SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 10, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, Friedman, Buckley, Catterson, JJ.

3905-
3905A Ramon Vargas, Index 25842/01
Plaintiff-Respondent-Appellant, 42033/01
83323/03

-against-

New York City Transit Authority,
Defendant-Respondent-Appellant.

- - - -

New York City Transit Authority,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Halmar Builders of New York,
Third-Party Defendant-Appellant-Respondent.

- - - -

Granite Halmar Construction Company, Inc., etc.,
Second Third-Party Plaintiff-
Appellant-Respondent,

-against-

Grand Mechanical Corp., et al.,
Second Third-Party Defendants-Respondents,

Atlantic Rolling Steel Door Corp.,
Second Third-Party Defendant-
Respondent-Appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Stephen J. Molinelli, of counsel), for New York City Transit Authority, respondent-appellant/respondent-appellant.

Alexander J. Wulwick, New York, for Ramon Vargas, respondent.

Mound Cotton Wollan & Greengrass, New York (Todd A. Bakal of counsel), for Granite Halmar Construction Company, Inc., appellant-respondent/appellant-respondent.

Cerussi & Spring, PC, White Plains (Peter Riggs of counsel), for Atlantic Rolling Steel Door Corp., respondent-appellant.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for Grand Mechanical Corp., respondent.

Rende Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for Miller Proctor Nickolas, Inc., respondent.

Orders, Supreme Court, Bronx County (Janice Bowman, J.; Barry Salman, J.), entered June 12, 2007 and February 19, 2008, which, to the extent appealed from, granted motions for summary judgment dismissing the complaint only to the extent of dismissing the cause of action under Labor Law § 200 while denying such motions insofar as addressed to the causes of action under Labor Law § 240(1) and § 241(6) and common-law negligence, denied the motion by defendant/third-party plaintiff-respondent-appellant New York City Transit Authority (NYCTA) for summary judgment on its third-party claim for contractual defense and indemnification against third-party defendant/second third-party plaintiff-appellant-respondent Granite Construction Northeast, Inc. f/k/a Granite Halmar Construction Company, Inc. f/k/a Halmar Builders of New York, Inc. (Granite), denied Granite's motion for summary judgment on its third-party claims for contractual defense and indemnification against second third-party defendant-respondents Grand Mechanical Corp. (Grand Mechanical) and Miller

Proctor Nickolas, Inc. (Miller Proctor), denied the motion by second third-party defendant-respondent-appellant Atlantic Rolling Steel Door Corp. (Atlantic) for summary judgment dismissing Granite's third-party claim and all cross claims against it, and granted Grand Mechanical's and Miller Proctor's respective cross motions for summary judgment dismissing Granite's third-party claims and all cross claims against them, unanimously modified, on the law, to dismiss the cause of action for common-law negligence, to grant NYCTA summary judgment as to liability on its third-party claim against Granite for contractual defense and indemnification, to grant Granite summary judgment as to liability on its third-party claim for contractual defense and indemnification against Grand Mechanical, to grant Atlantic summary judgment dismissing Granite's third-party claim and all cross claims against it, to deny Grand Mechanical's cross motion to the extent it sought dismissal of Granite's third-party claim for contractual defense and indemnity against it and dismissal of NYCTA's cross claims against it for contractual defense and indemnity and breach of contract, to deny Miller Proctor's cross motion insofar as it sought summary judgment dismissing Grand Mechanical's cross claim for contractual defense and indemnity against Miller Proctor, that cross claim reinstated, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of Atlantic dismissing the

second third-party complaint and all cross claims as against it.

The subject incident occurred in the course of the construction of a bus maintenance facility owned by NYCTA. Granite, the project's general contractor, hired Grand Mechanical as the HVAC subcontractor. Grand Mechanical hired Miller Proctor to commission, or start up, the facility's boilers. In March 2001, after the boilers had been commissioned, Grand Mechanical called Miller Proctor to address a leak in one of them. Plaintiff, the Miller Proctor employee sent to respond to the call, alleges that, because his employer did not provide him with a ladder, and no others were available at the site, he borrowed one from employees of Atlantic, the project's rolling door subcontractor. Plaintiff further alleges that, because the A-frame ladder provided by Atlantic, when opened, was not tall enough to enable him to reach the top of the boiler, he climbed the ladder while it was closed and leaning on the spherical boiler. Plaintiff was injured when the ladder collapsed while he was climbing it in this fashion.

As plaintiff does not challenge the dismissal of his cause of action under Labor Law § 200, and as section 200 is merely a codification of the common-law duty imposed on owners and general contractors to maintain a safe construction site (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]), we modify to dismiss plaintiff's causes of action against the owner and general

contractor for common-law negligence. However, the motions to dismiss the causes of action under Labor Law § 240(1) and § 241(6) were correctly denied. The record does not establish, as a matter of law, that plaintiff's acts were the sole proximate cause of the accident, given the evidence that the unsecured ladder on which he was standing collapsed and that no other safety devices were provided (*see Vega v Rotner Mgt. Corp.*, 40 AD3d 473 [2007], citing *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [2004]), although there was also countervailing evidence. Contrary to the arguments of NYCTA and the third-party defendants, Labor Law § 240(1) expressly covers "repairing" a building or structure. As to Labor Law § 241(6), Industrial Code (12 NYCRR) § 23-1.21(b)(4)(iv) is both applicable and sufficiently specific to support a claim under the statute (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 176 [2004]).

Regarding the third-party claims, the record establishes that NYCTA is entitled to contractual indemnification and defense from Granite, and that Granite is entitled to contractual indemnification and defense from Grand Mechanical, in each case pursuant to the plain terms of the applicable written agreement between the two parties. Since the record contains no evidence that plaintiff's injuries resulted from negligence on the part of either NYCTA or Granite, there is no statutory bar to enforcement of these indemnity agreements. We note, however, that Granite's

claim for indemnity and breach of contract against Miller Proctor was correctly dismissed, since Granite and Miller Proctor were not in contractual privity with each other, and the purchase orders constituting the agreements between Grand Mechanical and Miller Proctor do not make Granite a third-party beneficiary thereof, nor do such agreements incorporate by reference the terms of the subcontract between Granite and Grand Mechanical. We reject Grand Mechanical's argument that plaintiff's injuries did not arise from Grand Mechanical's work for the project, since the record establishes that Miller Proctor sent plaintiff to the work site at Grand Mechanical's request, pursuant to the purchase orders between Grand Mechanical and Miller Proctor.

After Grand Mechanical was impleaded into the action, NYCTA asserted cross claims against it for contractual defense and indemnity and for breach of contract, the latter based on Grand Mechanical's alleged failure to procure contractually required insurance coverage for NYCTA. We agree with NYCTA's argument that Supreme Court erred in dismissing these cross claims against Grand Mechanical. The subcontract between Granite and Grand Mechanical expressly incorporated by reference the terms of the prime contract between NYCTA and Granite and made Granite's obligations under the prime contract binding on Grand Mechanical. Accordingly, such cross claims by NYCTA against Grand Mechanical are reinstated.

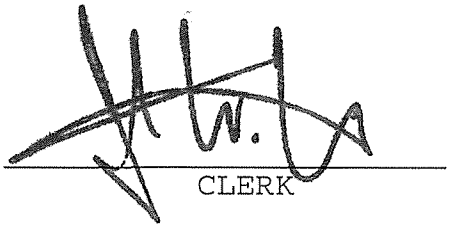
Since we are reinstating Granite's and NYCTA's claims against Grand Mechanical, we also reinstate Grand Mechanical's cross claim against Miller Proctor solely to the extent that cross claim seeks contractual defense and indemnity. While Grand Mechanical has not taken an appeal, it was not aggrieved by the orders under review, which dismissed all claims against it. We note that Grand Mechanical has not advanced any argument in favor of the viability of a claim for common-law indemnity or contribution against Miller Proctor, which appears to be immunized from such liability by Workers' Compensation Law § 11, given that plaintiff does not allege a "grave injury" under that statute.

Finally, Atlantic was entitled to dismissal of all claims against it. The record establishes that Atlantic, the rolling door subcontractor, was not in contractual privity with plaintiff's employer, that it had no supervision, direction or control over plaintiff's work, and that it had no duty to provide him with equipment adequate for the performance of his work. Accordingly, plaintiff's injuries did not arise from Atlantic's work, and were not caused by any fault attributable to Atlantic.

The Decision and Order of this Court entered herein on September 9, 2008 is hereby recalled and vacated (*see* M-4875 decided simultaneously herewith).

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

ENTERED: MARCH 10, 2009



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Friedman, J.P., McGuire, Acosta, DeGrasse, Freedman, JJ.

4820 The People of the State of New York, Ind. 502/04
Respondent,

-against-

Christopher Calder,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered July 10, 2006, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him to a term of 3 years, unanimously affirmed.

The imposition of mandatory surcharges and fees by way of court documents, but without mention in the court's oral pronouncement of sentence, was lawful *(People v Guerrero*, __ NY3d __, 2009 NY Slip Op 1242). Defendant's argument that his plea was rendered involuntary by the court's failure to mention the assessments during the plea allocution is without merit (*People v Hoti*, __ NY3d __, 2009 NY Slip Op 1249).

Regardless of whether the written waiver of defendant's

right to appeal is valid, we perceive no basis to reduce the sentence.

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

ENTERED: MARCH 10, 2009

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

5091 The People of the State of New York, Ind. 4240/05
Respondent,

-against-

Francisco Sanchez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Malancha Chanda of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered July 17, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third and seventh degrees, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to an aggregate term of 7 years, unanimously reversed, on the law, the conviction vacated, and the matter remanded for a new trial.

The court should have granted defendant's challenge for cause to a prospective juror who repeatedly expressed a predisposition to credit police testimony, since the totality of her responses established that she would be unable to put aside

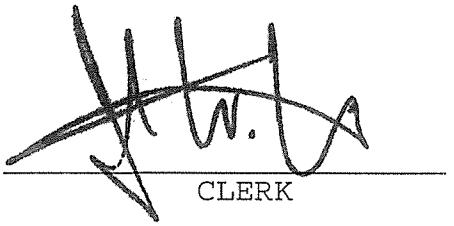
her inclination and be fair and impartial *(see People v Arnold*, 96 NY2d 358, 362 [2001]; *compare People v Johnson*, 32 AD3d 371 [2006], *lv denied* 7 NY3d 902 [2006]).

In this case involving defendant's alleged sale of narcotics to an undercover narcotics officer, the only police testimony comes from the undercover officer, his ghost and the arresting officer. The prospective juror, whose son is a retired undercover narcotics officer who was shot in the line of duty, repeatedly expressed skepticism that an undercover officer could lie or be mistaken. She also expressed concerns about drugs and violence in her building and neighborhood. The court itself admonished the juror not to "say what you think is a correct answer." At no point did the juror give an "unequivocal assurance" that she would put aside her beliefs and concerns and render an impartial verdict based on the evidence (*People v Johnson*, 94 NY2d 600, 614 [2000]) and her assurances, when given, were equivocal and not voiced with conviction (*People v Blyden*, 55 NY2d 73, 78 [1982]). As the Court of Appeals has said, "the trial court should lean toward disqualifying a prospective juror of dubious impartiality, rather than testing the bounds of discretion by permitting such a juror to serve. It is precisely for this reason that so many veniremen are made available for jury service" (*People v Branch*, 46 NY2d 645, 651-652 [1979]).

Since we are ordering a new trial, we find it unnecessary to discuss defendant's other arguments.

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

ENTERED: MARCH 10, 2009



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Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5122 The People of the State of New York, Ind. 4462/06
Respondent,

-against-

Richard Tramble,
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 (Sheila L. Bautista of counsel), for respondent.

Judgment, Supreme Court, New York County (John Cataldo, J. at hearing; Arlene D. Goldberg, J. at jury trial and sentence), rendered September 18, 2007, convicting defendant of robbery in the second degree and assault in the second degree, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). There is no basis for disturbing the jury's determinations concerning credibility.

The court properly denied defendant's suppression motion. The showup identification, made in close temporal and geographic proximity to the crime, was not unduly suggestive (*see People v Duuvon*, 77 NY2d 541, 544-45 [1991]). The showup was not rendered suggestive by the fact that defendant was in handcuffs and

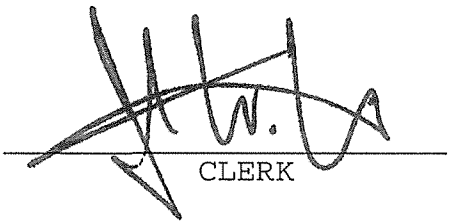
guarded by officers when viewed by the victim (*see e.g. People v Gatling*, 38 AD3d 239, 240 [2007], *lv denied* 9 NY3d 865 [2007]). Defendant's distinctive appearance did not render the showup suggestive; if anything, it enhanced the reliability of the victim's identification.

The imposition of mandatory surcharges and fees by way of court documents, but without mention in the court's oral pronouncement of sentence, was lawful (*see People v Guerrero*, __ NY3d __, 2009 NY Slip Op 1242).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 10, 2009



Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5238 The People of the State of New York, Ind. 4598/07
Respondent,

-against-

Linda Taylor,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J. at suppression hearing; Daniel Conviser, J. at plea and sentence), rendered March 25, 2008, convicting defendant of attempted burglary in the third degree, and sentencing her, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

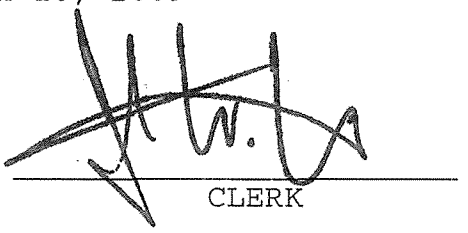
The record establishes that defendant knowingly, intelligently and voluntarily waived her right to appeal and that such waiver encompassed her suppression claim (*see People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248 [2006]; *People v Kemp*, 94 NY2d 831 [1999]). As an alternative holding, we also reject defendant's suppression claim on the merits.

Defendant's argument that her plea was rendered involuntary by the fact that the court did not warn her, at the time of the plea, that she would be subject to mandatory surcharges and fees,

is unavailing. Such assessments are not components of the sentence (*see People v Guerrero*, __ NY3d __, 2009 NY Slip Op 1242) and, therefore, the court's failure to mention them did not deprive defendant of the opportunity to knowingly, voluntarily and intelligently choose among the alternative courses of action (*see People v Hoti*, __ NY3d __, 2009 NY Slip Op 1249; *cf. People v Catu*, 4 NY3d 242, 245 [2005]).

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

ENTERED: MARCH 10, 2009



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Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5290 Dorothy E. Gastman, Index 103814/07
Plaintiff-Appellant,

-against-

Department of Education of
The City of New York,
Defendant-Respondent.

Samuel J. Landau, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered February 28, 2008, which granted defendant's motion to renew its prior motion to dismiss the complaint and, upon renewal, granted the motion, unanimously affirmed, without costs.

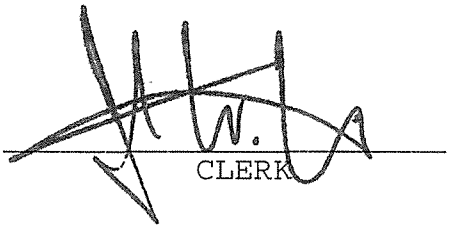
Supreme Court properly granted defendant's motion to dismiss the complaint for failure to file a timely notice of claim (Education Law § 3813[1]). As the court held, plaintiff's unverified letters and emails to Department of Education personnel, "each addressing different aspects of her complaints," do not constitute a notice of claim (*see* Education Law § 3813[1]; *Varsity Tr., Inc. v Board of Educ. of City of N.Y.*, 5 NY3d 532 [2005]; *Parochial Bus Sys., Inc. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 547 [1983]). In any event, such correspondence was not presented to defendant's governing body within three months after the accrual of plaintiff's

discrimination claims as required by the statute (*see Pinder v City of New York*, 49 AD3d 280 [2008]). Plaintiff's application for leave to file a late notice of claim made beyond the one-year statute of limitations must be denied as untimely (*see* Education Law § 3813[2-b]; *Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367, 373-374 [2007]).

We have reviewed plaintiff's remaining contentions and find them unavailing.

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

ENTERED: MARCH 10, 2009



Andrias, J.P., Sweeny, McGuire, Moskowitz, JJ.

5317 Mary Elizabeth Stewart, Index 113699/03
Plaintiff-Appellant,

-against-

Manhattan and Bronx Surface
Transit Operating Authority, et al.,
Defendants-Respondents.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Stephen C. Glasser of counsel), for appellant.

Gruvman, Giordano & Glaws, LLP, New York (Charles T. Glaws of counsel), for respondents.

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered September 11, 2007, after a jury verdict in plaintiff's favor, apportioning liability 72% against plaintiff and awarding her $22,000 for past pain and suffering, and bringing up for review an order, same court and Justice, entered June 14, 2007, which denied plaintiff's motion to set aside the verdict and grant a new trial on liability and damages, unanimously modified, on the facts, the past pain and suffering award vacated and a new trial directed on damages for past pain and suffering, and otherwise affirmed, without costs, unless defendants, within 30 days after service of a copy of this order, stipulate to an increased award of $150,000, prior to apportionment, for past pain and suffering and entry of an amended judgment in accordance therewith.

The jury's apportionment of fault was not against the weight

of the evidence. Given the evidence that the intoxicated plaintiff stepped off the curb and continued to walk, even though she saw the bus turning onto the street, as well as conflicting evidence as to whether she was within the crosswalk at the time of the accident, the jury could have fairly determined that her conduct was the greater cause of the accident (*see Shachnow v Myers*, 229 AD2d 432 [1996]).

Whether the trial court properly precluded a portion of the bus driver's testimony is a matter we need not resolve since any error in this regard was harmless.

The verdict denying future damages was not against the weight of the evidence, given the testimony of defendants' expert that plaintiff had no disability or permanent restrictions (*see Crooms v Sauer Bros. Inc.*, 48 AD3d 380, 381-382 [2008]; *Roness v Federal Express Corp.*, 284 AD2d 208 [2001]). However, the award of $22,000 for past pain and suffering deviated materially from reasonable compensation under the circumstances (CPLR 5501[c]). It is undisputed that as a result of the accident, the 43-year-old plaintiff sustained fractures of her left elbow and the lateral cuneiform bone in her left foot, which required a hospital stay of three days, arm and leg braces for several months, and physical therapy for at least six months. The award

for past pain and suffering is accordingly increased to the extent indicated.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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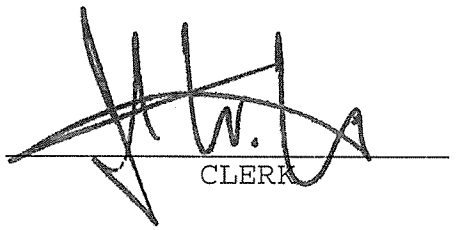

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5406 Heath Dykstra, Index 11121/02
Plaintiff-Respondent,

-against-

Avalon Restaurant Renovations, Inc., et al.,
Defendants,

New York City Health & Hospitals Corporation (Bellevue Hospital Center),
Defendant-Appellant.

Michael C. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for appellant.

Billig Law, P.C., New York (Darin Billig of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered November 13, 2007, insofar as appealed from as limited by the briefs, awarding plaintiff damages of $75,000 for past lost earnings and $1,000,000 for future lost earnings (over 30 years), upon a jury verdict in plaintiff's favor finding defendant hospital liable for medical malpractice in performing surgery on plaintiff's shoulder, unanimously modified, on the facts, the award of damages for future lost earnings vacated, a new trial directed thereon, and otherwise affirmed, without costs, unless plaintiff stipulates, within 30 days of service of a copy of this order, to reduce that award to $300,000, and to entry of judgment in accordance therewith.

The verdict is not against the weight of the evidence.

Plaintiff's expert, a general surgeon with a subspecialty in vascular surgery, was not required to have practiced in the specific specialty of orthopedic surgery since he had the requisite knowledge regarding general practices for preventing blood clots during surgery (*see Robertson v Greenstein*, 308 AD2d 381, 382 [2003], *lv dismissed* 2 NY3d 759 [2004]). The weight to be accorded his testimony, which conflicted with that of defendant's expert orthopedic surgeon concerning not only whether certain clot prevention techniques were indicated but also whether use of such techniques would have prevented the injury-causing clot, was "a matter peculiarly within the province of the jury" (*Torricelli v Pisacano*, 9 AD3d 291, 293 [2004] [internal quotation marks and citations omitted], *lv denied* 3 NY3d 612 [2004]). Defendant's argument that plaintiff's expert should not have been allowed to testify because he practices in Connecticut, not New York, where the surgery took place, was not raised before the trial court, and we decline to consider it.

The challenged damage award for past lost earnings is supported by the evidence. However, the evidence established future lost earnings only in the amount of $300,000; the jury

award in excess of that amount was based on a purely hypothetical earning capacity.

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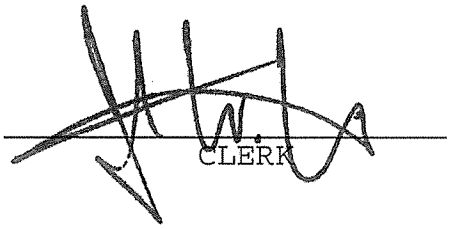

Tom, J.P., Friedman, Gonzalez, Sweeny, McGuire, JJ.

1 The People of the State of New York, Ind. 3443/06
Respondent,

-against-

Michael Gonzalez,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered March 16, 2007, convicting defendant, after a jury trial, of robbery in the second and third degrees, grand larceny in the third degree and grand larceny in the fourth degree (three counts), and sentencing him, as a persistent violent felony offender, to an aggregate term of 16 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The element of force required for the robbery convictions was established by evidence that defendant, after stealing several items from a store, engaged in pushing, fighting and kicking in an effort to defeat two store employees' efforts to recover the property.

Since defendant was in possession of the stolen property while he was engaged in such use of force and never discarded or even sought to relinquish it, the evidence supports the inference that his purpose in using force was to retain control of the property and not merely to escape or defend himself (*see e.g. People v Brandley*, 254 AD2d 185 [1998], *lv denied* 92 NY2d 1028 [1998]). Force employed by a thief to repel force initiated by a victim to prevent the thief from retaining the stolen property is still force within the meaning of Penal Law § 160.00(1).

The court properly denied defendant's request to submit to the jury robbery in the third degree as a lesser included offense of robbery in the second degree with respect to one of the employees. Given the nature of the wounds inflicted, which included bloody cuts, abrasions and a bite wound, the fact that the employee received medical treatment including stitches, and the employee's testimony that he was unable to write for several days and felt pain for a week or two after the incident, there was no reasonable view of the evidence, viewed most favorably to defendant, that he committed the robbery but did not cause the employee physical injury within the meaning of Penal Law § 10.00(9) (*see People v Beasley*, 238 AD2d 433 [1997], *lv denied* 90 NY2d 938 [1997]). In determining whether the evidence warranted submission of the lesser included offense, "[o]ur inquiry is not directed at whether persuasive evidence of guilt of the greater

crime exists, as it does here, but whether, under any reasonable view of the evidence, it is possible for the trier of facts to acquit defendant on the higher count and still find him guilty of the lesser one." (*People v Van Norstrand*, 85 NY2d 131, 136 [1995]). Here, the evidence was not merely persuasive that the employee sustained physical injury; the jury had no rational basis upon which to conclude that the injuries were merely "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]) that did not satisfy the statutory definition (*People v Chiddick*, 8 NY3d 445 [2007]).

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

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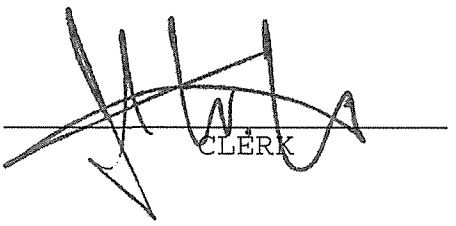


Tom, J.P., Friedman, Gonzalez, Sweeny, McGuire, JJ.

3 Maria Sutter, Index 6359/05
Plaintiff-Respondent,

-against-

Winston Reyes, et al.,
Defendants,

The City of New York,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for appellant.

The Kelly Group, P.C., New York (Robert J. Eisen of counsel), for respondent.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered October 31, 2007, which granted plaintiff's motion for an extension of time to serve the complaint pursuant to CPLR 306-b and denied defendant City of New York's cross motion to dismiss for lack of personal jurisdiction, unanimously affirmed, without costs.

Plaintiff, was injured on October 31, 2004, and served the City of New York with a notice of claim on December 7, 2004. Thereafter, a General Municipal Law § 50-h hearing was held. When plaintiff's process server attempted to serve the City he delivered the initiatory papers to the wrong government entity, namely The New York State Office of the State Deputy Comptroller. Thus, plaintiff failed to serve the City. Plaintiff's counsel did however, send letters to the lawyers that represented the

City at the section 50-h hearing, the New York State Office of the State Deputy Comptroller and the New York City Corporation Counsel's Office requesting that the City file an answer to the action. Subsequently, plaintiff sought an extension of time to serve the City, which Supreme Court granted.

In *Leader v Maroney, Ponzini & Spencer* (97 NY2d 95, 105-106 [2001]), the Court of Appeals stated:

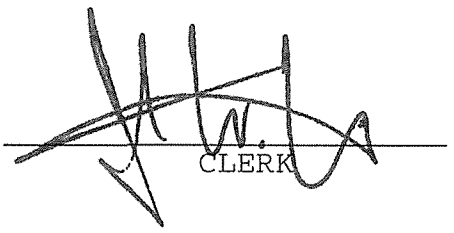
> "The interest of justice standard [of CPLR 306-b] requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant."

Here, plaintiff's counsel exercised little, if any, diligence in serving the City. Moreover, plaintiff's request for the extension of time to serve the City was not prompt. Nevertheless, there are factors which support an interest of justice extension, and the City has not demonstrated that it would be prejudiced if the extension were granted. In this regard, the City has not established that, as a result of plaintiff's failure to serve it timely or plaintiff's delay in seeking an extension,

the City has lost some special right, or incurred some change of position or some significant expense (*see Murray v City of New York*, 51 AD3d 502, 503 [2008], *lv denied* 11 NY3d 703 [2008], citing *Barbour v Hospital for Special Surgery*, 169 AD2d 385 [1991]). Because some factors weigh in favor of granting an interest of justice extension and some do not, we should not disturb Supreme Court's discretion-laden determination. We note that it is significant that the notice of claim and General Municipal Law § 50-h hearing provided the City with notice of the occurrence, theory of recovery and claimed injuries well before expiration of the statute of limitations (*cf. Slate v Schiavone Constr. Co.*, 4 NY3d 816 [2005]).

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

ENTERED: MARCH 10, 2009



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

4 In re Danny R. and Others,

Children Under the Age of
Eighteen Years, etc.,

Rebecca M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

John J. Marafino, Mount Vernon, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondent.

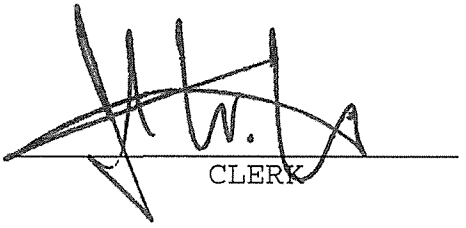
Order, Family Court, Bronx County (Lori S. Sattler, J.), entered on or about July 17, 2007, placing the subject children with the Commissioner of Social Services upon a fact-finding determination of neglect, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence showing that the children's physical and mental health was threatened by the psychologically fragile respondent's failure to provide a minimum degree of care, needed mental health care services, and an adequate education (Family Ct Act § 1012[f][i][A]; *see Matter of Inbunique V.*, 22 AD3d 412 [2005]; *Matter of Dyandria D.*, 303 AD2d 233 [2003], *lv dismissed* 1 NY3d 623 [2004]). The extraordinary amount of school missed by the two older children -- 240 days by one and 159 days by the other from September 2004 to February 2007 -- without adequate excuse

and markedly compromising their education, supports Family Court's implicit finding of derivative educational neglect of the youngest, preschool-age child (*see Matter of Ember R.*, 285 AD2d 757 [2001], *lv denied* 97 NY2d 604 [2001]).

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

ENTERED: MARCH 10, 2009



CLERK

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

6-
6A Imaging International, Inc., Index 5062/92
Plaintiff-Appellant,

-against-

Hell Graphic Systems, Inc., et al.,
Defendants-Respondents.

Edward C. Kramer, New York, for appellant.

Schlam Stone & Dolan LLP, New York (Jonathan Mazer of counsel), for respondents.

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered March 24, 2008, awarding plaintiff nominal damages of $1, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered October 29, 2007, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

We find no basis for disturbing Justice Fried's credibility determinations and we affirm the judgment entered March 24, 2008 for the reasons stated by Justice Fried in his written decision explaining his award of nominal damages to plaintiff (17 Misc 3d 1123(A) [2007]).

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

ENTERED: MARCH 10, 2009

CLERK

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

7 The People of the State of New York, Respondent, Ind. 3991/06

-against-

Famian Cornado, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 26, 2007, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 5 years, unanimously affirmed.

The record indicates that shortly before the jury announced that it had reached a verdict, the court received a note requesting certain photographs received into evidence and a readback of testimony. Nothing in the record bears on the issue of whether the court read this note to counsel; the court did not respond to it before accepting the verdict. We conclude that defendant has failed to present on this appeal a record that is adequate to permit review of his claim (*see People v Kinchen*, 60 NY2d 772 [1983]) that the court violated the precepts set forth in *People v O'Rama* (78 NY2d 270, 277-278 [1991]). Although this failure alone is sufficient to reject defendant's argument, we

note that defendant has not established any prejudice (*see People v Agosto*, 73 NY2d 963, 966 [1989]). By promptly reaching a verdict without any further inquiry, the jury implicitly indicated that it no longer needed the information requested (*see People v Fuentes*, 246 AD2d 474, 475 [1998], *lv denied* 91 NY2d 941 [1998]). We also note that the note in question asked for a readback of testimony about lighting conditions, and the jury had already received a readback on that subject.

Defendant also contends that the court failed to follow the steps set forth in *People v O'Rama* with respect to two other jury inquiries. Although the court reporter apparently was not present when the court informed the parties about the content of this note, it is clear from the record that the court did disclose the contents of each of these inquiries in open court before responding. Accordingly, it fulfilled its "core responsibility" under *People v Kisoon* (8 NY3d 129, 135 [2007]) and there was no mode of proceedings error exempt from preservation requirements (*see e.g. People v Starling*, 85 NY2d 509, 516 [1995]; *People v Snider*, 49 AD3d 459 [2008], *lv denied* 11 NY3d 795 [2008]). We decline to review defendant's unpreserved claim in the interest of justice. As an alternative holding, we find no basis for reversal. The record supports the conclusion that counsel received a suitable opportunity for input into the court's responses. Two of the inquiries at issue

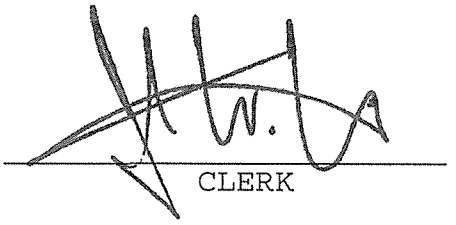
requested routine readbacks, and these requests were not likely to require significant input from counsel. The third asked whether the jurors could take notes, and the court gave the jury appropriate instructions on that subject. While we do not find that the court's handling of any of the jury inquiries in this case requires reversal, nevertheless, as the Court of Appeals stated in *Kisoon*, "we underscore the desirability of adherence to the procedures outlined in *O'Rama*" (8 NY3d at 135).

We find no basis for a reconstruction hearing as to any of the issues presented on appeal.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 10, 2009



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

8 Commissioner of Social Services
of the City of New York as
assignee of Lorraine C.,
Petitioner-Respondent,

-against-

Irving H.,
Respondent-Appellant.

Grace Nwachukwu, Brooklyn, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta B. Ross of counsel), for respondent.

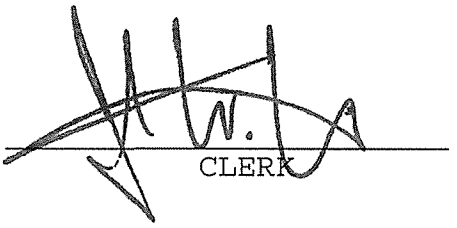
Order, Family Court, New York County (Sara P. Schecter, J.), entered on or about July 6, 2007, which denied respondent Harris's objections and affirmed a Support Magistrate's order of filiation and support, entered on or about March 6, 2007, unanimously affirmed, without costs.

Respondent's objections to the filiation and support determinations are factually and legally insufficient to warrant reversal of the order appealed from. We find no support for the assertion that petitioner was without authority to maintain this proceeding under Social Services Law § 102, nor are the findings of fact inconsistent with the order of support. Respondent's

claims of violations of Family Court Act § 459 and § 413 are not supported by the record.

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

ENTERED: MARCH 10, 2009



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

9 The People of the State of New York, Respondent, Ind. 1207/01

-against-

Edwin Rodriguez, Defendant-Appellant.

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

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

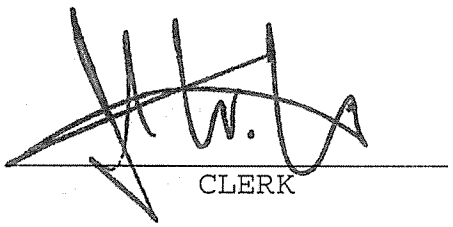
Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered July 16, 2008, resentencing defendant to a term of 7 years with 5 years' postrelease supervision, unanimously affirmed.

The court properly resentenced defendant pursuant to Correction Law § 601-d to comply with the requirement that PRS be part of the court's oral pronouncement of sentence (*see People v Sparber*, 10 NY3d 457 [2008]). We reject defendant's arguments that the court lacked authority and jurisdiction to correct his sentence once he completed the prison portion thereof (*see People v Hernandez*, __ AD3d __, 2009 NY Slip Op 631 [February 5, 2009]. Defendant's double jeopardy argument, which is of a type that requires preservation (*see People v Gonzalez*, 99 NY2d 76, 82-83 [2002]), and his remaining challenges to the resentencing are unpreserved and we decline to review them in the interest of

justice. As an alternative holding, we find them without merit (*see Hernandez*, __ AD3d __, *supra*). With regard to defendant's argument that the resentencing court had discretion to let stand the original sentence, which unlawfully lacked a provision for PRS, we conclude that Correction Law § 601-d and Penal Law § 70.85, when read together, make clear that a court imposing a resentence pursuant to these enactments has no discretion to omit PRS without the prosecutor's consent, which was lacking here.

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

ENTERED: MARCH 10, 2009



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

10-
11 Travelers Indemnity Company, etc., et al., Plaintiffs-Respondents-Appellants, Index 114169/05

-against-

Zeff Design, et al., Defendants,

Z One Design, LLC, Defendant-Appellant,

Hage Engineering, et al., Defendants-Respondents.

McElroy, Deutsch, Mulvaney & Carpenter LLP, New York (Brian W. Keatts of counsel), for appellant.

Katz & Rychik, P.C., New York (Abe M. Rychik of counsel), for respondents-appellants.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Douglas R. Halstrom of counsel), for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 27, 2007, which, to the extent appealed from, granted the Hage defendants' motion for summary judgment dismissing the complaint against them, and granted defendant Z One's motion to dismiss the complaint only to the extent of dismissing the cause of action against it for professional malpractice, unanimously affirmed, with costs.

There was no waiver of subrogation in the contract and rider at issue. The court correctly found the rider did not incorporate certain provisions in the AIA forms which provide for

a waiver of subrogation. Specifically, the "contract documents" referred to in paragraph 3(d)(ii) of the rider are not the contract and rider. Rather, that paragraph undoubtedly referred to contracts Z One was to enter into with its subcontractors. Accordingly, Z One did not demonstrate that Leibovitz clearly and unequivocally waived any claim for subrogation.

Assuming without deciding that Z One can properly raise the argument, Travelers did not pay Leibovitz voluntarily or fail to invoke applicable exclusions in the subject policy. Accordingly, this subrogation action is not barred by Travelers' payment to its insured (*cf. Employers Mut. Liab. Ins. Co. of Wis. v Di Cesare & Monaco Concrete Constr. Corp.*, 9 AD2d 379, 382 [1959]; *Travelers Ins. Co. v Nory Const. Co.* (184 Misc 2d 366 [2000], *affd* 281 AD2d 956 [2001]). Once Leibovitz demonstrated the existence of the all-risk policy and the loss, Travelers bore the burden of proving that the proximate cause of the loss came within one of the exclusions (*Holiday Inns Inc. v Aetna Ins. Co.*, 571 F Supp 1460, 1463 [SD NY 1983]). Indeed, to avoid coverage under such circumstances, "it is not sufficient for the all risk insurers' case for them to offer a reasonable interpretation under which the loss is excluded; they must demonstrate that an interpretation favoring them is the only reasonable reading of at

least one of the relevant terms of exclusion" (*Pan Am. World Airways v Aetna Cas. & Sur. Co.*, 505 F2d 989, 1000 [2d Cir 1974]). Therefore, it is not sufficient for Z One to suggest various policy exclusions that may apply. Rather, it must demonstrate that its interpretation of a certain exclusion is the only reasonable reading of that exclusion, and that the proximate cause of the loss fell within that exclusion. Z One has failed to meet that burden.

Z One does not set forth its theory of how the subject wall settled, nor does it offer definitive proof that one of the policy exclusions applies to that event. In any event, as the motion court found, the "Earth Movement" and "Wear and tear" exclusions appear to be limited to shifting caused by the gradual effect of natural causes, not by the sudden effect of construction activities. Furthermore, the exclusion for defective work does not apply where the damage to the property resulted from a "Covered Cause of Loss," as was the case here. Finally, the note regarding the payment to Leibovitz, which read "CELEBRITY INVOLVED AND ADJUSTMENT HAS BEEN DIFFICULT AND MUST GET OUT PAYMENT TODAY," does not lead to the conclusion that Travelers paid Leibovitz as a volunteer or that it could have disclaimed coverage on the basis of an exclusion.

The court correctly dismissed the complaint as against the Hage defendants. The record makes clear that Hage had no

obligations with regard to underpinning. Indeed, pursuant to Hage's agreement with Z One, Hage was not contractually obligated to -- and did not -- perform any services related to the installation of underpinning, shoring or bracing, or to other stability measures. That fact was further supported by various notations on Hage's drawings and specifications, which made clear that all underpinning, sheeting, shoring or other similar required construction would be the contractor's responsibility, that the contractor was to retain a licensed professional engineer to provide all necessary designs and required inspections, and that the contractor was to provide all measures and precautions necessary to prevent damage and settlement of existing or new construction. Furthermore, while Hage filed a Technical Report form with the City, indicating that it would conduct controlled inspections of the shoring, structural stability and concrete, it did so only to expedite the filing process for obtaining a construction work permit. Z One was notified of that fact and was advised that before construction was commenced, performance of these inspections should be taken over by a controlled inspection company engaged by someone other than Hage. In any event, as the motion court found, the record demonstrates that there is no evidence of negligence on Hage's part, since its specifications were not followed, and the settling happened only after there was a deviation from Hage's

instructions.

Moreover, Travelers failed to include an expert's affidavit to support its conclusion that it was Hage's design "first and foremost" that failed. A claim of malpractice against a professional engineer requires expert testimony to establish a viable cause of action (*see e.g. 530 E. 89 Corp. v Unger*, 43 NY2d 776 [1977]). "A claim of professional negligence requires proof that there was a departure from accepted standards of practice, and that the departure was a proximate cause of the injury" (*Hamilton Textiles v Estate of Mate*, 269 AD2d 214, 215 [2000]). Travelers failed to provide such proof from an expert in opposition to Hage's motion, and this also warranted dismissal of the complaint as against Hage.

Travelers further argues that the court erred in dismissing its causes of action for breach of contract and misrepresentation against Hage. An allegation that a party failed in the proper performance of services related primarily to its profession is a claim of professional malpractice (*see e.g. Boslow Family Ltd. Partnership v Kaplan & Kaplan, PLLC*, 52 AD3d 417 [2008], *lv denied* 11 NY3d 707 [2008]). Accordingly, while Travelers casts claims in contract and negligence, this does not mean that the allegations fall into those designated causes of action (*see Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538 [2004]), and the issue is whether the

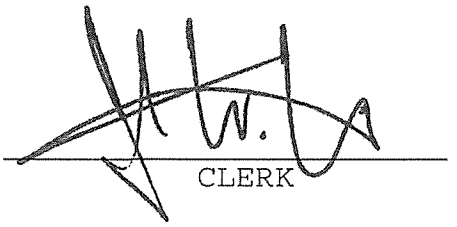
allegations set forth by the plaintiff amount to a cause of action for professional negligence.

In order to sustain the claim for misrepresentation, Travelers had to show that the damages it sustained as a result were different or supplementary to its damages sustained by reason of alleged professional malpractice (*see generally Simcuski v Saeli*, 44 NY2d 442 [1978]). Here, the various causes of action against Hage are based on the same allegations of professional malpractice, and Travelers failed to demonstrate any difference between these two sets of damages. While they may be termed differently by Travelers, the claim for misrepresentation is in fact a cause of action for professional malpractice, and cannot be sustained.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: MARCH 10, 2009



CLERK

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

12 The People of the State of New York, Ind. 6407/06
Respondent,

-against-

Wendell Smith,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (William Wang of counsel), for respondent.

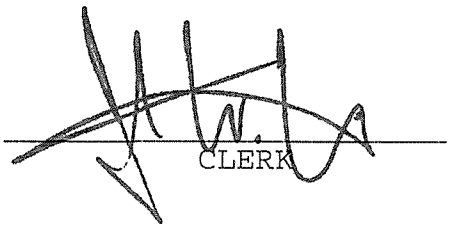
Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered June 14, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of 2 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Late at night, in a desolate, drug-prone alleyway, an experienced narcotics officer saw defendant take an unidentified object from his boot or sock and give it to another person in return for what appeared to be money. This provided probable cause for defendant's arrest (*see People v Jones*, 90 NY2d 835 [1997]). Even without any police training, "any person observing defendant . . ., using good common sense, would have, in the totality of circumstances, concluded that defendant was involved in the sale

of narcotics" (*People v Graham*, 211 AD2d 55, 60 [1995], *lv denied* 86 NY2d 795 [1995]). While defendant argues that the transaction could have involved the sale of a lawful item, he has not identified what type of lawful item might be stored in a sock and sold in the manner described above. Defendant's conduct was "hardly the type of behavior engaged in by legitimate street vendors, who advertise their wares openly" (*id.*).

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

ENTERED: MARCH 10, 2009



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

13 Great American Insurance Company of New York, et al., Plaintiffs-Appellants, -against- Simplexgrinnell LP, Defendant-Respondent. Index 102557/07

Kingsley Kingsley & Calkins, Hicksville (Kevin T. Murtagh of counsel), for appellants.

Shook, Hardy & Bacon LLP, Kansas City, MO (Aristotle N. Rodopoulos, of the bar of the State of Missouri, admitted pro hac vice, of counsel), for respondent.

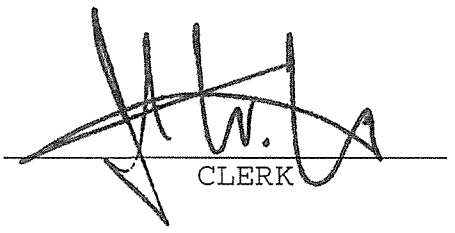
Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 8, 2008, which granted defendant's motion pursuant to CPLR 3211(a)(1) to dismiss the complaint, unanimously affirmed, with costs.

The court properly found that the waiver of subrogation provision in the underlying sprinkler system servicing agreement was neither overreaching nor procedurally or substantively unconscionable (*see Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10 [1988]). We reject plaintiffs' contention that the waiver does not bar a claim for gross negligence. As the Court of Appeals has held, "[a] distinction must be drawn between contractual provisions which seek to exempt a party from liability . . . and contractual provisions . . . which in effect simply require one of the parties to the contract to provide

insurance for all of the parties" (*Board of Educ. v Valden Assoc.*, 46 NY2d 653, 657 [1979]). We discern no public policy basis for limiting freedom of contract (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995]) so as to preclude parties from agreeing that a waiver of subrogation bars not only claims of negligence but also claims of gross negligence. Thus, the waiver conclusively established a defense to plaintiff insurer's claim (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005]; *Held v Kaufman*, 91 NY2d 425, 430-431 [1998]). Moreover, we hold as well that plaintiffs' allegations of tortious conduct fail to allege the necessary violation of a legal duty independent of the contract with defendant (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 [1987]). We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: MARCH 10, 2009



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

14 Joy Kellman, Index 104238/07
Plaintiff-Appellant,

-against-

Walter Mosley,
Defendant-Respondent.

Shatzkin & Mayer, P.C., New York (Karen Shatzkin of counsel), for appellant.

Advocate & Lichtenstein, LLP, New York (Jason A. Advocate of counsel), for respondent.

Order, Supreme Court, New York County (Jacqueline Silbermann, J.), entered July 16, 2008, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment as to liability, and calculated interest on late payments from the dates of failure to cure, unanimously modified, on the law, the matter remanded for recalculation of the interest from the dates of initial breach, and otherwise affirmed, without costs.

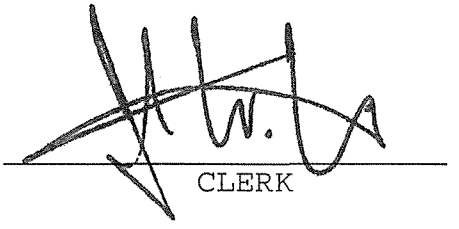
Plaintiff contends that the settlement agreement unambiguously entitles her to share in revenues from any "copyrightable element" of the works defendant published during their marriage. The agreement does not expressly say this, and is susceptible to more than one reasonable interpretation. The IAS court therefore properly considered extrinsic evidence on the

motion (*see Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 190-191 [1986]), and that evidence highlighted a factual issue as to the meaning of the clause. Accordingly, summary judgment was properly denied.

As to defendant's late payments, plaintiff should be entitled to interest calculated from the due date as laid out in the agreement. Interest on the payments accrues from the time of an actionable breach (CPLR 5001). The agreement contains a provision for notice and cure in the event of a payment breach. However, unlike the typical cure clause, this one did not bar plaintiff from suing immediately on a breach. Rather, it provides an additional right: in the event plaintiff gives notice and an opportunity to cure, she can still sue and recover attorney's fees as well. We conclude that each breach occurred on the due date for that payment, and all interest should be calculated from those dates.

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

ENTERED: MARCH 10, 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 10, 2009.

Present - Hon. Peter Tom, Justice Presiding
David Friedman
Luis A. Gonzalez
John W. Sweeny, Jr.
James M. McGuire, Justices.

The People of the State of New York, Ind. 6357/06
Respondent,

-against- 15

Abdulai Barrie,
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 (Gregory Carro, J.), rendered on or about June 28, 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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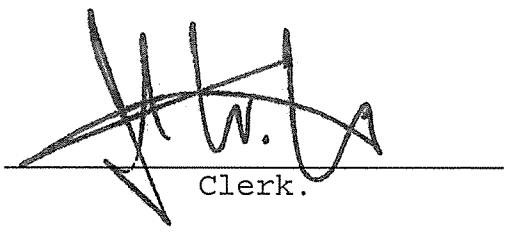


Clerk.

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

Friedman, J.P., Gonzalez, Sweeny, McGuire, JJ.

16 Angela Tese-Milner, as Trustee of Howard C. Friedman, et al.,
Plaintiffs-Respondents,

-against-

30 East 85th Street Company,
Defendant-Respondent,

Banana Republic, LLC,
Defendant,

30 East 85th Street Condominium Associates,
Defendant-Appellant. Index 104395/05

Litchfield Cavo LLP, New York (Bradford Cooke of counsel), for appellant.

Glenn H. Shore, New York, for Angela Tese-Milner and Howard C. Friedman, respondents.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for 30 East 85th Street Company, respondent.

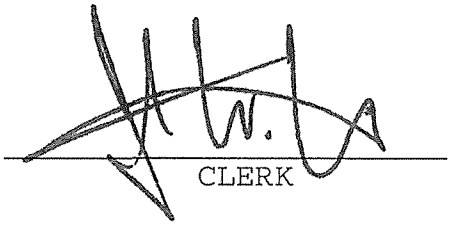
Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 10, 2008, which, to the extent appealed from as limited by the briefs, denied defendant 30 East 85th Street Condominium Associates' motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs.

Defendant moved for summary judgment dismissing the complaint on the ground that the sidewalk defect that allegedly caused plaintiff's accident was so trivial as to be nonactionable (*see Trincere v County of Suffolk*, 90 NY2d 976 [1997]). After

examining all "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury" (*Trincere* at 978 [internal quotation marks and citation omitted]), the court correctly found that an issue of fact was presented. The photographs, which show a depressed area with a rough, uneven surface, do not unequivocally show a defect that is trivial. Plaintiff's expert stated that the defect measured more than three-quarters of an inch deep, more than seven inches long, and approximately four inches wide, and opined that it was unsafe and could cause a pedestrian to trip. The court properly considered the expert's affidavit, in which, contrary to defendant's contention, the expert stated that his conclusion that the defect had existed for a considerable time before the accident occurred was based on his comparison of the sidewalk condition during his inspection of the site and the condition as shown in photographs taken immediately after the accident.

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

ENTERED: MARCH 10, 2009



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

17 The People of the State of New York, Ind. 4678/05
Respondent,

-against-

Wilbur Diggs,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell, New York (Una A. Dean of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered September 26, 2006, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 15 years, unanimously affirmed.

The court properly declined to submit third-degree robbery as a lesser included offense, since there was no reasonable view of the evidence, viewed most favorably to defendant, that the victim did not sustain physical injury as defined by Penal Law § 10.00(9), a necessary element of second-degree robbery under Penal Law § 160.00(2)(a).

In robbing a sidewalk food vendor, defendant punched the victim in the head and body, knocked him down and dragged him along the sidewalk in an effort to get his money, carried in a pouch strapped around the victim's waist and neck. Witnesses,

including responding police, testified that the victim was bleeding. The victim testified that the pain from his injuries was intense, causing him to scream on one occasion, that he experienced difficulty using his wrist and that he continued to experience pain for about one month. Medical records established that the victim sustained a closed head injury with swelling, along with contusions to the wrist, elbow and knee, and "mild painful distress." The victim received pain medication by injection (Toradol) and a prescription for another pain medication (Vicodin).

In determining whether the evidence warranted submission of the lesser included offense, "[o]ur inquiry is not directed at whether persuasive evidence of guilt of the greater crime exists, as it does here, but whether, under any reasonable view of the evidence, it is possible for the trier of facts to acquit defendant on the higher count and still find him guilty of the lesser one." (*People v Van Norstrand*, 85 NY2d 131, 136 [1995]). Whether a victim sustained "substantial pain" (Penal Law § 10.00[9]) is generally a question for a trier of fact, which is free to credit or discredit the victim's assessment of the injury (*see People v Guidice*, 83 NY2d 630, 636 [1994]). Here, however, the jury would have had no basis for finding that defendant forcibly stole property, but without causing "substantial pain"

to the victim (*see People v Beasley*, 233 AD2d 433 [1997], *lv denied* 90 NY2d 938 [1997]).

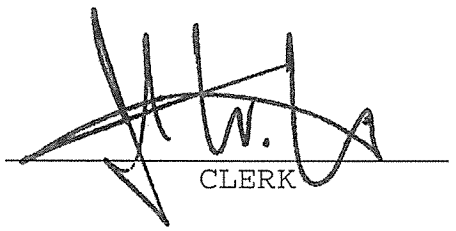
Defendant argues that the evidence suggested the victim "may have suffered only limited injuries." Nevertheless, the Court of Appeals has recently explained that an injury as minor as a broken fingernail may satisfy the statutory definition, if it causes "more than slight or trivial pain." (*People v Chiddick*, 8 NY3d 445, 447 [2007]). Here, there was no reasonable view of the evidence that would have permitted the jury to find that these injuries did not reach the level of "more than slight or trivial pain."

Any error in failing to redact a reference to robbery from the history portion of the victim's medical records was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 10, 2009



Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

19 The People of the State of New York, Respondent,

-against-

Anthony Amitrano, Defendant-Appellant.

Ind. 23/05

Howard R. Birnbach, Great Neck, for appellant.

Robert M. Morgenthau, District Attorney, New York (Gina Mignola of counsel), for respondent.

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered May 3, 2007, convicting defendant, after a jury trial, of assault in the third degree, and sentencing him to a term of 6 months, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

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 to establish defendant's role in attacking the victim.

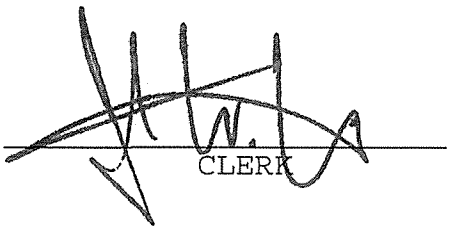
The court provided suitable remedies for the People's loss of certain police reports (*see People v Martinez*, 71 NY2d 937, 940 [1988]). The court's adverse inference charge conveyed the proper standards, including the permissive nature of such an

inference (*see People v Brister*, 239 AD2d 513 [1997], *lv denied* 90 NY2d 938 [1997]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 10, 2009



Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

20 Gristede's Operating Corp., et al., Index 111955/06
Plaintiffs-Appellants,

-against-

Axis Specialty Insurance Company,
Defendant-Respondent.

Proskauer Rose LLP, New York (Seth B. Schafler of counsel), for appellants.

Kaufman Borgeest & Ryan LLP, New York (Joan M. Gilbride of counsel), for respondent.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered December 19, 2007, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to declare that defendant is not obligated to indemnify plaintiff against any claims made in the underlying class action, and otherwise affirmed, without costs.

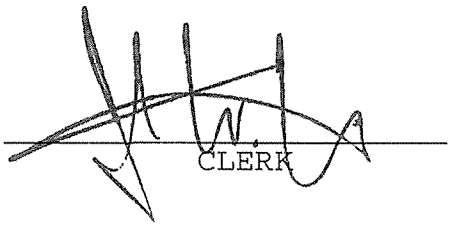
While "an insurer's duty to defend and to pay defense costs under liability insurance policies must be construed broadly in favor of the policyholder" (*Fed. Ins. Co. v Kozlowski*, 18 AD3d 33, 41 [2005] [citation omitted]), the "existence of the duty is dependent upon whether sufficient facts are stated so as to invoke coverage under the policy" (*American Home Assur. Co. v Port Auth. of N.Y. & N.J.*, 66 AD2d 269, 278 [1979]). The policy here did not cover plaintiff against the claims alleged in the underlying class action, and defendant thus had no duty to

advance defense costs (*see Société Générale v Certain Underwriters at Lloyd's, London*, 1 AD3d 164 [2003]). Rejection of plaintiffs' cause of action for a declaration required that the court declare in favor of defendant, and we modify accordingly (*Decana, Inc. v Contogouris*, 55 AD3d 325, 326 [2008]).

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: MARCH 10, 2009



Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

21 Dominion Financial Corp., Index 600096/07
Plaintiff-Respondent-Appellant,

-against-

Asset Indemnity Brokerage Corp.,
Defendant-Appellant-Respondent.

Keidel, Weldon & Cunningham, LLP, White Plains (Howard S. Kronberg of counsel), for appellant-respondent.

Hartman & Craven LLP, New York (Donald L. Rosenthal of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered June 30, 2008, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the complaint to the extent of dismissing the first cause of action for negligence and denied the motion to the extent of sustaining the second cause of action for negligence, and granted plaintiff's cross motion to amend the complaint to add causes of action for breach of contract, unanimously modified, on the law, to deny defendant's motion in its entirety and to reinstate the first cause of action, and otherwise affirmed, without costs.

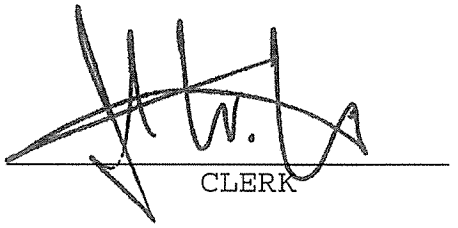
In this action against an insurance broker for failure to properly procure insurance, plaintiff asserts claims on its own behalf and as the assignee of the claims of defendant's client against defendant. Plaintiff has alleged facts sufficient to demonstrate that it was an intended beneficiary not only of the

surety coverage procured by defendant, in which it was so named, but also of defendant's agreement with its client to procure the surety coverage (*see Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 33-35 [1979], *affd* 49 NY2d 924 [1980]; *Henry v Guastella & Assoc.*, 113 AD2d 435 [1985], *lv denied* 67 NY2d 605 [1986]; *20th Century Foods Pte., Ltd. v Home Ins. Co.*, 1989 WL 99773, *8-10, 1989 US Dist LEXIS 9843, *28-33 [SD NY 1989]). These facts include that defendant was aware, from the moment its client contacted it about procuring coverage, that plaintiff was the intended beneficiary of the coverage, and that plaintiff participated on its own behalf in discussions with defendant and its client about the coverage to be provided. Accordingly, plaintiff has stated a cause of action for negligence both on its own behalf and as the assignee of defendant's client's claims against defendant. For the same reasons, the court properly granted plaintiff's motion to amend the complaint to add causes of action for breach of contract as a third-party beneficiary of the brokerage agreement and as assignee of defendant's client's claims.

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 10, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

22 The People of the State of New York, Respondent,

-against-

Stuart Ebanks, Defendant-Appellant.

Ind. 5932/02

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

Robert T. Johnson, District Attorney, Bronx (Jennifer Marinaccio of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Judith S. Lieb, J.), rendered January 11, 2006, convicting defendant, after a jury trial, of aggravated criminal contempt, criminal contempt in the first degree (two counts), and stalking in the third degree, and sentencing him to an aggregate term of 3⅔ to 11 years, unanimously affirmed.

The court properly exercised its discretion in permitting the People to introduce evidence of uncharged crimes that were probative of defendant's motive and intent and provided background information explaining the sequence of events and the relationship between defendant and the victim (*see e.g. People v Steinberg*, 170 AD2d 50, 72-74 [1991], *affd* 79 NY2d 673 [1992]). Unlike evidence of general criminal propensity, evidence that a particular victim was the focus of a defendant's continuing

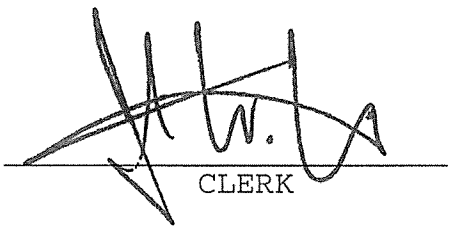
aggression may be highly relevant (*see People v Bierenbaum*, 301 AD2d 119, 150 [2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]), and the People "were not bound to stop after presenting minimum evidence" (*People v Alvino*, 71 NY2d 233, 245 [1987]). The probative value of this evidence outweighed any prejudicial effect, which was minimized by the court's suitable limiting instructions. Defendant's constitutional argument is both unpreserved and without merit (*see People v Pettaway*, 30 AD3d 257 [2006], *lv denied* 7 NY3d 816 [2006]).

Defendant's argument, including his constitutional claim, that the court should have provided a remedy, beyond the inquiry it conducted, for his assertion that the police improperly destroyed allegedly exculpatory evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 10, 2009



Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

23-
23A-
23B The People of the State of New York, Ind. 3948/04
Respondent,

-against-

David Robinson,
Defendant-Appellant.

David Robinson, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered May 13, 2005, as amended June 30, 2005, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree and assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 5 years, and orders, same court and Justice, entered on or about March 9, 2006 and May 11, 2006, which denied defendant's CPL 440.10 motions to vacate the judgment of conviction, unanimously affirmed.

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

The court properly concluded that the jury verdict acquitting defendant of second-degree assault while convicting

him of second-degree possession of a weapon and third-degree assault was not repugnant. Under the court's charge (*see People v Tucker*, 55 NY2d 1 [1981]), the jury could have found that defendant possessed a loaded firearm with intent to use it unlawfully, but that he injured the victim without the use of the firearm.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]) at all stages of the case. Defendant's claim that he was deprived of his right to hire counsel of his own choosing is without merit.

We have considered and rejected defendant's remaining claims.

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

ENTERED: MARCH 10, 2009

Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

24 In re Richard J. McAllan, Index 102343/07
Petitioner-Appellant,

-against-

New York State Department of Health, et al.,
Respondents-Respondents.

Richard J. McAllan, appellant pro se.

Andrew M. Cuomo, Attorney General, New York (Ann P. Zybert of counsel), for The New York State Department of Health and The New York State Emergency Medical Advisory Committee, respondents.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for municipal respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered September 11, 2007, which granted respondents' cross motions to dismiss this article 78 proceeding due to petitioner's lack of standing, unanimously affirmed, without costs.

Petitioner retired in December 2004, having served with the New York City Fire Department as a paramedic. Two months later, the New York City Emergency Medical Advisory Committee voted to allow Advanced Life Support First Response Units to be staffed with one paramedic and one Emergency Medical Technician, instead of two paramedics. Petitioner brought this proceeding to challenge that staffing change.

To have standing to challenge a governmental action, a party "must show 'injury in fact,'" such that he "will actually be

harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural" (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). Furthermore, "petitioners must show that they have suffered an injury . . . distinct from that of the general public" (*Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]). Petitioner's concern that the Health Department's determination might adversely affect him, as a citizen, if he requires an ambulance or a fire engine in the future, is too speculative. Moreover, he concedes that this is a concern he shares with millions of other New York City residents. Therefore, he has not suffered an injury "different in kind or degree from that suffered by the public at large" (*Matter of Parkland Ambulance Serv. v New York State Dept. of Health*, 261 AD2d 770, 772 [1999], *lv denied* 93 NY2d 818 [1999]).

Petitioner's reliance on Public Health Law § 3002-a(2-a) is of no avail. Assuming arguendo that this subsection applies to judicial proceedings as well as to administrative appeals, petitioner was not adversely affected in his capacity as a paramedic because he retired before the effective date of the change (*see generally Matter of Clark v Town Bd. of Town of Clarkstown*, 28 AD3d 553 [2006]).

Petitioner did not contend in the nisi prius court that he should be granted public interest standing or that respondents

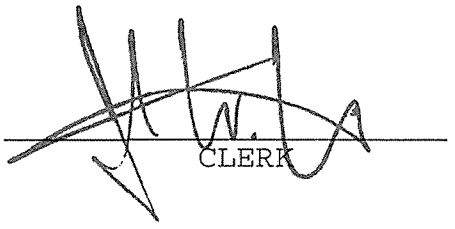
had violated the State Administrative Procedure Act. We decline to consider these new arguments (*see e.g. Matter of Wallace v Environmental Control Bd. of City of N.Y. [Dept. of Consumer Affairs]*, 8 AD3d 78 [2004]; *Matter of Cocozzo v Ward*, 162 AD2d 202, 203 [1990]).

Petitioner lacks taxpayer standing under State Finance Law § 123-b because "the dispositive activity challenged" by him was a "nonfiscal determination" (*Kennedy v Novello*, 299 AD2d 605, 607 [2002], *lv denied* 99 NY2d 507 [2003]).

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

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

ENTERED: MARCH 10, 2009



Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

25-
26-
26A Keiwan Sital, Index 7058/03
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

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

Irom, Wittels, Freund, Berne and Serra, P.C., Bronx (Richard W. Berne of counsel), for respondent.

Amended judgment, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about February 13, 2008, after a jury verdict and stipulated reduction, awarding plaintiff damages in the amount of $500,000 on his claim for false arrest and $1,600,000 on his claim for malicious prosecution, pursuant to an order, same court and Justice, entered February 4, 2008, which granted defendant's motion to set aside the verdict to the extent of directing a new trial on the issue of damages unless plaintiff stipulated to said reduction in the award of damages, unanimously modified, on the facts, and the matter remanded for a new trial solely on the issue of damages on the cause of action for false arrest, and otherwise affirmed, without costs, unless, within 30 days of service of a copy of this order with notice of entry, plaintiff stipulates to reduce the award for false arrest to

$150,000 and to entry of a further amended judgment in accordance therewith. Appeal from the February 4, 2008 order, unanimously dismissed, without costs, as subsumed in the appeal from the amended judgment. Appeal from judgment, same court and Justice, entered on or about September 5, 2007, unanimously dismissed, without costs, as superseded by the appeal from amended judgment.

The court properly denied defendant's motion for judgment as a matter of law (*see generally Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Regarding the false arrest cause of action, the evidence demonstrates that a rational jury could have found that there was no probable cause for plaintiff's arrest because the accusation from an identified citizen, which was the sole basis for the arrest, was not sufficiently reliable, given that the investigating officer had doubts about the witness's credibility (*compare Norasteh v State of New York*, 44 AD3d 576 [2007], *lv denied* 10 NY3d 709 [2008]). The identification of plaintiff was also arguably contradicted by physical evidence from the crime scene that was consistent with a conflicting statement of an independent eyewitness, and the jury heard testimony showing that the investigating officer recognized plaintiff based on a prior arrest, at which time he had referred to plaintiff as "an animal." Under these circumstances, a rational jury could have determined that the officer's failure to make further inquiry of potential eyewitnesses was unreasonable under the circumstances,

and evidenced a lack of probable cause (*see Roundtree v City of New York*, 208 AD2d 407 [1994]).

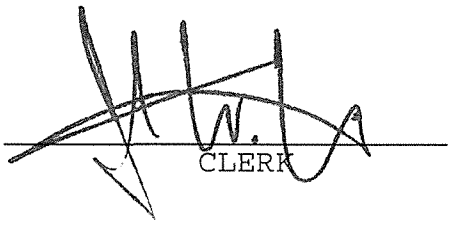
Regarding the claim for malicious prosecution, there was a sufficient basis in the trial record for the jury to conclude that the presumption of probable cause created by the indictment was rebutted (*see Colon v City of New York*, 60 NY2d 78, 82-83 [1983]). Viewing the facts in plaintiff's favor (*see Szczerbiak*, 90 NY2d at 556), the jury could have rationally concluded that the investigating officer, who did not alert the prosecutor to the statement by another witness, which was inconsistent with the statement given by the individual who accused plaintiff, and arguably implicated that individual in the shooting, failed to make a complete and full statement of facts to the District Attorney (*see Colon*, 60 NY2d at 82-83). Furthermore, the jury may have reasonably determined that the officer otherwise had initially acted in bad faith by arresting plaintiff solely on the basis of a less than credible accusation, and that the evidence showing that the investigating officer had previously arrested plaintiff and had referred to him at that time as "an animal," supported the finding of malice (*see Maskantz v Hayes*, 39 AD3d 211, 215 [2007]).

However, we modify to the extent indicated because the award of damages on the false arrest claim, even as reduced by the trial court from $2,700,000 to $500,000, deviates materially from

what would be reasonable compensation for the 20 hours plaintiff spent in custody between his arrest and arraignment (CPLR 5501[c]; *see e.g. Landow v Town of Amherst*, 49 AD3d 1236 [2008]; *Roundtree*, 208 AD2d at 407; *Musto v Arakel*, 184 AD2d 243 [1992]).

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

ENTERED: MARCH 10, 2009



Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

28 The People of the State of New York, Ind. 3864/04
Respondent,

-against-

David Carter,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

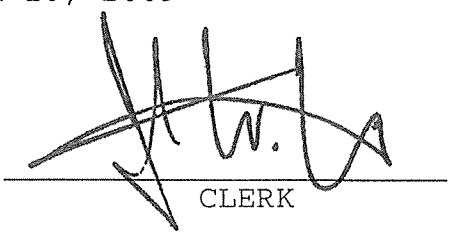
Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about January 24, 2007, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in denying defendant a downward departure from his presumptive risk level (*see People v Guaman*, 8 AD3d 545 [2004]). We note that the underlying sex crime was violent, and that defendant had a history of violent crimes.

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

ENTERED: MARCH 10, 2009



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Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

29 Saundra Crane, Index 117565/04
Plaintiff-Respondent,

-against-

New York City Transit Authority,
et al.,
Defendants-Appellants.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellants.

Roth & Roth, Garden City (Lisa M. Comeau of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered March 14, 2008, which granted plaintiff's motion for partial summary judgment as to liability and directed an assessment of damages, unanimously affirmed, without costs.

Plaintiff was injured on December 19, 2003, when defendants' bus, on which she was a passenger, allegedly came to a sudden, violent stop near 34th Street and Fifth Avenue. Plaintiff sustained a head injury and a broken clavicle.

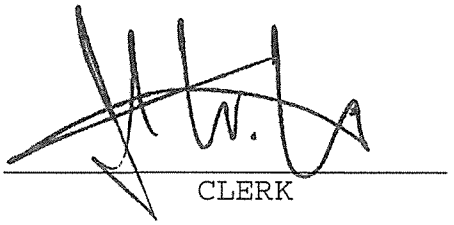
Plaintiff established a prima facie case of negligence with deposition testimony that the sudden stop caused a jerk or lurch that was "unusual and violent" (*see Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 829-30 [1995]). Defendants' opposition to summary judgment was insufficient to create a triable issue of fact. Their contention that the bus stopped suddenly because a passenger pushed on the rear door, possibly activating the bus's

rear door interlock braking mechanism, was unsupported by evidence as to how the mechanism worked and as to whether it was functioning properly and was operated properly by the bus driver at the time and on the bus in question.

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

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

ENTERED: MARCH 10, 2009



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Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

30 In re Leon St. Clair Nation, Index 104767/08
Petitioner,

-against-

The City of New York, et al.,
Respondents.

Law Offices of Stuart A. Klein, New York (Christoper M. Slowik of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Louise Moed of counsel), for respondents.

Determination of respondent Commissioner of the Department of Buildings (DOB), dated December 4, 2007 and January 15, 2008, which, after a hearing, revoked petitioner's professional certification privileges pursuant to 1 RCNY 21-02 and refused to accept any application or other document submitted by petitioner to DOB, pursuant to Administrative Code of City of NY § 26-124(c), for two years effective January 15, 2008, to be followed by a three-year probationary period, unanimously modified, on the law, to the extent of vacating the penalty imposed pursuant to Administrative Code § 26-124(c), and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Jane S. Solomon, J.], entered June 26, 2008) otherwise disposed of by confirming the remainder of the determination, without costs.

Substantial evidence supports the Commissioner's

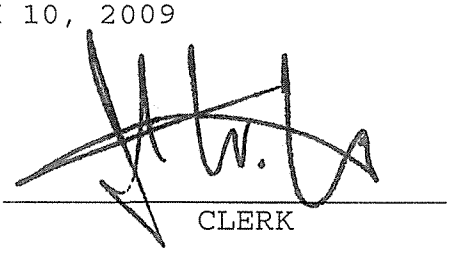
determination that petitioner negligently certified the accuracy of falsified photographs submitted with plans for two separate properties and a false application for alterations to the nonexistent second floor of a third property (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Whether or not petitioner was required by statute, regulation or rule to visit work sites or to submit photographs in connection with applications and plans, he was professionally bound to verify the accuracy of the applications and plans he certified as accurate. The Administrative Law Judge's reference to the professional standards for engineers of the New York State Board of Regents and the National Society for Professional Engineers was neither an improper usurpation of the Board of Regents' authority to regulate engineers nor an attempt to enforce the rules of the National Society against a nonmember. Rather, these professional standards were cited as evidence of the standard of care expected of a professional engineer certifying documents such as applications and plans filed with DOB. Given that, in issuing permits under the "Limited Supervisory Check and/or Professional Certification Program for Applications and Plans" (1 RCNY 21.01), DOB must rely on the certifications of professionals such as petitioner, the Commissioner's determination to revoke petitioner's professional certification privileges does not shock the conscience of the

Court (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

However, the Commissioner impermissibly invoked Administrative Code § 26-124(c) to bar petitioner from submitting any applications or documents to DOB under his name for a period of two years, to be followed by a probationary period of three years. Section 26-124(c) did not take effect until well after petitioner engaged in the acts charged against him. Since it is clearly penal in nature, it may not be applied retroactively (*see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998]; *Landgraf v USI Film Prods.*, 511 US 244, 265, 280 [1994]; *Doe v Pataki*, 120 F3d 1263, 1272-1273 [2d Cir 1997], *cert denied* 522 US 1122 [1998]; *Forti v New York State Ethics Commn.*, 75 NY2d 596, 609-610 [1990]; *Ciafone v Kenyatta*, 27 AD3d 143, 146 [2005]; *Matter of Allied Grocers Coop. v Tax Appeals Trib.*, 162 AD2d 791 [1990]).

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

ENTERED: MARCH 10, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

31 The People of the State of New York, Ind. 8105/00
Respondent,

-against-

Martin Dominguez,
Defendant-Appellant.

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

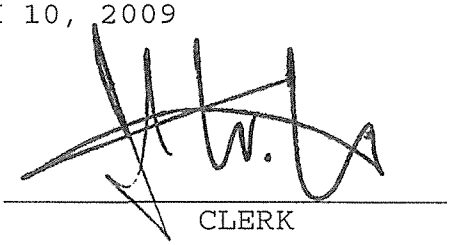
Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Order, Supreme Court, New York County (Michael A. Corriero, J.), entered on or about September 27, 2007, which denied defendant's application for resentencing pursuant to the Drug Law Reform Act (L 2004, ch 738), unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the application. The scale of defendant's involvement with drug trafficking outweighed his favorable prison record and the other factors upon which he relied (*see e.g. People v Rizo*, 51 AD3d 436 [2008]).

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

ENTERED: MARCH 10, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

32 In re Jada Serenity H.,

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

Clifton H., etc.,
Respondent-Appellant,

McMahon Services for Children/
Good Shepherd Services,
Petitioner-Respondent.

Joseph T. Gatti, New York, for respondent.

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

Order of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about February 25, 2008, which terminated respondent father's parental rights to his daughter after a fact-finding determination that he had permanently neglected the child, and transferred custody and care to the New York City Commissioner of Social Services and petitioner for the purpose of adoption, unanimously affirmed, without costs.

Unlike a fact-finding hearing, where the issue of permanent neglect is resolved, a dispositional hearing is concerned only with the best interests of the child (Family Ct Act § 631). There is no presumption that those interests will best be served by return of the child to her parent *(see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]).

Respondent, who did not challenge the court's finding of

permanent neglect, seeks a suspended judgment based on his progress in remaining drug free for approximately one year and his intention to terminate his relationship with the child's mother, which in the past was an impediment to his obtaining custody because of the mother's drug abuse.

The child has been in the same kinship foster home for almost six years, since she was six months old. The court found that her foster mother provided a loving and nurturing home and had met all of the child's physical, emotional, medical and educational needs for almost her entire life, and that the child lived with her half sister, who was adopted by the foster mother. The foster mother has expressed a desire to adopt this child.

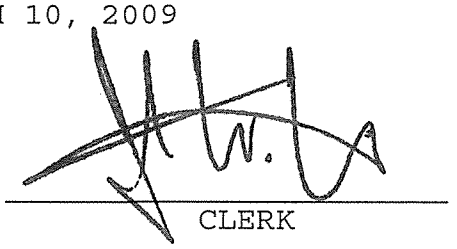
Despite respondent's progress in rehabilitating himself, the child should not be denied permanence through adoption in order to provide him with additional time to demonstrate that he can be a fit parent. Unfortunately, his past efforts were not successful and he relapsed into drug abuse.

Termination of parental rights is warranted where the child has lived most of her life with a foster parent with whom she maintains a positive relationship, and who wants to adopt her, even where the parent has made commendable but belated efforts to remain drug free *(see Matter of Roger Guerrero B.*, 56 AD3d 262 [2008]; *Matter of Saraphina Ameila S.*, 50 AD3d 378, 379 [2008]).

The court correctly determined that it was in the child's best interests to terminate respondent's parental rights and enable her to be adopted by her foster mother.

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

ENTERED: MARCH 10, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

33 Aram Babikian, Index 112320/06
Plaintiff-Respondent,

-against-

Nikki Midtown, LLC, et al.,
Defendants-Appellants,

Christopher Berlingo,
Defendant.

Gallo, Vitucci & Klar, New York (Yolanda L. Ayala of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about August 7, 2008, which, in an action for personal injuries sustained in an attack against plaintiff by defendant Berlingo outside premises operated by defendants-appellants (defendants) as a nightclub and restaurant, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment motion dismissing the complaint, and awarded plaintiff $100 motion costs, unanimously modified, on the law and upon a search of the record, to dismiss plaintiff's second and fourth causes of action for "negligent assault" and "negligent battery," respectively, and otherwise affirmed, without costs.

We modify to dismiss the second and fourth causes of action for "negligent assault" and "negligent battery" as no such causes

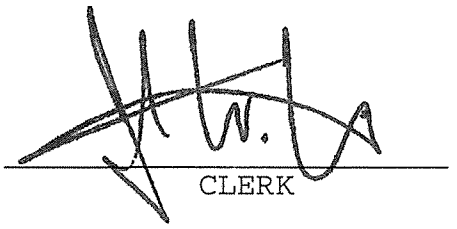
of action exist under New York law (*Smiley v North Gen. Hosp.*, __ AD3d __, 2009 NY Slip Op 630, *1 [Feb. 5, 2009]; *Fariello v City of New York Bd. of Educ.*, 199 AD2d 461, 462 [1993]). As for plaintiff's causes of action for assault (first), battery (third), and negligent hiring against each of the defendants (fifth and sixth), defendants' motion should be denied regardless of the sufficiency of plaintiff's opposing papers, because defendants do not meet their prima facie burden of submitting evidentiary proof in admissible form sufficient to demonstrate as a matter of law that, as they claim, Berlingo was not in their employ at the time of the attack, or, even if he were, that the attack was not within the scope of his duties as a bouncer (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). The unsworn incident report, which was apparently prepared shortly after the attack by defendants' general manager and is submitted by defendants to show that the attack took place outside of their premises, is not authenticated by the attorney's affirmation to which it is attached (*see Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 480 [2007]; *McDonald v Tishman Interiors Corp.*, 290 AD2d 266, 267 [2002]), and defendants do not provide an affidavit from the general manager. The affidavit of defendants' bookkeeper stating that Berlingo was in the nightclub on the night of the attack "solely as a patron" is inadmissible hearsay, since she does not aver that she spoke from firsthand

knowledge and appellants point to no applicable exception (*see Nucci v Proper*, 95 NY2d 597, 602 [2001]). Nor does the bookkeeper's affidavit lay the foundation necessary for the admissibility of the purported employment records and the computer printout submitted to show what employees were on duty on the date of the attack. The bookkeeper does not state that she is in charge of employment or employment records or otherwise has firsthand knowledge Berlingo's employment status, or that she prepared these documents and knows what they are and that they were prepared in the regular course of business (*see People v Kennedy*, 68 NY2d 569, 579-580 [1986]; *Zuluaga*, 45 AD3d at 480). Nor do plaintiff's allegations, liberally construed, show that the site of the attack was so far removed from defendants' premises as to be beyond the area that defendants might have expected their bouncers to control (*see Riviello v Waldron*, 47 NY2d 297, 303-304 [1979]). In view of the foregoing, we need not consider the parties' arguments relating to plaintiff's unpleaded potential cause of action for breach of the public establishment owner's common-law duty to control the conduct of persons on its premises. The award of $100 motion costs was a proper exercise

of discretion under CPLR 8106, which requires no showing of frivolousness (*see Greenspan v Rockefeller Ctr. Mgt. Corp.*, 268 AD2d 236, 237 [2000]).

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

ENTERED: MARCH 10, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

34 In re Epdi Associates, Index 108960/07
Petitioner-Respondent,

-against-

New York City Loft Board,
Respondent-Appellant,

Stephen Conley,
Respondent.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellant.

Law Office of Robert J. Miletsky, White Plains (Robert Jan Miletsky of counsel), for Epdi Associates, respondent.

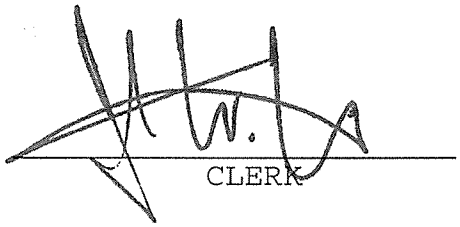
Order, Supreme Court, New York County (Marcy L. Kahn, J.), entered December 20, 2007, which granted the owner's petition to the extent of annulling that part of a Loft Board order that required amendment of an abandonment application to list former tenants as affected parties to be served with notice of the application, rejected the administrative law judge's recommendation that the former tenants' units were abandoned, and remanded the application for further proceedings, unanimously reversed, on the law, without costs, the petition denied in its entirety, the proceeding dismissed, and the Loft Board order reinstated and confirmed.

The Loft Board properly interpreted its own regulation (*see IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal*, 10 NY3d 474, 481 [2008]). It also correctly

understood its own prior order in implicitly finding that it did not decide the rights of the departed Brower, Koch and Roussin tenants, so the order at issue was neither irrational nor inconsistent with the administrative body's own precedent (*cf. Matter of Field Delivery Serv. [Roberts]*, 66 NY2d 516 [1985]). We note that the obituary of a departed tenant was not part of the administrative record, and was thus improperly considered by the court (*see Rizzo v New York State Div. of Hous. & Community Renewal*, 6 NY3d 104, 110 [2005]), and that the Loft Board was justifiably skeptical about other evidence submitted by petitioner.

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

ENTERED: MARCH 10, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

35 Maureen Nolan, Index 104536/07
Plaintiff-Appellant,

-against-

Jack Lechner, et al.,
Defendants-Respondents.

Ballon Stoll Bader & Nadler, P.C., New York (Marshall B. Bellovin of counsel), for appellant.

Hoey, King, Toker & Epstein, New York (Danielle M. Dandrige of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered February 19, 2008, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion to compel their acceptance of the complaint, unanimously reversed, on the law, without costs, defendant's motion denied, the cross motion granted, and defendant directed to accept the complaint.

A party who has commenced an action by service of a summons without complaint and fails to serve a complaint within 20 days of a demand must demonstrate the merits of the action and a reasonable excuse for the delay in order to avoid dismissal (CPLR 3012[d]; *Barasch v Micucci*, 49 NY2d 594, 599 [1980]).

Plaintiff did satisfy these requirements. On May 1, 2007, defendants served a notice of appearance and demanded a complaint, which meant that plaintiff had 20 days in which to comply (CPLR 3012[b]). On June 26, 36 days after expiration of

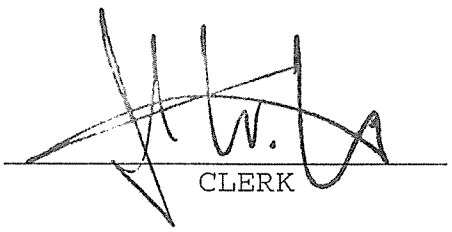
the 20-day deadline, plaintiff served a copy of the verified complaint, attached as an exhibit to her cross motion to compel defendants' late acceptance of the complaint (*see* 3012[d]). Plaintiff's counsel cited law office failure for the delay, claiming to have discovered on June 1 only defendants' notice of appearance, but not their demand; also cited was the disabled plaintiff's physical difficulties in appearing at counsel's office to sign the verification. This constituted a reasonable excuse for the delay (*see Wess v Olympia & York Realty Corp.*, 201 AD2d 365 [1994]).

Plaintiff also submitted an affidavit of merit, sufficiently detailing the injuries she allegedly suffered as a result of defendants' tortious acts. At no time did plaintiff evince an intent to abandon her claim, and defendants have not demonstrated prejudice by reason of the delay (*see Rose v Our Lady of Mercy Med. Ctr.*, 268 AD2d 225 [2000]).

Dismissal of the action under these circumstances was an improvident exercise of the court's discretion (*see Aquilar v Nassau Health Care Corp.*, 40 AD3d 788 [2007]).

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

ENTERED: MARCH 10, 2009



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

36 Ruchama Gamiel, Index 603887/02
Plaintiff-Respondent, 590268/04

-against-

Curtis & Reiss-Curtis, P.C., et al.,
Defendants-Appellants.

[And A Third-Party Action]

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Stephen D. Strauss and Gerard Benvenuto of counsel), for appellants.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered September 4, 2008, which denied defendants attorneys' motion for summary judgment (1) dismissing plaintiff's remaining causes of action for return of the legal fees she paid to them in an underlying action and compelling their turnover of the file in that action, and (2) awarding judgment on their counterclaim for unpaid attorneys' fees, unanimously reversed, on the law, without costs, the motion granted, the complaint dismissed and judgment awarded defendants on their counterclaim. The Clerk is directed to enter judgment dismissing the complaint and awarding judgment in favor of defendants and against plaintiff in the amount of $36,193.86, with interest from November 1, 2001.

A prior motion by defendants for summary judgment dismissing the complaint was granted on default; a motion by plaintiff to vacate the default was denied on the ground that plaintiff failed

to show a meritorious cause of action; on appeal, this Court modified to the extent of reinstating the sixth and seventh causes of action for overbilling and improper retention of the file in the underlying action, finding that "plaintiff sufficiently set forth the merit of [these] claims . . . to preclude summary resolution of those claims (44 AD3d 327 [2007], *lv dismissed* 9 NY3d 1016 [2008], 10 NY3d 789 [2008]), citing *Batra v Office Furniture Serv.*, 275 AD2d 229 [2000]). The motion court, in denying defendants' subsequent motion for summary judgment dismissing the remaining sixth and seventh causes of action and awarding judgment on their counterclaim for account stated, construed our prior order as a substantive ruling on defendants' prior motion for summary judgment, stating that "[h]ad the Appellate Division wished for the Supreme Court to decide defendants' summary judgment motion [with respect to the sixth and seventh causes of action], it would have remanded the matter for consideration [there]of" (citing, inter alia, *Carillo v New York City Tr. Auth.*, 39 AD3d 296, 297 [2007]). This misconstrued our prior order, which reinstated plaintiff's sixth and seventh causes of action under the lesser standard of proof for vacating a default, and was not meant to preclude a future motion for summary judgment by defendants (*cf. Batra*, 275 AD2d 229, 231; *see e.g. Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A.*, 42 AD3d 380 [2007]).

On the merits, defendants adduce evidence, unrebutted by plaintiff, sufficient to show that plaintiff received, retained without objection, and partially paid invoices without protest, warranting summary judgment on their counterclaim for account stated (*see Morrison Cohen Singer & Weinstein v Ackerman*, 280 AD2d 355 [2001]; *Mintz & Gold v Hart*, 48 AD3d 526 [2008]). Summary judgment in defendants' favor on their claim for unpaid attorneys' fees in the underlying action necessarily requires dismissal of plaintiff's cause of action to compel defendants' turnover of the file in that action (*see Hoke v Ortiz*, 83 NY2d 323, 331 [1994], *cert denied* 513 US 865 [1994] [retaining lien is security for payment of attorneys' fees and is enforceable only by possession]).

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

ENTERED: MARCH 10, 2009

CLERK

Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

37N Donald MacPherson, Index 101665/04
Plaintiff-Appellant,

-against-

80 Varick Street Group, L.P., et al.,
Defendants-Respondents.

David A. Kaminsky & Associates, P.C., New York (Martin Gerald Dobin of counsel), for appellant.

Goldberg Segalla LLP, White Plains (Angela Delfino-Vitali of counsel), for 80 Varick Street Group, L.P., 80 Varick Street Realty Corp., Michael Saperstein, Mark Ramer, Scott J. Leisner and IAB Management, Inc., respondents.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for Pale Realty Corp. and/or Pale Management Corp., respondents.

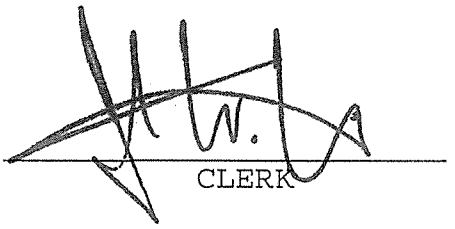
Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered November 1, 2007, which denied plaintiff's motion to vacate an order dismissing the action and restore the case to the calendar, unanimously affirmed, without costs.

Plaintiff proffered a reasonable excuse for his default, i.e., that he never received notice of the preliminary conference, at which indeed neither side appeared (*see Grant v Rattoballi*, 57 AD3d 272, 273 [2008]). However, he failed to

proffer facts showing that he has a meritorious cause of action (*see Rugieri v Bannister*, 7 NY3d 742 [2006]).

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

ENTERED: MARCH 10, 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 10, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David B. Saxe
Eugene Nardelli
Leland G. DeGrasse
Helen E. Freedman,

Justices.

In re Gary Teasley,
Petitioner,

Ind 3259/07
5758/07

-against-

38
[M-320]

Hon. Bruce Allen, etc.,
Respondent.

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

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

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

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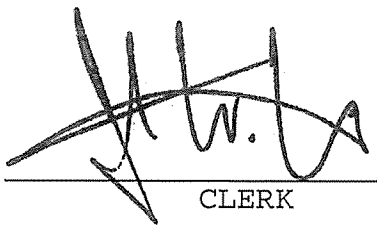

CLERK