Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5217 Regiany Mauro, et al., Index 110246/06
Plaintiffs-Respondents,

-against-

Rosedale Enterprises, etc., et al.,
Defendants-Appellants.

Blane Magee, Rockville Centre, for appellants.

Friedman & Moses, LLP, Garden City (Lisa M. Comeau of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 5, 2008, which denied defendants' motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed in its entirety. The Clerk is directed to enter judgment accordingly.

On an October evening in 2005, plaintiff Regiany Mauro sustained injuries in a Burger King parking lot. She was in the process of removing her son from the rear seat of the family vehicle when she stepped backward over a concrete curb, onto a grassy area she believed to be higher than it was. She lost her balance and fell, fracturing her foot.

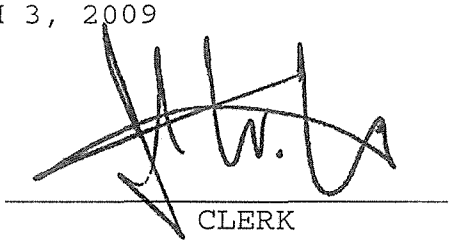
Defendants established prima facie entitlement to summary relief by demonstrating that the condition of the curb and of the adjacent grassy area was readily observable by the reasonable use of one's senses (*Capozzi v Huhne*, 14 AD3d 474 [2005]; *see also Tushaj v City of New York*, 258 AD2d 283 [1999], *lv denied* 93 NY2d

818 [1999]). Plaintiffs in turn failed to demonstrate the existence of an actionable defect.

We need not determine whether the affidavit of plaintiffs' expert engineer should not have been considered in light of plaintiffs' failure to identify this expert during pretrial disclosure, despite repeated court orders to do so (*compare Construction by Singletree, Inc. v Lowe*, 55 AD3d 861 [2d Dept 2008] and *DeLeon v State of New York*, 22 AD3d 786, 787 [2d Dept 2005], *lv denied* 7 NY3d 701 [2006]) with *Kozlowski v Alcan Aluminum Corp.*, 209 AD2d 930 [4th Dept 1994]; *see* Connors, *Case Law on CPLR 3101(d)(1)(i), Expert Disclosure, is in Shambles*, 1/20/09 NYLJ at 3, col 1). The expert affidavit, even if considered, fails to raise a triable issue of fact, instead citing various broad or inapt engineering rules, regulations and standards (*see Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327 [2006]).

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

ENTERED: MARCH 3, 2009



CLERK

Mazzarelli, J.P., Gonzalez, Sweeny, McGuire, DeGrasse, JJ

5387N Brian Ritchie, et al., Index 101038/06
Plaintiffs-Respondents, 509464/07

-against-

Felix Associates, LLC, et al.,
Defendants-Appellants,

Judlau Contracting, Inc., et al.,
Defendants.

[And a Third-Party Action]

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for appellants.

Herman M. Goldberg & Associates, LLC, New York (Jeffrey J. Shapiro of counsel), for respondents.

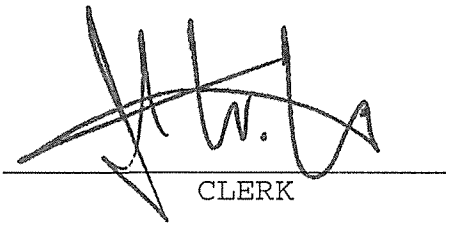
Order, Supreme Court, New York County (Walter B. Tolub, J.), entered August 20, 2008, which, in an action for personal injuries sustained by plaintiff Brian Ritchie when he tripped and fell as he stepped off an allegedly improperly constructed sidewalk curb, granted plaintiffs' motion for leave to amend the notice of claim, complaint and all subsequent pleadings to correct the date of the accident from March 15, 2005 to March 2, 2005, and denied defendant-appellants' cross motion to amend the answer of defendant City of New York and for summary judgment dismissing the complaint and cross claims based on plaintiffs' failure to satisfy the requirements of General Municipal Law § 50-e(2), unanimously affirmed, without costs.

The court providently exercised its discretion in granting

plaintiffs' motion (*see* General Municipal Law § 50-e[6]). Although three years passed between the date of the accident and the subject motion, the record does not demonstrate any lack of good faith on plaintiffs' part. Furthermore, given that discovery in this action has not commenced, defendants fail to demonstrate any actual prejudice, nor is there any apparent prejudice to them given the non-transitory nature of the defect (*see Matter of Puzio v City of New York*, 24 AD3d 679 [2005]; *Fabian v New York City Tr. Auth.*, 271 AD2d 244 [2000]).

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

ENTERED: MARCH 3, 2009



CLERK

Mazzarelli, J.P., Gonzalez, Sweeny, McGuire, DeGrasse, JJ.

5389N-
5389NA Tasha M. Vlahos, Index 107648/07
Plaintiff-Respondent,

-against-

422 East 14th Street Associates, LLC,
Defendant-Appellant.

Kucker & Bruh, LLP, New York (Patrick K. Munson of counsel), for appellant.

Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for respondent.

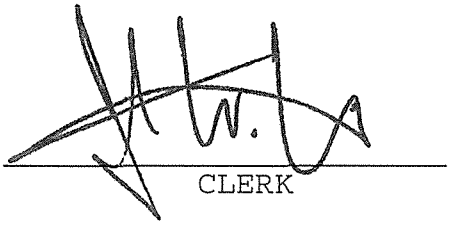
Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 17, 2008, which struck defendant's answer and awarded judgment in favor of plaintiff, and order, same court and Justice, entered October 22, 2008, which denied defendant's motion for summary judgment, unanimously affirmed, without costs.

The court providently exercised its discretion in finding defendant's noncompliance with multiple discovery orders willful and contumacious, warranting the striking of its pleadings (*see e.g. Brewster v FTM Servo Corp.*, 44 AD3d 351 [2007]). Defendant's proffered reason for staying of discovery in conjunction with its motion for summary judgment, filed with the court the day before the sanction conference, does not adequately explain its failure to comply for the 11 months preceding its motion. Given this disposition, the court correctly denied defendant's subsequent motion for summary judgment as moot.

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

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

ENTERED: MARCH 3, 2009



CLERK

Mazzarelli, J.P., Gonzalez, Sweeny, McGuire, DeGrasse, JJ.

5394N Donald Kugel, Index 404254/04
Plaintiff-Respondent,

-against-

City of New York, et al.,
Defendants,

A. Jetta Towing,
Defendant-Appellant.

Wade Clarke Mulcahy, New York (Dennis M. Wade and Lora H. Gleicher of counsel), for appellant.

DeBerardine & DeBerardine, Brooklyn (Roger B. DeBerardine and Elaine A. DeBerardine of counsel), for respondent.

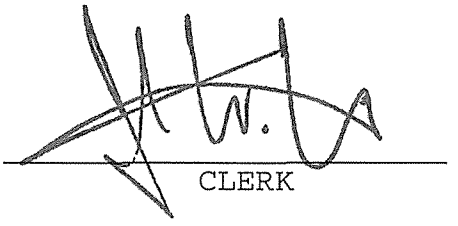
Order, Supreme Court, New York County (Karen S. Smith, J.), entered June 25, 2008, which, to the extent appealed from, granted plaintiff's cross motion to strike defendant's answer for spoliation of evidence and award judgment on liability, unanimously reversed, on the law, without costs, the cross motion denied and the answer reinstated.

While a party's pleading may be struck as a sanction for the intentional destruction of key evidence (*see Amaris v Sharp Elecs. Corp.*, 304 AD2d 457 [2003], *lv denied* 1 NY3d 507 [2004]), the documents destroyed by defendant, allegedly because its president believed the corporation had been dissolved, did not constitute key evidence warranting such a harsh sanction. Where the destroyed evidence is not crucial to the proof of the plaintiff's case, as here, a lesser sanction for spoliation is

appropriate (*see Metropolitan N.Y. Coordinating Council on Jewish Poverty v FGP Bush Term.*, 1 AD3d 168 [2003]; *Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [2002]). As we have said, "[a]lthough some lesser sanction . . . appears to be appropriate, that is a matter best left to the discretion of the trial court and should be made on the basis of the record before it at the time" (*Quinn v City University of NY*, 43 AD3d 679, 680 [2007]). Furthermore, the record does not establish that defendant's failure to comply with discovery demands was willful, contumacious or in bad faith (*see Mangual v New York City Tr. Auth.*, 48 AD3d 212 [2008]).

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

ENTERED: MARCH 3, 2009



CLERK

Mazzarelli, J.P., Gonzalez, Sweeny, McGuire, DeGrasse, JJ.

5395N Interoil LNG Holdings, Inc., et al., Index 603006/08
Plaintiffs-Appellants,

-against-

Merrill Lynch PNG LNG Corp.,
Defendant-Respondent.

Garvey Schubert Barer, New York (Andrew J. Goodman of counsel), for appellants.

Milbank, Tweed, Hadley & McCloy LLP, New York (Michael L. Hirschfeld of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 12, 2008, which granted defendant's cross motion for a preliminary injunction in aid of arbitration, unanimously affirmed, with costs.

In addition to showing that the arbitration award could be rendered ineffectual, a party seeking an injunction in aid of arbitration must demonstrate the traditional factors for injunctive relief under CPLR article 63 (CPLR 7502[c]) (*see SG Cowen Securities Corp. v Messih*, 224 F3d 79, 83-85 [2d Cir 2000] [construing CPLR 7502(c) and CPLR 7501 and concluding that in addition to a showing that the arbitration award could be rendered ineffectual the traditional requirements for injunctive relief apply to a request under CPLR 7502(c) for injunctive relief]). Plaintiff asserts that defendant failed to satisfy two of those elements -- a likelihood of success on the merits, and

irreparable injury.

Defendant has met this standard. As to the merits, defendant claims to have an enforceable agreement for a supply contract to purchase LNG from the parties' mutually owned company. While the price term in that agreement is not definite on its face, we find defendant has made a sufficient showing that the term can be supplied from public price indices and industry practice. Given the wording of the price provision and the parties' clear intent to enter into a supply/output contract, the contract is not too vague to be enforced (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989], *cert denied* 498 US 816 [1990]). Moreover, the loss of rights to purchase a commodity into the future (the term of the agreement is 20 years) would result in a loss which, at the least, would be difficult to quantify (*Gunderman & Gunderman Insurance v Brassill*, 46 AD3d 615, 617 [2007] [upholding finding of irreparable injury where claimed damages were "difficult to quantify"]). Accordingly, defendant made a sufficient showing of irreparable injury.

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

ENTERED: MARCH 3, 2009

CLERK

Mazzarelli, J.P., Gonzalez, Sweeny, McGuire, DeGrasse, JJ.

5396N Eighth Avenue Garage Corp., Index 604472/05
Plaintiff-Appellant,

-against-

H.K.L. Realty Corp., et al.,
Defendants,

Lila Scheiner,
Defendant-Respondent.

Law Office of Donald Snider, Mamaroneck (Donald Snider of counsel), for appellant.

Lewette Fielding, P.C., New York (Lewette Fielding of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered March 7, 2008, which, to the extent appealed from, denied plaintiff's motion to amend its complaint for a second time, unanimously affirmed, with costs.

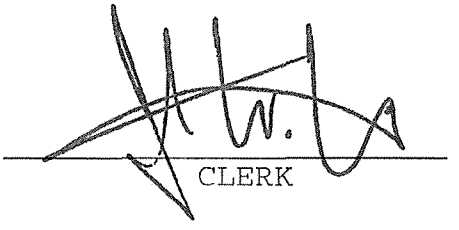
Leave to amend a pleading is freely given (CPLR 3025[b]), absent prejudice or surprise resulting directly from the delay *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]). The determination of whether to allow such an amendment is reserved for the court's discretion, and exercise of that discretion will not be overturned without a showing that the facts offered for the amendment do not support the new claim(s) (*Murray v City of New York*, 43 NY2d 400 [1977]). Nevertheless, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of

action is warranted (*Megaris Furs v Gimbel Bros.*, 172 AD2d 209 [1991]). Where a court concludes that an application to amend a pleading clearly lacks merit, leave is properly denied (*see Davis & Davis v Morson*, 286 AD2d 584, 585 [2001]).

Here, the motion court did not improvidently exercise its discretion in denying leave to amend the complaint for the second time. The causes of action in the proposed amended complaint lack merit; under no set of circumstances could plaintiff have demonstrated either that defendant Scheiner breached the lease by not providing an estoppel certificate or that defendant Scheiner's failure to deliver an estoppel certificate caused any damage to plaintiff. Similarly, under no set of circumstances could plaintiff have made out a case for tortious interference with advantageous business relations (*see Carvel v Noonan*, 3 NY3d 182 [2004]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]).

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

ENTERED: MARCH 3, 2009



CLERK

Mazzarelli, J.P., Gonzalez, Sweeny, McGuire, DeGrasse, JJ.

5397N Robert C. Best, Index 7543/98
Plaintiff-Respondent,

-against-

2170 5th Avenue Corporation,
Defendant-Appellant.

Gannon, Rosenfarb & Moskowitz, New York (Martin J. Moskowitz of counsel), for appellant.

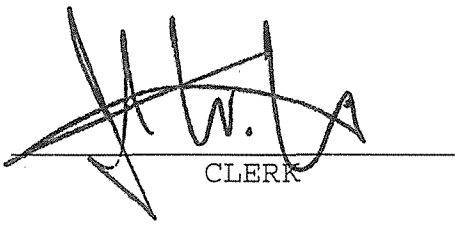
Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about January 4, 2008, which to the extent appealed from as limited by the brief, denied defendant's motion to unseal plaintiff's criminal court file, unanimously reversed, on the law, with costs, and the motion granted.

Where an individual, who has records that would otherwise be kept sealed under Criminal Procedure Law § 160.50, affirmatively places the underlying conduct at issue by bringing a civil suit, the statutory protection afforded by section 160.50 is waived, as the privilege, which is intended to protect the accused, may not be used as "a sword to gain an advantage in a civil action" (*Green v Montgomery*, 95 NY2d 693, 701 [2001] [internal quotation marks and citation omitted]; *see Rodriguez v Ford Motor Co.*, 301 AD2d 372 [2003]). Here, plaintiff waived the protection afforded by the statute by placing into issue the prosecution against him when he commenced this action alleging, inter alia, malicious

prosecution based on that criminal proceeding (*see Kalogris v Roberts*, 185 AD2d 335, 336 [1992]; *Wright v Snow*, 175 AD2d 451, 452 [1991], *lv dismissed* 79 NY2d 822 [1991]).

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

ENTERED: MARCH 3, 2009



Mazzarelli, J.P., Gonzalez, Sweeny, McGuire, DeGrasse, JJ.

5398N Felicito Ramirez, Index 122538/00
Plaintiff-Appellant, 590774/01

-against-

Willow Ridge Country Club, Inc., et al.,
Defendants.
- - - - - -
Trolman, Glaser & Lichtman, P.C.,
Nonparty Respondent.

[And a Third-Party Action]

Friedman Friedman Chiaravalloti & Giannini, New York (Alan M. Friedman of counsel), for appellant.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about July 30, 2007, which, to the extent appealed from as limited by the briefs, granted plaintiff's former counsel's motion for a statutory lien for legal fees and disbursements, unanimously modified, on the law, and that portion of the motion granted only to the extent of directing a hearing on the issue of entitlement to legal fees and disbursements, to be held on 30 days' notice by former or present counsel for plaintiff, and otherwise affirmed, without costs.

The underlying personal injury action sought damages for serious injuries allegedly sustained by plaintiff while working at a construction site in 2000. On the eve of trial, the Trolman firm moved to be relieved as plaintiff's counsel and for the

imposition of a statutory lien for legal fees and disbursements.

It is well settled that "where an attorney's representation terminates and there has been no misconduct, no discharge for just cause and no unjustified abandonment by the attorney, the attorney's right to enforce the statutory charging lien is preserved" (*Klein v Eubank*, 87 NY2d 459, 464 [1996]; *see also Delaj v Jameson*, 51 AD3d 450 [2008], *lv dismissed* 11 NY3d 816 [2008]). However, the moving papers did not give any indication of the ground upon which the relief was sought, stating only that "it became clear to us that we could not proceed as [plaintiff's] attorneys." This vagueness was not cured by counsel's reference, during argument, to an unspecified ethical constraint. In the absence of an adequate showing of the grounds for the relief sought, an evidentiary hearing must be held to determine whether withdrawal was with just cause (*Klein*, 87 NY2d at 464; *Shalom Toy v Each & Every One of Members of N.Y. Prop. Ins. Underwriting Assn.*, 239 AD2d 196, 198 [1997]).

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

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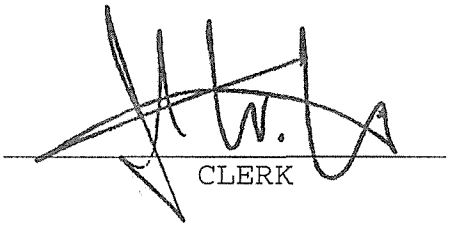


Mazzarelli, J.P., Gonzalez, Sweeny, McGuire, DeGrasse, JJ.

5399N Frank Miraglia, Index 25228/00
Plaintiff-Respondent-Appellant,

-against-

H & L Holding Corp.,
Defendant/Third-Party Plaintiff,

-against-

Lane & Sons Construction Corp.,
Third-Party Defendant-
Appellant-Respondent.

Mauro Goldberg & Lilling LLP, Great Neck (Matthew W. Naparty of counsel), for appellant-respondent.

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

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered October 9, 2007, which, to the extent appealed from as limited by the briefs, denied third-party defendant's motion for an amended judgment providing recovery by plaintiff only from defendant, and amended judgment, same court and Justice, entered October 29, 2007, awarding plaintiff damages against both defendant and third-party defendant in the principal amount of $18,097,112.15, unanimously affirmed, without costs.

Plaintiff was employed by third-party defendant contractor. As noted on prior appeals (306 AD2d 58 [2003]; 36 AD3d 456 [2007], *lv denied* 10 NY3d 703), he was working on a residential structure on land owned by defendant when he fell from planks

used to span a trench and provide access to foundation walls, and was impaled by a steel bar from the scrotum to L2 on his spinal cord, resulting in paraplegia and associated complications. In a separate action, plaintiff recovered over $6 million from defendant's insurer, with defendant retaining the right to contractual indemnification.

After the 2007 appeal, third-party defendant asserted for the first time that since it was plaintiff's employer, the court could not enter a judgment in which plaintiff was granted a right to recover directly against it because the worker's compensation paid to plaintiff was his exclusive remedy. The first judgment, affirmed in the 2007 appeal except for future pain and suffering damages (for which plaintiff stipulated to a reduction), also provided plaintiff with a direct recovery against third-party defendant, which failed to raise any objection based on worker's compensation exclusivity at that time.

A defense of worker's compensation exclusivity is waived if the employer ignores the issue "to the point of final disposition itself" (*Murray v City of New York*, 43 NY2d 400, 407 [1977]), especially where belated assertion of the defense will prejudice the party opposing the assertion (*see Shine v Duncan Petroleum Transp.*, 60 NY2d 22, 27-28 [1983]). Here, not only did third-party defendant fail to raise this objection to the judgment on the 2007 appeal (*see Harbas v Gilmore*, 214 AD2d 440 [1995], *lv*

dismissed 87 NY2d 861 [1995]), but it assumed defense of the direct defendant at trial, after the latter had successfully moved in limine for contractual indemnification while instructing its accountant -- unbeknownst to plaintiff -- to file for dissolution. Plaintiff was thus denied the opportunity to object to third-party defendant's representation of the direct defendant while reserving its worker's compensation exclusivity defense, or to otherwise protect his position. This is unacceptable. Worker's compensation exclusivity is important as a matter of state public policy, but so is the finality of the result when a party charts its own course.

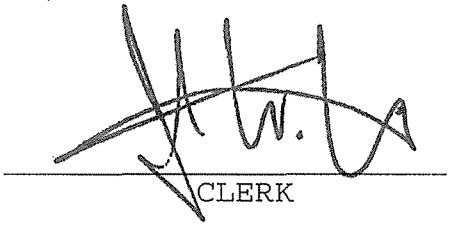
It does not avail third-party defendant to assert that it could not have waived this argument because it goes to jurisdiction. While lack of subject matter jurisdiction can be raised at any time, it is still within a New York court's power "to entertain the case before it" (*Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997]; *see also Matter of Rougeron*, 17 NY2d 264, 271 [1966], *cert denied* 385 US 899 [1966]). Here, third-party defendant is not arguing that Supreme Court "never had power to hear a particular type of proceeding in the first place" (*see Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 280 [2006], *appeal dismissed* 8 NY3d 837 [2007]). Waiver of an argument will be recognized where, as here, "the court had jurisdiction of the general subject matter but a contention is

made after judgment that the court did not have power to act in the particular case or as to a particular question in the case" (*see Rougeron*, 17 NY2d at 271). Nor is third-party defendant persuasive in arguing -- for the first time on appeal -- that Supreme Court lacked personal jurisdiction over it. Supreme Court has always had the power to render an adjudication over third-party defendant (*see Security Pac. Natl. Bank*, 31 AD3d at 280), which surely would not have assumed the defense of the direct defendant at trial if it believed the court lacked personal jurisdiction over it.

Because we are not granting relief to third-party defendant on the main appeal, we need not address any of the arguments with respect to plaintiff's conditional cross appeal.

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

ENTERED: MARCH 3, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5402 William Vera, etc., Index 22539/00
Plaintiff-Appellant,

-against-

Montefiore Medical Center, et al.,
Defendants-Respondents.

The Law Offices of Mark Kressner, Bronx (Mitchell L. Perry of counsel), for appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for respondents.

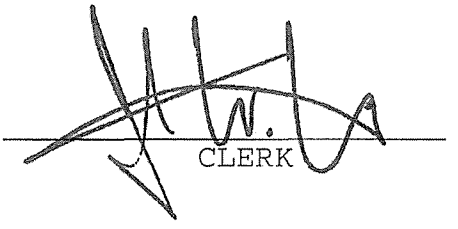
Appeal from order, Supreme Court, Bronx County (Stanley Green, J.), entered April 18, 2007, which granted upon renewal defendant Montefiore's motion for summary judgment, deemed to be an appeal from the subsequent judgment (CPLR 5501[c]), entered July 11, 2007, dismissing the complaint, and as so considered, unanimously affirmed, without costs.

In alleging medical malpractice resulting in personal injury and wrongful death, plaintiff asserted that Montefiore and its physicians were negligent in failing to timely diagnose and treat cancer in decedent's left breast, and later in her right breast. The medical records submitted on the renewal motion, along with the affirmation submitted by defendants' expert (which was identical to the opinion of a different expert on the original motion), established the following: that decedent's left breast cancer did not transform into another type of cancer and then

metastasize to the right breast or right axillary nodes, resulting in her death; that the timing of the diagnosis of a benign lesion in one area of a breast did not impact a later discovery of a malignant lesion in a different area of the same breast; and that a two-month delay between diagnosis and removal of a malignancy did not impact decedent's prognosis. In response, plaintiff failed to raise a triable issue of fact, as the affidavits from his experts set forth only general conclusions, misstatements of evidence and unsupported assertions, which were insufficient to demonstrate that defendants had failed to comport with accepted medical practice, or that any such failure was the proximate cause of decedent's injuries (*Coronel v New York City Health & Hosps. Corp.*, 47 AD3d 456 [2008]).

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

ENTERED: MARCH 3, 2009



Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5404 In re Jaffa Wally F., etc.,

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

Thelma Lynn W.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Magovern & Sclafani, New York (Marion C. Perry of counsel), for respondent.

Neal D. Futerfas, White Plains, Law Guardian.

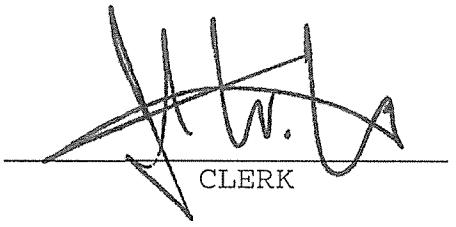
Order of disposition, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about December 11, 2006, which, upon a finding of permanent neglect, terminated the mother's parental rights to the subject child and committed his custody and guardianship to petitioner agency and the Commissioner of Social Services for the purposes of adoption, unanimously affirmed, without costs.

The evidence of permanent neglect is clear and convincing given respondent mother's admitted failure to avail herself of mental health services, which has required the child's placement in foster care from the time he was four days old and has continued despite petitioner's diligent efforts to help

respondent obtain such services (*see* Social Services Law § 384-b[7][c]; *Matter of Prudical Antonio D.*, 37 AD3d 244, 245 [2007], *lv denied* 8 NY3d 813 [2007]; *Matter of Selathia Nicole F.*, 243 AD2d 400 [1997], *lv denied* 91 NY2d 806 [1998]). A preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]) demonstrates that the termination of respondent's parental rights is in the child's best interests. Respondent, by reason of her unaddressed mental health issues, will not be able to serve as a custodial parent in the near term. Under the circumstances, the child's best chance for a stable and nurturing family life lies in his adoption by his foster parent, who has cared for him since birth, by whom his special needs are met, and with whom he has established a loving relationship.

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

ENTERED: MARCH 3, 2009



Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5407 The People of the State of New York, Ind. 43/06
Respondent,

-against-

Kevin Malave,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Lindsey M. Kneipper of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 21, 2006, as amended December 4, 2006, convicting defendant, after a jury trial, of menacing in the first degree and six counts of criminal contempt in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 4 to 8 years, unanimously affirmed.

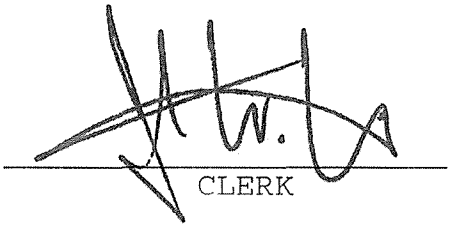
The court properly exercised its discretion in admitting evidence of the facts underlying two of the prior orders of protection that had been issued to the victim. This evidence was relevant to elements of the crimes charged, and its probative value outweighed any prejudicial effect, which was minimized by the court's thorough limiting instructions. One of the trial issues was whether defendant's possession and display of a hammer, which remained in his waistband during the incident in question, was with criminal or innocuous intent. Accordingly,

his prior use of household items against the same victim tended to show his intent rather than mere propensity, and it was also highly probative of the "reasonable fear of physical injury" element of Penal Law § 215.51(b)(i) (*see e.g. People v Palladino*, 47 AD3d 491 [2008], *lv denied* 10 NY3d 843 [2008]; *People v Garvin*, 37 AD3d 372 [2007], *lv denied* 8 NY3d 984 [2007]). The prosecutor's summation comments properly referred to the prior incidents, not to show propensity, but rather to establish the elements of the charged crimes. Furthermore, these remarks could not have caused any prejudice, particularly in light of the court's final instructions to the jury.

Defendant's specific appellate arguments concerning the sufficiency of the evidence and the court's refusal to submit a lesser included offense are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: MARCH 3, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5408 In re Dianne Sulker, Index 403552/06
Petitioner,

-against-

John A. Johnson, as Commissioner of the New York State Office of Children and Family Services, et al.,
Respondents.

Steven Banks, The Legal Aid Society, New York (Susan Welber of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Steven C. Wu, of the District of Columbia Bar, admitted pro hac vice, of counsel), for John A. Johnson, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for John B. Mattingly, respondent.

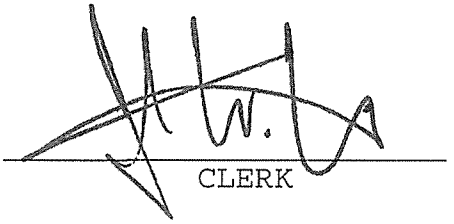
Determination of respondent New York State Office of Children and Family Services, dated May 12, 2006, which denied petitioner's request that the approved increase in her adoption subsidy to the "exceptional" rate be applied retroactively to the date of adoption, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Herman Cahn, J.], entered March 1, 2007), dismissed, without costs.

Respondent's determination that petitioner failed to establish her entitlement to the exceptional rate as of November 1, 1999, the date of adoption, is supported by substantial

evidence on the record as a whole demonstrating that it was not until her September 25, 2001 psychiatric evaluation that the child was found to be a danger to herself and others and to require 24-hour care (*see* 18 NYCRR 427.6[d]). Even if there is evidence in the record that would support a contrary conclusion, our finding that substantial evidence supports the determination precludes further judicial review (*see Matter of Rivera [State Line Delivery Serv.-Roberts]*, 69 NY2d 679, 682 [1986], *cert denied* 481 US 1049 [1987]).

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

ENTERED: MARCH 3, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5410 Jaime Mateo, et al., Index 24003/00
Plaintiffs-Respondents,

-against-

T & H Enterprises, et al.,
Defendants-Appellants.

Gorton & Gorton LLP, Mineola (John T. Gorton of counsel), for appellants.

Bader, Yakaitis & Nonnenmacher, LLP, New York (Chris Vargas of counsel), for respondents.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered February 28, 2008, which, to the extent appealed from, denied defendant T & H Enterprise's motion to dismiss the complaint, unanimously affirmed, without costs.

Dismissal is the most drastic sanction contemplated by the CPLR for failure to comply with discovery and should be imposed only when the conduct of the offending party was willful, contumacious, or in bad faith (*see Palacios v New York City Tr. Auth.*, 50 AD3d 520 [2008]; *Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [2003]; *Tsai v Hernandez*, 284 AD2d 116, 117 [2001]).

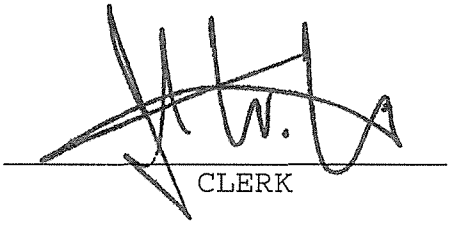
Here, the motion court's August 15, 2007 order directed completion of all depositions of plaintiffs, as well as all independent medical examinations, by November 14, 2007 or plaintiffs would be precluded from giving testimony at trial. Given that all plaintiffs were deposed and had appeared for

orthopedic IMEs by November 14, 2007, and that neurological IMEs have now been completed, defendant failed to show any willful, contumacious or bad faith conduct on the part of plaintiffs and it was well within the motion court's discretion to allow plaintiffs 45 additional days to appear for neurological IMEs (*see Nussbaum v Amico*, 29 AD3d 449 [2006]).

We have considered defendant's remaining contentions and find them unavailing.

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

ENTERED: MARCH 3, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5411 The People of the State of New York, Ind. 5645/06
Respondent,

-against-

Anthony Caldwell,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheryl Feldman of counsel), for respondent.

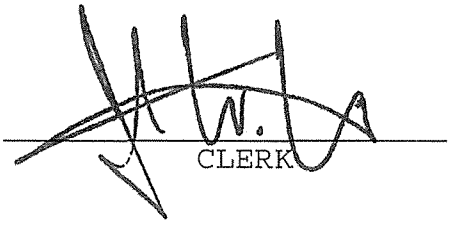
Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered November 15, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to a term of 6 years, unanimously affirmed.

To the extent defendant is challenging the legal sufficiency of the evidence, that 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. In addition, we conclude that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. Defendant's guilt was established by, among other things, the testimony of an officer

who stopped defendant after seeing him with the undercover officer immediately before and after the sale, and after following defendant a short distance without losing sight of him.

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

ENTERED: MARCH 3, 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 March 3, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
David Friedman
John T. Buckley
James M. Catterson
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 6099/06
Respondent,

-against- 5412

Michael Rush,
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 October 17, 2007,

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

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

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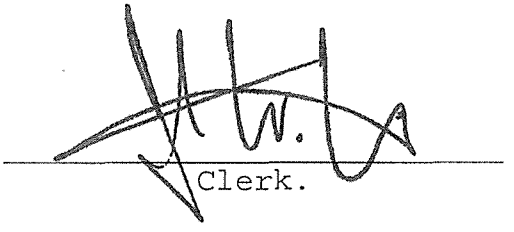


Clerk.

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

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5413-
5314 Steven Gary, Index 7959/05
Plaintiff-Respondent,

-against-

Flair Beverage Corp., et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

-against-

JJ's On Broadway Beer & Soda Corp.,
Third-Party Defendant-Respondent.

Carol R. Finocchio, New York, for appellants.

DeAngelis & Hafiz, Mount Vernon (Talay Hafiz of counsel), for Steven Gary, respondent.

Rende, Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for JJ's on Broadway Beer & Soda Corp., respondent.

Orders, Supreme Court, Bronx County (John A. Barone, J.), entered June 23 and September 30, 2008, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, and dismissed the third-party complaint, unanimously modified, on the law, defendants' motion granted to the extent of dismissing the complaint as against defendant Flair Beverage and the claims based on common law negligence and Labor Law § 200 as against defendant 3835 9th Avenue Realty, third-party defendant's cross motion denied with respect to the third-party claim of 3835, 3835's motion for summary judgment against third-party defendant

on the third-party claim for breach of contract to procure insurance and conditional summary judgment for contractual indemnification granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

With regard to the Labor Law § 200 and common-law negligence claims, plaintiff failed to raise an issue of fact as to whether defendants supervised, directed or controlled the work performed, or had actual or constructive notice of a dangerous condition at the work site (*see Mitchell v New York Univ.*, 12 AD3d 200 [2004]). Indeed, plaintiff's failure to address this issue in its responding brief indicates an intention to abandon this basis of liability (*see e.g. Brown v Christopher St. Owners Corp.*, 2 AD3d 172, 173 [2003], *lv dismissed* 1 NY3d 622 [2004]).

With regard to the claims under Labor Law § 240(1) and 241(6), there is no evidence that Flair, a tenant in the building where the alleged accident occurred, contracted for or otherwise had the right or the authority to control plaintiff's work (*see Guzman v L.M.P. Realty Corp.*, 262 AD2d 99 [1999]). Contrary to plaintiff's contention, defendants preserved their argument that plaintiff was not engaged in an activity protected by § 240(1). In any event, the court properly denied that branch of defendants' motion for summary judgment dismissing plaintiff's § 240(1) claim as against 3835, the owner of the building, since an issue of fact existed as to whether plaintiff was doing more

than merely changing a light bulb, and thus was doing "repair" work within the meaning of the statute (*see e.g. Clemente v Grow Tunneling Corp.*, 235 AD2d 331 [1997]).

The IAS court properly denied that branch of defendants' motion for summary judgment dismissing the § 241(6) claim as against 3835 since an issue of fact exists as to whether plaintiff was engaged in repair work within the meaning of 12 NYCRR 23-1.4(b)(13), and was thus protected under § 241(6) (*see e.g. Piccione v 1165 Park Ave.*, 258 AD2d 357, 358 [1999], *lv dismissed* 93 NY2d 957 [1999]).

Contrary to third-party defendant's contention, defendants may appeal from the order granting the cross motion for summary dismissal of the third-party complaint. While no appeal lies from an order granted upon the default of an aggrieved party (CPLR 5511; *Flake v Van Wagenen*, 54 NY 25 [1873]), here the court did not grant the third-party defendant's cross motion on default. Although defendants failed to preserve their arguments with respect to 3835's contractual indemnification claim (*see e.g. Omansky v Whitacre*, 55 AD3d 373, 374 [2008]), this Court can review them nonetheless because they are legal in nature and apparent on the face of the record (*Gerdowsky v Crain's N.Y. Bus.*, 188 AD2d 93, 97 [1993]), particularly since both parties sought judgment as a matter of law on this claim.

3835's third-party claim for contractual indemnification was

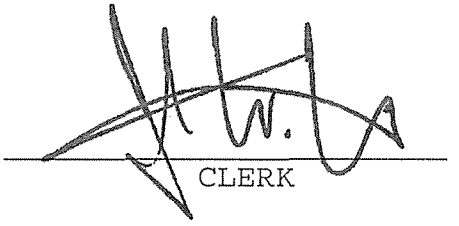
improperly dismissed as barred by Workers' Compensation Law § 11. Because it is undisputed that the parties entered into the lease containing the indemnification provision prior to the date of plaintiff's accident, § 11 presents no obstacle to indemnification (*see e.g. Portelli v Trump Empire State Partners*, 12 AD3d 280, 281 [2004]; *see also Acosta v S.L. Green Mgt. Corp.*, 267 AD2d 67, 68 [1999]). Nor is the claim barred by General Obligations Law §§ 5-321 and 5-322.1. Where, as here, a commercial lease negotiated between sophisticated business entities contains an insurance provision allocating the risk of liability to a third party, the indemnification clause is valid and enforceable and does not violate the General Obligations Law (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412 [2006]; *see also Mennis v Commet 380, Inc.*, 54 AD3d 641, 642 [2008]). Nor is "the absence of a contractual provision expressly limiting [3835's] recovery to [JJ's] insurance coverage fatal" (*Great N. Ins.*, 7 NY3d at 419 n 4). Since the indemnification provision plainly contemplates a showing of negligence by third-party defendant, and there are issues of fact as to that negligence, 3835 is entitled to conditional summary

judgment on its contractual indemnification claim (*see e.g. McCarthy v Turner Constr., Inc.*, 52 AD3d 333 [2008]; *Steakin v Voicestream Wireless Corp.*, 39 AD3d 424 [2007]). 3835 is also entitled to counsel fees and costs pursuant to the broad language of the indemnification clause (*see Breed, Abbott & Morgan v Hulko*, 139 AD2d 71, 75-76 [1988], *affd* 74 NY2d 686 [1989]; *Boshnakov v Board of Educ. of Town of Eden*, 302 AD2d 857 [2003]).

3835's third-party claim for breach of contract for failure to procure insurance was improperly dismissed. Since third-party defendant does not address this issue in its brief and does not dispute that it failed to procure the requisite insurance, 3835 is entitled to summary judgment on that claim (*see Crespo v Triad*, 294 AD2d 145, 148 [2002]).

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

ENTERED: MARCH 3, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5415-
5415A The People of the State of New York, Ind. 3426/05
Respondent, 364/06

-against-

Jose Ramirez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

Judgments, Supreme Court, New York County (Arlene R. Silverman, J.), rendered September 13, 2006, convicting defendant, after a jury trial, of robbery in the second degree, assault in the second degree and bribing a witness, and also convicting him, upon his plea of guilty, of two counts of criminal possession of stolen property in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 18 years to life, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). The convictions that the court permitted the People to elicit were all highly relevant to defendant's credibility, even though one of them was somewhat similar to one of the charged crimes, and they were not

excessively numerous or remote.

The court properly exercised its discretion when it slightly modified its *Sandoval* ruling as a result of defendant's testimony. On direct and cross-examination, defendant persistently made unnecessary references to his having pleaded guilty in other cases. Although he did not state it directly, it was clear that the point he was trying to make was that whenever he was guilty of a crime in the past he would plead guilty, so that the absence of a guilty plea in this case implied his innocence. Defendant thus opened the door to limited cross-examination tending to show that certain guilty pleas were motivated by a desire to avoid conviction of more serious charges (*see People v Cooper*, 92 NY2d 968 [1998]). In any event, the difference between the information permitted under the original *Sandoval* ruling and the information ultimately elicited was minimal.

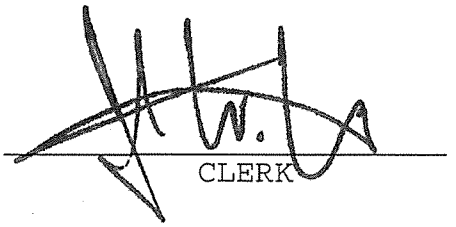
The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The evidence amply supported the physical injury element of second-degree robbery

(*see People v Chiddick*, 8 NY3d 445 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]; *People v James*, 2 AD3d 291 [2003]).

Defendant's remaining argument is without merit.

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

ENTERED: MARCH 3, 2009



Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5416 Felise Garage LLC, et al., Index 602831/07
Plaintiffs-Appellants,

-against-

Leonard Litwin, et al.,
Defendants-Respondents.

Law Office of Donald Snider, Mamaroneck (Donald Snider of counsel), for appellants.

Greenberg Traurig, LLP, New York (James W. Perkins of counsel), for Leonard Litwin and Glenwood Management Corp., respondents.

Herrick, Feinstein LLP, New York (David Feuerstein of counsel), for Rafael Llopiz, Marathon/Quick Park NYC LLC, Quik Park Felise LLC and Quik Park (Leaseco II) LLC, respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 27, 2008, which granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

In a 2006 action, Felise Garage LLC ("Felise"), of which entity Jacob I. Sopher is the sole member, sued Quik Park (Leaseco II) LLC ("Leaseco"), of which entity Rafael Llopiz and Marathon/Quick Park NYC LLC are sole members. The action related to Felise's right of first refusal (ROFR) in connection with certain real property, alleged that the full terms of a proposed transaction involving the transfer of the property were being withheld, and sought injunctive relief and damages. There, the court found that Felise's contractual ROFR was never triggered. Nonetheless, Leaseco offered Felise a ROFR, which Felise accepted

but then allowed to lapse by failing to pay the requisite $20 million deposit by December 18, 2006.

On or about December 21, 2006, after Felise allowed the ROFR to lapse, the parties and related entities entered into the release wherein plaintiffs "unconditionally" and "irrevocably" released all claims arising out of the property, including the ROFR, and covenanted not to sue in connection therewith. Plaintiffs now seek to, inter alia, rescind the release on the ground that a material misrepresentation was made concerning the nature of benefits which would flow to Llopiz in connection with the transfer of the property.

Plaintiffs' claims for fraud, fraudulent inducement, breach of fiduciary duty, breach of contract, breach of covenant of good faith and fair dealing, and aiding and abetting those claims, are premised upon the assumption that plaintiffs had an exercisable ROFR which they were defrauded into giving up. In the absence of a contractual ROFR and given the lapse of the ROFR which was extended to them, plaintiffs cannot sustain any claims arising from its loss (*see Weinstock v Cleary, Gottlieb, Steen & Hamilton*, 255 AD2d 508, 509 [1998]).

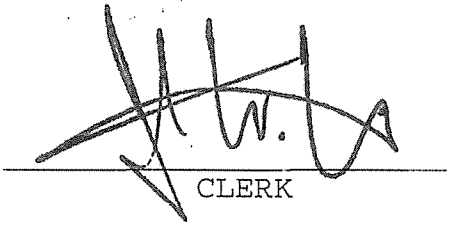
Moreover, the release cannot be rescinded based on fraudulent inducement as plaintiffs' unconditional and irrevocable relinquishment is inconsistent with their present claim to have relied on an oral representation concerning the

terms of the transfer (*see Citibank, N.A. v Plapinger*, 66 NY2d 90, 92 [1985]). Even if the release were subject to rescission, no claim for fraudulent inducement would lie as plaintiffs' reliance upon the very issue on which the prior action was based was not reasonable (*see East Brook Caribe, A.V.V. v Fresh Del Monte Produce, Inc.*, 11 AD3d 296, 297 [2004], *lv denied* 4 NY3d 844 [2005]).

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

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

ENTERED: MARCH 3, 2009



CLERK

Andrias J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5417 The People of the State of New York, Ind. 3584/00
Respondent,

-against-

Jimmy Diaz,
Defendant-Appellant.

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

Order, Supreme Court, New York County (Edward McLaughlin, J.), entered on or about January 19, 2006, 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.

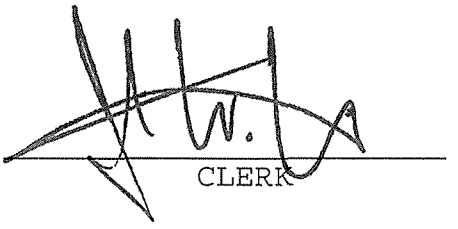
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: MARCH 3, 2009



Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5418 Tower Insurance Company of New York, Plaintiff-Appellant-Respondent, Index 107963/07

-against-

Jaison John Realty Corp., et al., Defendants-Appellants,

Elisabeth Dias, Defendant-Respondent.

Law Office of Max W. Gershweir, New York (Jennifer Kotlyarsky of counsel), for appellant-respondent.

Quadrino Schwartz, Garden City (Brad A. Schlossberg of counsel), for appellants.

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered June 23, 2008, which, in a declaratory judgment involving whether plaintiff insurer (Tower) is obligated to defend and indemnify defendants apartment building owner and property manager (collectively John) in an underlying action brought by defendant tenant (Dias) for personal injuries sustained when she fell down a stairway in the building, upon motions for summary judgment, declared that Tower is not obligated to defend and indemnify John and that Dias gave Tower timely and otherwise valid notice of the accident in accordance with Insurance Law § 3420(a)(3), unanimously modified, on the law, Tower's motion as to Dias granted, Dias's cross motion denied, and it is declared that Dias is not entitled to proceed

directly against Tower, and otherwise affirmed, without costs.

It appears that later in the day of the accident, September 17, 2006, John was on the premises and saw that the stairway handrail had been removed. Then, while still on the premises, John received a phone call from the police informing him that a person named Dias had fallen down the stairs and that the handrail had been removed. John did not undertake to obtain a copy of the police report, which would have informed him that a tenant named Dias was taken from the building by ambulance after falling down the stairs due to a loose handrail, and that the police had removed a portion of the handrail. John asserts that he saw Dias the day after the accident and spoke to her and that she appeared fine and did not mention the accident, and that she called him several days after the accident to complain about noise and hot water and again did not mention the accident, but he never asked her what, if anything, had happened or whether she was injured. John first gave Tower written notice of the accident on or about February 5, 2007, almost five months after the accident, when he forwarded the summons and complaint in the underlying action. These circumstances, particularly the missing handrail, establish that John's belief that Dias had not been injured and would not make a claim was unreasonable, and thus did not excuse the otherwise unreasonable five-month delay in giving notice of the accident (*see Great Canal Realty Corp. v Seneca*

Ins. Co., Inc., 5 NY3d 742, 743 [2005] [whether and to what extent insured has inquired into circumstances of accident may be relevant on issue of reasonableness]; *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [2002]; *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583 [1998]).

Concerning the declaration in favor of Dias and against Tower, the December 20, 2006 letter from Dias's counsel to John advised John to notify his insurer of the accident, and that if counsel did not hear from John's insurer or legal representative within 20 days, Dias would commence an action. A month later, on or about January 23, 2007, having received no response and still unaware of the identity of John's insurer, Dias commenced suit against John, and, less than two weeks later, Tower received notice of the accident when John forwarded a copy of the summons and complaint. This is insufficient under Insurance Law § 3420(a)(3). Dias never attempted to ascertain the identity of John's insurer and merely relied on correspondence to John (*Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305 [2008]). We have considered the parties' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: MARCH 3, 2009

CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5420 Guillermo Colon, Index 13503/07
Plaintiff-Respondent,

-against-

Bernardo Tavares, et al.,
Defendants-Appellants.

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

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

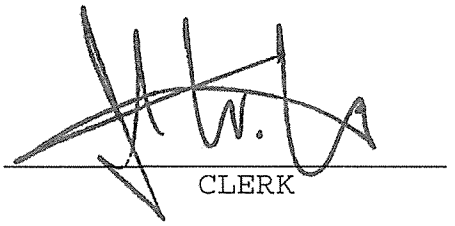
Order, Supreme Court, Bronx County (John A. Barone, J.), entered August 5, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Neither of plaintiff's experts address defendants' admittedly sufficient prima facie showing that plaintiff's allegedly partially disabling spine and shoulder conditions revealed in MRIs taken shortly after the accident were due to preexisting, degenerative changes unrelated to any traumatic injury that could be attributed to the accident. Accordingly, no issue of fact exists as to whether the accident caused a

permanent or significant loss or limitation (*see Pommells v Perez*, 4 NY3d 566, 577-578, 579-580 [2005]; *Valentin v Pomilla*, __ AD3d __, 2009 NY Slip Op 981; *Reyes v Esquilin*, 54 AD3d 615 [2008]). While defendants' doctors acknowledge the possibility that the accident might have aggravated plaintiff's preexisting conditions, causing his acute symptoms in the emergency room, plaintiff fails to support his claim of a 90/180-day injury with evidence that he was unable to perform his usual and customary daily activities. In this regard, a reduced or changed work schedule is insufficient (*Ronda v Friendly Baptist Church*, 52 AD3d 440 [2008]; *Lopez v Simpson*, 39 AD3d 420 [2007]).

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

ENTERED: MARCH 3, 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 March 3, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
David Friedman
John T. Buckley
James M. Catterson
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 3431/05
Respondent,

-against- 5421

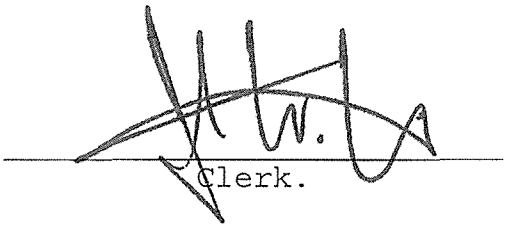
Pedro Richiez, also known as Richiez Pedro,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael R. Ambrecht, J.), rendered on or about January 9, 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.

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5422N The Insurance Corporation of New York, Index 600925/08
Plaintiff-Respondent,

-against-

Kenning Management of Connecticut, LLC, et al.,
Defendants-Appellants.

Eiseman Levine Lehrhaupt & Kakoyiannis, P.C., New York (Stephen L. Weinstein of counsel), for appellants.

Manatt, Phelps & Phillips, LLP, New York (Lauren Reiter Brody of counsel), for respondent.

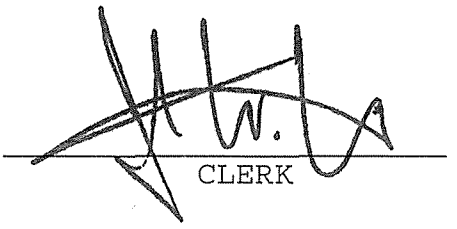
Order, Supreme Court, New York County (Helen E. Freedman, J.), entered June 10, 2008, which, in an action alleging breach of fiduciary duty and unjust enrichment, denied defendants' motion pursuant to CPLR 7503 to compel arbitration and stay further proceedings in this action, unanimously affirmed, with costs.

The court properly denied the motion to compel arbitration, since plaintiff did not agree to arbitrate, and the management agreement between its parent Trenwick America Reinsurance Corporation (TARCO) and defendant Kenning, to develop and manage a Run-Off Plan accepted by the Connecticut Department of Insurance relating to TARCO, did not cover either the corporate or individual parties to this action (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335 [1998]). Nor may the individual defendants compel arbitration as third-party beneficiaries of the TARCO

agreement, since none of plaintiff's claims against defendants arise under that agreement.

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

ENTERED: MARCH 3, 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 March 3, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
David Friedman
John T. Buckley
James M. Catterson
Rolando T. Acosta, Justices.

In re Charles E. Graham, Jr., Index 1367/08
Petitioner,

5423
-against- [M-266]

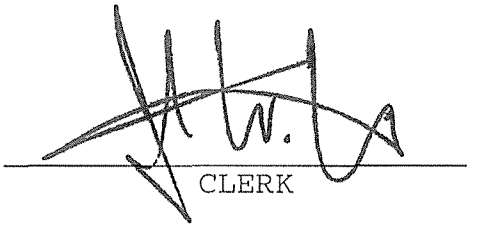
The People of the State of New York, and
Hon. Michael R. Ambrecht, etc.
Respondents.

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.

ENTER:



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Luis A. Gonzalez
John W. Sweeny, Jr.
Dianne T. Renwick
Leland G. DeGrasse, JJ.

5121N
Ind. 400532/06

Mary Speranza, et al.,
Plaintiffs-Appellants,

-against-

Repro Lab Inc.,
Defendant-Respondent.

Plaintiffs appeal from an order and judgment (one paper) of the Supreme Court, New York County (Jane S. Solomon, J.), entered January 30, 2007, which denied their motion for a preliminary injunction and declared that they have no legal right to certain specimens.

Ginsberg & Katsorhis, P.C., Flushing (Kerry J. Katsorhis of counsel), for appellants.

Arthur Lawrence Alexander, P.C., New York (Danielle I. Pedras of counsel), for respondent.

SAXE, J.P.

This appeal considers whether plaintiffs, as the administrators of their late son's estate, may obtain possession from defendant tissue bank of certain semen specimens deposited by their son before his death, or whether that relief is precluded either by his directive that the specimens be destroyed in the event of his death or by the terms of applicable New York State Department of Health regulations.

In 1997, Mark Speranza deposited a number of semen specimens in the facility of defendant Repro Lab, Inc., a tissue bank licensed by the State of New York. The specimens were frozen and stored in defendant's liquid nitrogen vaults. The record contains no information on Mark's reasons for doing so. However, the parties agree that Mark was about to undergo treatment for an illness, and was concerned about being able to conceive a child afterwards. As part of his agreement with Repro Lab, on July 30, 1997, Mark filled in and signed a form document entitled, "Ultimate Disposition of Specimens," which contained several options for the disposition of the specimens by the tissue bank in the event of Mark's death. One option on the form directs that the specimens be given the depositor's spouse, another directs that the samples be destroyed, and a third option, with the heading "Other," leaves a blank to be filled in. Mark

checked off the provision stating that in the event of his death, "I authorize and instruct Repro Lab to destroy all semen vials in its possession." The document concludes with the statement that "[t]his agreement shall be binding on the parties and their respective assigns, heirs, executors and administrators."

Six months later, on January 28, 1998, Mark died.

Plaintiffs Mary and Antonio Speranza, Mark's parents, were named administrators of his estate, and they contacted Repro Lab about the specimens. Plaintiffs assert that they were then informed that Mark had deposited the specimens for his use only, in that the specimens were not screened as required for donation to a member of the public. However, the lab agreed to maintain the specimens if plaintiffs continued to pay the yearly fee. The president of Repro Lab, Awilda Grillo, states that Mary Speranza pleaded with her not to destroy the specimens until she could determine her legal options, and that she acceded to that request, as long as the storage fee continued to be paid. The Speranzas paid the annual fee each year.

Mark's parents then began to seek a surrogate mother to be artificially inseminated with those semen specimens, with the hope of producing a grandchild for them. In 2005, the Speranzas contacted Repro Lab to ascertain the procedure for obtaining the specimens and were informed that the lab could not turn over the

specimens; it produced for the first time the document Mark had signed specifying that the specimens should be destroyed upon his death. However, the lab continued to be willing to maintain the specimens upon payment of the annual fee.

Plaintiffs, in their position as administrators of their son's estate, then commenced this action seeking a declaration that the estate is the rightful owner of the specimens. The complaint asserts that by accepting yearly payments from them after Mark's death, the lab breached and terminated its agreement with Mark, or waived or relinquished any obligation it had to destroy the specimens, and plaintiffs constructively became the rightful and proper owners of the specimens. Plaintiffs also moved for a preliminary injunction ordering the tissue bank to preserve the sperm specimens pending the outcome of this action.

In the order challenged here, the IAS court denied plaintiffs' motion for an injunction, and then, sua sponte, dismissed the action. As a preliminary matter, the court asserted that the contract between Mark and defendant could be reformed, in light of both Mark's desire to have a child and defendant's acceptance of storage fees from plaintiffs. Nevertheless, the court concluded that because the medical tests for disease required for donors of reproductive tissue by the Department of Public Health (10 NYCRR 52-8.6[g]) had not been

performed on Mark and no longer could be conducted, it would violate the law and public policy to allow the sperm to be released to plaintiffs for their use.

Discussion

Initially, plaintiffs challenge the propriety of the sua sponte issuance of a final judgment in this matter, contending that it was premature, since only a motion for a preliminary injunction was before the court. They emphasize that there has been no discovery, they question the validity of the proffered contract, and they assert that there are scientific issues to be considered at trial which may not properly be addressed on papers related only to the application for injunctive relief.

As to the denial of the injunction, plaintiffs cite the uniqueness of the issue, the motion court's suggestion that defendant's conduct might in other contexts have warranted reformation of the contract, and the absence of prejudice or harm to defendant. Also implicit in plaintiffs' presentation is the suggestion that the balance of the equities weighs in their favor. However, although plaintiffs' plight elicits sympathy, we can find no legal basis for allowing the ultimate relief plaintiffs seek, and there are substantial grounds upon which it must be denied. Although *as between the parties*, defendant will not be harmed if plaintiffs prevail, other broader interests

preclude giving plaintiffs possession of the specimens for purposes of engendering Mark's biological child, their grandchild, with the sperm he left behind.

The operative regulations of the New York State Department of Health both form the foundation of the problem presented here and necessitate its disposition. These regulations define two distinct categories of semen depositors with tissue banks: depositors and donors. A "client-depositor" is "a man who deposits reproductive tissue prior to intended or potential use in artificial insemination or assisted reproductive procedures performed on his regular sexual partner" (10 NYCRR 52-8.1[d]). A "donor" is "a person who provides reproductive tissue for use in artificial insemination or assisted reproductive procedures performed on recipients other than that person or that person's regular sexual partner, and includes directed donors" (10 NYCRR 52-8.1[f]). A "directed donor" by definition "includes a man providing semen to a surrogate, but who is not the regular sexual partner of the recipient" (10 NYCRR 52-8.1[e]).

The regulations contain extensive screening and testing requirements that apply to "donors" only, and not to "depositors" (10 NYCRR 52-8.5, 52-8.6). This required screening and testing is deemed unnecessary by the regulations *only* when, at the time of the deposit, the specimen was intended to be used only by the

depositor or his regular sexual partner. Any other potential recipient, *including* a surrogate who was not the regular sexual partner of the donor, is included among those intended to be protected by these regulations, which strictly mandate thorough testing before any such use.

To further illustrate the strict limitations on the handling of semen specimens, the regulations also contain very particularized provisions for the manner in which a tissue bank must treat deposited reproductive tissue, and require the informed consent of a tissue donor, including a statement that the donor has the right to withdraw his or her consent to donation up until a specified point in the assisted reproduction process (10 NYCRR 52-8.7, 52-8.8[a][6]).

In view of these provisions, defendant responded in the only way it properly could when plaintiffs inquired into obtaining the specimens for insemination of a surrogate. Defendant pointed out that Mark, as a "client depositor" rather than a "donor," had not been examined and screened as directed by 10 NYCRR 52-8.5, and that his blood and semen had not been tested for the infectious diseases covered in 10 NYCRR 52-8.6; rather, his specimens were simply stored without any medical screening or testing. Therefore, the tissue bank could not properly release the specimens for insemination of a surrogate. Nor may the court

properly ignore the dictates or policy concerns of those regulations.

Notwithstanding these regulatory impediments, plaintiffs seek to either reform or terminate Mark's agreement with defendant lab so as to eliminate the applicability of the directive that the specimens be destroyed, or to otherwise claim a legal right to ownership of the specimens. We perceive no viable cause of action that would entitle them to take possession of the specimens for insemination of a surrogate to produce the child he did not create while he lived.

Initially, contrary to the motion court, we find plaintiffs' claim for reformation of the contract between the decedent and defendant to be without merit.

> "Reformation is an equitable remedy which emanates from the maxim that equity treats that as done which ought to have been done. The purpose of reforming a contract on the basis of mutual mistake is to make a defective writing conform to the agreement of the parties upon which there was mutual assent. While the erroneous instrument must be made to correctly express the real agreement between the parties, no court can make a new contract for the parties" (27 Williston on Contracts § 70:19 [4th ed] [footnotes omitted]).
>
> "Reformation of a written instrument is available where, because of a mutual mistake of fact, the instrument fails to express the real agreement between the parties. The equitable remedy of reformation will not make a new agreement for the parties but, instead, will establish and perpetuate the true, existing contract by making the instrument express the real intent of the parties. Reformation is only available

> to correct a mutual mistake in order to conform an agreement to the original intent of the parties" (27 Williston on Contracts § 70.20 [4th ed] [footnote omitted]).

The agreement here is clear and unambiguous, and nothing in the allegations of the complaint or the submissions on the motion presents grounds to conclude that it is erroneous or must be corrected in order to express the parties' real agreement.

Plaintiffs assert that Mark's purpose in storing the sperm was to assure his ability to have a child. The contract, however, is not that vague. It represents a determined choice that the sperm should be available to him so he could protect his ability to procreate *if he survived*. It does not protect any possibility that his genetic or biological issue could be created after his death; indeed, the directive that his semen be destroyed in the event of his death precludes such a possibility. Since the document conveys a clear intent that the specimens be destroyed upon Mark's death, which intent is not contrary to the asserted intent to assure his ability to have a child *while he was alive*, it cannot be said that the instrument contains an erroneous expression of the intention of the parties. Accordingly, nothing in plaintiffs' submissions would justify reforming the contract so as to permit them to fulfill their wish after his death, contrary to his express wishes.

Nor does defendant's alleged conduct, in accepting yearly storage fees without revealing the existence of the contract directing the destruction of the specimens in the event of Mark's death, and without initially informing plaintiffs that the specimens could not, under applicable law, be turned over to them, provide plaintiffs with a legal right to claim ownership of the specimens. Whatever remedies Mark's estate might be entitled to seek for the asserted contract breach created by defendant's failure to destroy the specimens, the breach would not engender in Mark's estate a right to an ownership interest. Simply put, under applicable regulations as well as the terms of the contract between Mark and defendant, the specimens are not assets of the estate over which the administrators have possessory rights.

Rather, the legal obligations with regard to the possession and handling of the semen specimens are dictated solely and completely by the applicable Department of Health regulations. At this point, the proposed use of Mark's semen would fundamentally violate 10 NYCRR 52-8.6(g), which requires that a semen donor be "fully evaluated and tested" prior to the use of his semen "by a specific recipient, other than his current or active regular sexual partner." Since the purpose of this statute is to protect the surrogate mother, and thereby the general public, from disease, we cannot countenance avoidance of

the regulations' dictates, even though we recognize the joy that ignoring those regulations could bring to plaintiffs.

We reject plaintiffs' suggestion that the section should not apply because it was never intended to apply to a situation like this, where the depositor is deceased and thus cannot be tested. The Legislature and the Department of Public Health put into place protections against the spread of serious infectious and potentially fatal diseases. If, for any reason, these protections cannot be complied with, the law bars use of the sperm.

Plaintiffs also suggest that defendant must have performed this testing on Mark when he first donated the sperm, because such testing is required under 10 NYCRR 52-8.6(g). However, as defendant correctly points out, those provisions are intended to apply only to donors, not to depositors like Mark; depositors need not be tested until they wish the sperm to be used by someone other than their regular sexual partner.

Plaintiffs not only failed to show a likelihood that they would succeed on the merits of their underlying claim seeking possession of the semen specimens (*see City of New York v Untitled LLC*, 51 AD3d 509, 511-512 [2008]), but, moreover, the assertions of the complaint and the submissions on the motion fail to justify the ultimate award of any such relief.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Jane S. Solomon, J.), entered January 30, 2007, which denied plaintiffs' motion for a preliminary injunction and declared that they have no legal right to the specimens, should be affirmed, without costs.

All concur.

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

ENTERED: MARCH 3, 2009