 NY3d 926 [2006]). There was no evidence to support a reasonable view that defendant, by reason of alleged intoxication or otherwise, entered the premises without the intent to steal.

The motion court properly denied that portion of defendant's suppression motion that sought a *Dunaway* hearing. The allegations in defendant's moving papers, when considered in the context of the detailed information provided to defendant, were insufficient to create a factual dispute requiring such a hearing (*compare People v Long*, 36 AD3d 132 [2006], *affd* 8 NY3d 1014 [2007], *with People v Bryant*, 8 NY3d 530, 533-534 [2007]). Defendant merely claimed, in a conclusory manner, that he had lawfully entered the building and that he was not engaged in "any illegal or illicit behavior at the time of his arrest or at [any time] prior to his arrest." However, he did not address the specific allegations set forth in the felony complaint and voluntary disclosure form.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 22, 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 22, 2009.

Present - Hon. Peter Tom, Justice Presiding
Richard T. Andrias
Eugene Nardelli
James M. Catterson
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 911N/06
Respondent,

-against- 5100

Melvin Reyes,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about October 26, 2007,

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

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

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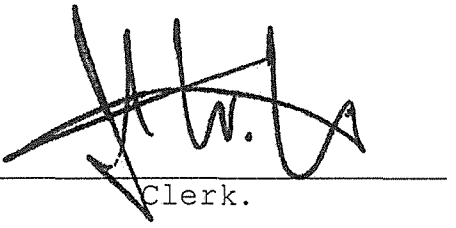

Clerk.

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

Tom, J.P., Andrias, Nardelli, Catterson, Moskowitz, JJ.

5101N East Forty-Fourth Street LLC, Index 603216/07
Plaintiff-Respondent,

-against-

Yusuf Bildirici,
Defendant-Appellant.

Davidoff Malito & Hutcher LLP, New York (Larry Hutcher of counsel), for appellant.

Tofel & Partners, LLP, New York (Lawrence E. Tofel of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered September 4, 2008, which, insofar as appealed from, denied defendant's motion to disqualify plaintiff's attorney, unanimously affirmed, with costs.

Disqualification for violation of the Code of Professional Responsibility DR 5-102 (22 NYCRR 1200.21), which requires withdrawal by counsel if it appears that he will be called as a witness, was properly denied in the absence of a showing that the testimony of plaintiff's attorney will be necessary to establish the claim or prejudicial in the event the attorney is called (*see Kirshon, Shron, Cornell & Teitelbaum v Savarese*, 182 AD2d 911 [1992]).

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

ENTERED: JANUARY 22, 2009

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
John T. Buckley
Rolando T. Acosta
Helen E. Freedman, JJ.

4180
Index 117860/06

Ramos Aguilar Delfino,
Plaintiff-Respondent,

-against-

Rodolfo Luzon,
Defendant-Appellant.

Defendant appeals from an order of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered May 21, 2008, which denied his motion for summary judgment dismissing the complaint on the ground that plaintiff had not suffered a "serious injury" within the meaning of Insurance Law § 5102(d).

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellant.

Shanker & Shanker, P.C., New York (Steven J. Mines of counsel), for respondent.

BUCKLEY, J. --

Defendant satisfied his prima facie burden of entitlement to summary judgment dismissing the complaint based on the affirmations of his expert witnesses. The defense radiologist's review of an MRI film of plaintiff's left shoulder, taken 17 days after the accident, showed normal osseous structures, labrum, deltoid muscle, and biceps tendon, and no rotator cuff injury, tendinitis, osteochondral defect or fracture. There was some fluid in the acromioclavicular joint, which the radiologist believed would "resolve without intervention due to the absence of any ligamentous, osseous, or tendinous etiology." An MRI film of plaintiff's lumbar spine, taken six weeks after the accident, was normal, other than dessication and bulging at the L5 transitional S1 vertebral level, which resulted from a condition with which plaintiff was born. The radiologist stated that the dessication could not have occurred during the interval between the accident and the examination, but rather was "indicative of pre-existing, degenerative change likely associated with the congenital variant." Similarly, the bulging was "related to ligamentous laxity" and was "degenerative in nature." Notably, there were no osseous, ligamentous, or intervertebral disc changes of recent or post-traumatic origin.

Upon conducting a physical examination of plaintiff,

defendant's orthopedist determined that plaintiff had full range of motion of the lumbar spine and left shoulder, and plaintiff's medical records did not show a substantial injury to either of those two regions. The fluid around plaintiff's acromioclavicular joint, evident in the MRI film, was consistent with mild joint sprain. Surgical records indicated that an operation on plaintiff's left shoulder three and one-half months after the accident was for a "congenital/degenerative condition of subacromial impingement related to an abnormally shaped (dysmorphic) acromion which was reshaped surgically."

The opinions of defendant's experts were confirmed by plaintiff's own MRI report, which found only "fluid and/or soft tissue inflammation surrounding the acromioclavicular joint" and noted that the "MRI of the left shoulder [was] otherwise unremarkable."

In opposition to defendant's medical evidence of no serious injury, plaintiff submitted an affirmation from a nontreating physiatrist who examined him ten months after the accident and again four months after that. Although the expert listed specific numeric losses of range of motion for the left shoulder, he failed to describe what tests were used or provide any objective basis to substantiate his range of motion assessments, his opinion that the restrictions were causally linked to the

accident, or his prognosis that plaintiff will never fully recover and might require further surgery. Those omissions in plaintiff's expert's affirmation are fatal to plaintiff's claim (*see Rodriguez v Abdallah*, 51 AD3d 590 [2008]; *Smith v Cherubini*, 44 AD3d 520 [2007]; *Munoz v Hollingsworth*, 18 AD3d 278 [2005]). The absence from the record of objective findings of limited range of motion contemporaneous with the accident compounds the inadequacy of plaintiff's opposition (*see Lloyd v Green*, 45 AD3d 373 [2007]).

More importantly, plaintiff's expert did not even address, let alone rebut, the objectively substantiated findings of defendant's experts that plaintiff's conditions are congenital and degenerative, and therefore did not raise a triable issue of fact as to causation (*see Mullings v Huntwork*, 26 AD3d 214, 216 [2006]). In addition, plaintiff's expert did not attempt to reconcile his conclusory assertion that the shoulder surgery was necessitated by accident-related injuries with the MRI report describing the shoulder as "unremarkable" other than "fluid and/or soft tissue inflammation surrounding the acromioclavicular joint."

Accordingly, the order of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered May 21, 2008, which denied defendant's motion for summary judgment dismissing the complaint

on the ground that plaintiff had not suffered a "serious injury" within the meaning of Insurance Law § 5102(d), should be reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

All concur.

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

ENTERED: JANUARY 22, 2009