SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 12, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4304 The People of the State of New York, Respondent, Ind. 6646/05

-against-

Michael Reed, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Richard Nahas of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 2, 2006, convicting defendant, upon his plea of guilty, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

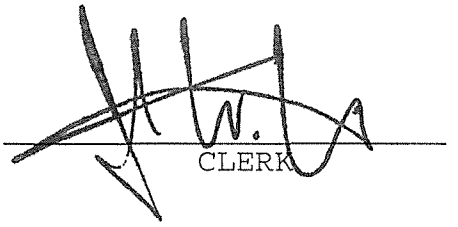
After sufficient inquiry (*see People v Frederick*, 45 NY2d 520 [1978]), the court properly denied defendant's motion to withdraw his guilty plea. The record establishes that the plea was voluntary (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]), and that defendant's attacks on his counsel's

representation were without merit (*see People v Ford*, 86 NY2d 397, 404 [1995]). "[T]he court had no reason to believe that the allegedly coercive conduct amounted to anything more than sound advice to accept the favorable plea offer." (*People v Torrence*, 7 AD3d 444 [2004], *lv denied* 3 NY3d 682 [2004]). Accordingly, there was no conflict of interest and no reason to assign new counsel for the plea withdrawal application. Defendant's assertion that medication affected his ability to understand the plea proceedings was unsupported by any evidence, as well as contradicted by the plea allocution record.

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 01242).

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

ENTERED: MARCH 12, 2009



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

4684 The People of the State of New York, Ind. 2394/06
Respondent,

-against-

Clenio Acevedo,
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, Supreme Court, New York County (James A. Yates, J.), rendered March 8, 2007, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to a term of 2 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 (*see People v Guerrero*, __ NY3d __, 2009 NY Slip Op 01242).

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

ENTERED: MARCH 12, 2009

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

4727 The People of the State of New York, Ind. 1389/07
Respondent,

-against-

Dwineu Monroe,
Defendant-Appellant.

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

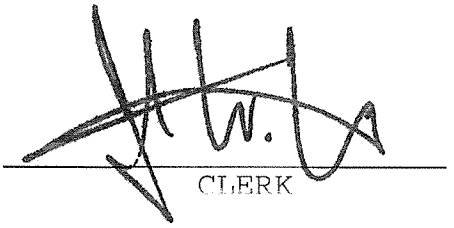
Robert M. Morgenthau, District Attorney, New York (David M. Cohn of counsel), for respondent.

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered October 25, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of 1½ years, unanimously affirmed.

The imposition of mandatory surcharges and fees by way of court documents, but without mention of the specific amount in the court's oral pronouncement of sentence, was lawful (*People v Guerrero*, __ NY3d __, 2009 NY Slip Op 01242).

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

ENTERED: MARCH 12, 2009



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Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4741 The People of the State of New York, Ind. 6382/05
Respondent,

-against-

Milton Velez,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered September 7, 2006, as amended September 20, 2006, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and attempted criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 6 years, unanimously affirmed.

The imposition of mandatory surcharges and fees by way of court documents, but without mention of the specific amount in the court's oral pronouncement of sentence, was lawful (*People v Guerrero*, __ NY3d __, 2009 NY Slip Op 01242).

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

ENTERED: MARCH 12, 2009

CLERK

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4834 The People of the State of New York, Ind. 62833C/04
Respondent,

-against-

Ciro Abreu,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Dana Levin of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Lawrence H. Bernstein, J.), rendered October 17, 2005, convicting defendant, upon his plea of guilty, of six counts of robbery in the first degree, and sentencing him to an aggregate term of 6 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 01242).

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

ENTERED: MARCH 12, 2009

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

4957 Reeva Potoff, Index 106265/06
Plaintiff-Respondent,

-against-

Chubb Indemnity Insurance Company,
Defendant-Appellant.

Tell, Cheser & Breitbart, Garden City (Kenneth R. Feit of counsel), for appellant.

Abraham, Lerner & Arnold, LLP, New York (Johnathan C. Lerner of counsel), for respondent.

Order, Supreme Court, New York County (Martin Shulman, J.), entered May 29, 2008, which denied defendant's motion for summary judgment and granted plaintiff's cross motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

When interpreting an insurance clause, it is for the court to determine the parties' rights and obligations based on the specific language of the policy (*see Newin Corp. v Hartford Acc. & Indem. Co.*, 62 NY2d 916, 919 [1984]). In a named-peril policy such as the one at bar, the insured "bears the initial burden of showing that the insurance contract covers the loss," i.e., that the loss resulted from a covered peril (*Roundabout Theatre Co. v Continental Cas. Co.*, 302 AD2d 1, 6 [2002]). Here, the policy covered "accidental discharge or overflow from within a plumbing . . . system" and "damage caused by water . . . which backs up

from within . . . drains." Plaintiff established that "the proximate, efficient and dominant cause" (*Album Realty Corp. v American Home Assur. Co.*, 80 NY2d 1008, 1010 [1992]) of the damage to her property was the clogged roof drain, which overflowed and sent water leaking into her apartment. The reasonable person would attribute this backup to a plastic bag that clogged the drain, as evidenced by the fact that the water began to clear from the roof almost immediately after the fire department removed the obstruction.

Defendant argues that plaintiff's apartment was damaged not by water emanating "from within" the drain, but rather from rainwater on the roof that seeped or leaked into the building. We reject that view of the evidence.

We have considered defendant's other arguments and find them unavailing as well.

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

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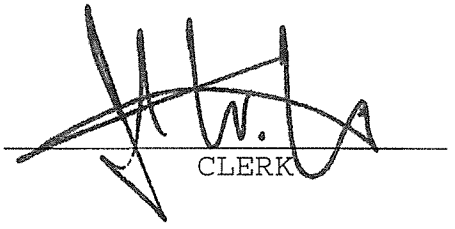

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5258-
5259-
5260 The People of the State of New York, Ind. 1247/06
Respondent,

-against-

James Bennett,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 15, 2007, as amended October 30, 2007, and as further amended July 29, 2008, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him to a term of 7 years, unanimously reversed, on the law, the plea vacated, the full indictment reinstated, and the matter remanded for further proceedings.

Before defendant pleaded guilty, the prosecutor asserted that defendant was a second felony offender based on a New Jersey conviction. Defense counsel did not challenge that assertion, and following defendant's guilty plea he was sentenced, as a second felony offender, to a term of seven years with five years' postrelease supervision. Subsequently, by way of a CPL 440.20 motion to set aside sentence, defendant established that his New

Jersey conviction did not qualify as a New York felony. At his ultimate resentencing, defendant moved to withdraw his plea as involuntary, claiming he had been misinformed as to his status and potential sentencing exposure. The resentencing court denied the motion, and imposed the same prison term as originally imposed, but this time with a PRS period of three years.

The plea withdrawal motion should have been granted. While defendant's ultimate sentence was actually less (with regard to PRS) than the one he bargained for, "[a]t the time defendant pleaded guilty, [h]e did not possess all the information necessary for an informed choice among different possible courses of action... Accordingly, defendant's decision to plead guilty cannot be said to have been knowing, voluntary and intelligent." (*People v Van Deusen*, 7 NY3d 744, 746 [2006]). To the extent the People are arguing that defendant would have still have accepted a disposition involving a seven-year prison term had he known he was only a first felony offender, that argument is speculative.

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

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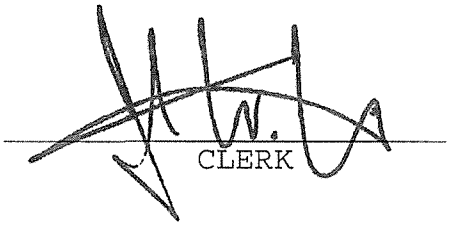

Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5372 Ruth Delores Smith, as Administratrix of the Estate of Doris H. Jackson,
Plaintiff-Respondent,

-against-

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

John Doe, M.D.,
Defendant.

Index 24520/00

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for appellants.

William T. Martin, Brooklyn, for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered September 18, 2007 which denied so much of defendants-appellants' motion to dismiss the complaint for lack of prosecution, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

This action for wrongful death, medical malpractice and medical negligence was commenced in 2000. In October 2004, defendants served a 90-day notice (CPLR 3216[b][3]) demanding that plaintiff resume prosecution, complete discovery and file a note of issue. Plaintiff acknowledges "technically" having failed to respond to this notice and instead serving discovery demands upon defendants in July 2005, thereafter attempting to commence settlement negotiations. Defendants served their motion

to dismiss in August 2007.

CPLR 3216(e) permits a court to dismiss an action for want of prosecution after the defendants have served the plaintiff with an unheeded 90-day notice, absent a showing of justifiable excuse for the delay and a good and meritorious cause of action. Since the notice was properly served and plaintiff never explained her delay or demonstrated merit in the form of a detailed affidavit from a medical expert, the court's refusal to dismiss was an improvident exercise of discretion (*see Mosberg v Elahi*, 80 NY2d 941 [1992]; *Ramos v Lapommeray*, 135 AD2d 439 [1987]). The certificate of merit filed by plaintiff's counsel in October 2000 was not a valid substitute for a medical expert's affidavit (*see Jackson v Bronx County Lebanon Hosp. Ctr.*, 7 AD3d 356 [2004]).

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

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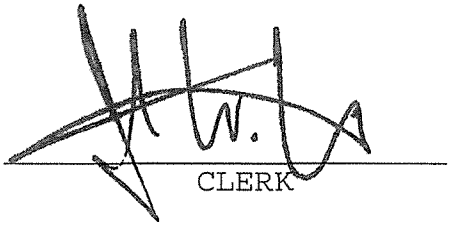

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Andrias, J.P., Saxe, Acosta, Renwick, JJ.

39 The People of the State of New York, Ind. 5233/05
Respondent,

-against-

Eville Vargas,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Amory W. Donelly of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered August 2, 2007, convicting defendant, after a jury trial, of two counts of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 25 years to life, unanimously affirmed.

The court properly exercised its discretion in admitting evidence that, following an unspecified 911 call, defendant was arrested at a store in Brooklyn with an air pistol in his waistband that resembled the weapon used in the two store robberies of which defendant was convicted. Defendant argues that the testimony should have been limited to defendant having been "located with a fake gun," and that the additional details were unduly prejudicial. However, these limited details were relevant to complete the narrative by explaining how the air

pistol came into the People's possession and how defendant came to be placed in a lineup and arrested for the charged crimes (*see People v Till*, 87 NY2d 835 [1995]; *People v Ashley*, 296 AD2d 339, 340 [2002], *lv denied* 99 NY2d 533 [2002]). This testimony did not imply that defendant had also robbed the Brooklyn store, and the court's thorough limiting instruction minimized any prejudicial effect.

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

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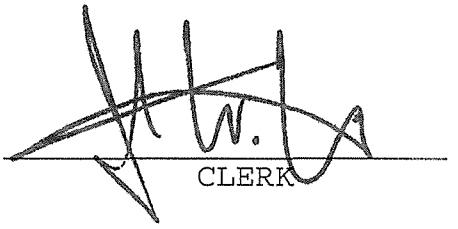


Andrias, J.P., Saxe, Acosta, Renwick, JJ.

40 17 East 96th Owners Corp., Index 108695/04
Plaintiff-Appellant,

-against-

Madison 96th Associates, LLC,
Defendant-Respondent.

[And a Third-Party Action]

- - - - -

Madison 96th Associates, LLC,
Second Third-Party Plaintiff,

-against-

Marson Contracting Co., Inc.,
Second Third-Party Defendant-Respondent.

[And a Third Third-Party Action]

Charles E. Boulbol, New York, for appellant.

Schoeman, Updike & Kaufman, LLP, New York (Jeremy M. Weintraub and Charles B. Updike of counsel), for Madison 96th Associates, LLC, respondent.

Torre, Lentz, Gamell, Gary & Rittmaster, LLP, Jericho (Robert Mark Wasko of counsel), for Marson Contracting Co., Inc., respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered October 24, 2007, which, insofar as appealed from, in this action arising out of an alleged trespass upon certain property, denied plaintiff's motion for leave to amend the complaint to add 21 East 96th Street Condominium (Condominium) as a defendant and to assert a trespass cause of action against Condominium and defendant Madison 96th Associates, LLC,

unanimously reversed, on the law, with costs, and the motion granted.

The motion to amend should have been granted as plaintiff satisfied the three prongs of the relation-back doctrine (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]). The allegations set forth in the first amended complaint and the proposed second amended complaint are virtually identical except that the latter pleading also makes reference to a certain land survey that found that the foundation of defendant's new condominium building encroaches over plaintiff's 100-foot long property line by approximately five inches, asserting that such encroachment constitutes unlawful entry onto plaintiff's property. We disagree with the motion court's conclusion that the discovery, after the service of the first amended complaint, that defendant's underground foundation wall encroaches several inches beyond the common boundary line constitutes a new and distinct claim from the trespass claims previously asserted because it is arises out of a different encroachment.

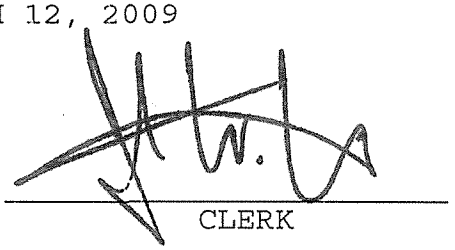
Although the first amended complaint did not expressly refer to the underground foundation wall, it did not limit defendant's purported encroachment to the installation of underpinning but included "other encroaching subsurface structures." Thus, the language in the first amended complaint, which envisioned the possibility of other subsurface structures, was sufficiently

broad to encompass the encroachment subsequently discovered through the land survey. The proposed new pleading does not, therefore, assert a new and distinct claim but, instead, is based upon the same conduct, transaction or occurrence as that asserted in the first amended complaint (*see* CPLR 203[f]).

Furthermore, since the proposed new defendant, Condominium, which now owns the building, is the successor-in-interest to the sponsor, Madison 96th Associates, LLC, and not merely an unrelated party with no notice of the subject litigation, plaintiff should also have been permitted to add Condominium as a defendant.

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

ENTERED: MARCH 12, 2009



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Andrias, J.P., Saxe, Acosta, Renwick, JJ.

41-
41A Estate of James Brown, et al., Index 602593/06
Plaintiffs-Respondents,

-against-

The Pullman Group,
Defendant-Appellant.

Frankel & Abrams, New York (Stuart E. Abrams of counsel), for appellant.

Hogan & Hartson LLP, Washington, DC (Matthew T. Ballenger, of the District of Columbia Bar, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered April 14, 2008, which granted plaintiffs' motion to dismiss defendant's counterclaim for breach of an engagement letter and declared moot the counterclaim that plaintiffs' proposed transaction with a third party would have been a breach if consummated, and order, same court and Justice, entered July 25, 2008, which denied defendant's motion to renew and amend its counterclaims, unanimously affirmed, with costs.

The court properly accorded the unambiguous engagement letter its plain and ordinary meaning (*see Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 521 [1996]; *Fingerlakes Chiropractic v Maggio*, 269 AD2d 790, 792 [2000]) in interpreting its ¶ 7 as applying only to consummated transactions, sales and financing, and not prohibiting plaintiffs from negotiating on

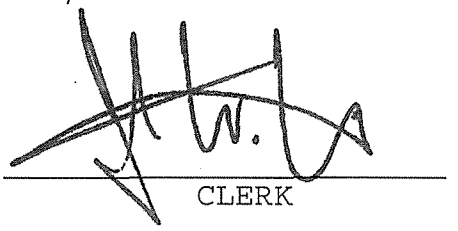
their own for refinancing. It is unnecessary to determine whether the rule governing a broker's exclusive right of sale would be applicable to the relationship between the parties; defendant's claim for breach of contract was properly rejected because it not only did nothing to procure plaintiffs' proposed loan with a third party, but frustrated that deal by sending a threatening letter (*see Ellenberg Morgan Corp. v Hard Rock Café Assoc.*, 116 AD2d 266, 271 [1986]). The counterclaim for declaratory relief did not present a justiciable controversy (*see American Std., Inc. v Oakfabco, Inc.*, 2009 NY Slip Op 121), inasmuch as plaintiffs' proposed loan from a third party did not go forward, and was not about to do so (*cf. Buller v Goldberg*, 40 AD3d 333 [2007]).

Denial of renewal was proper because this evidence was available at the time of the initial motion, and the failure to submit it was unexplained (*see Matter of Beiny*, 132 AD2d 190, 210 [1987], *lv dismissed* 71 NY2d 994 [1988]). In any event, the purportedly new evidence would not have altered the initial determination (*see NYCTL 1999-1 Trust v 114 Tenth Ave. Assoc., Inc.*, 44 AD3d 576 [2007], *appeal dismissed* 10 NY3d 757 [2008], *cert denied* __ US __, 129 S Ct 458 [2008]). Leave to amend was properly denied since the counterclaims had already been dismissed. We further note that the proposed amendment was

unsupported by an affidavit of merit (*see Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404 [2006]) or a verified pleading (CPLR 105[u]).

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

ENTERED: MARCH 12, 2009



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Andrias, J.P., Saxe, Acosta, Renwick, JJ.

42 In re Ronald Anthony G. III,

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

Ronald G.,
Respondent-Appellant,

Samantha J.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Anne Reiniger, New York, for appellant.

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

Karen Freedman, Lawyers for Children, Inc., New York (Michael D. Scherz of counsel), Law Guardian.

Appeal from order, Family Court, New York County (Susan K. Knipps, J.), entered on or about April 23, 2008, which, in a child neglect proceeding, upon respondent-appellant parent's failure to submit papers in opposition to petitioner ACS's motion pursuant to Family Court Act § 1039-b(b)(6) for a finding that reasonable efforts to return the child to his home are not required, reserved decision on the motion in order to afford appellant an opportunity to submit evidence in support of his position that a hearing on reasonable efforts is required, unanimously dismissed, without costs.

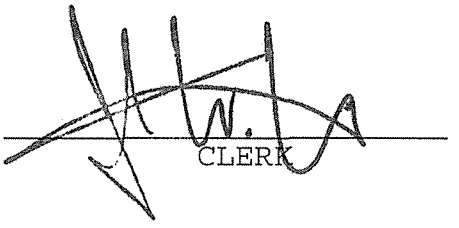
In opposition to the motion, which was based on the

existence of judgments involuntarily terminating respondents' parental rights to other of their children, appellant submitted no evidence but simply argued that due process necessarily required a hearing. The order on appeal, however, makes no ruling one way or the other as to whether there will be a hearing. While the order does determine that the judgments terminating parental rights satisfied petitioner's initial burden on the motion, and that the burden was thereby placed on respondents to come forward with evidence raising issues of fact bearing on the other inquires to be made on a section 1039-b(b)(6) motion -- whether providing reasonable efforts would be in the child's best interests, not contrary to the child's health and safety, and likely to result in reunification of parent and child in the foreseeable future -- the order makes no findings of fact. Instead, it affords appellant and his co-respondent an additional opportunity to submit evidence pertinent to these other inquiries, and sets a briefing schedule and a new return date. To the extent the order reserves decision on the motion, it is not appealable as of right (CPLR 5701[a][2]; *see Granato v Granato*, 51 AD3d 589, 590 [2008]); to the extent the order

imposes a burden on appellant to come forward with evidence, at this juncture, absent a finding dispensing with reasonable efforts, appellant is not aggrieved thereby (CPLR 5511).

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

ENTERED: MARCH 12, 2009



Andrias, J.P., Saxe, Acosta, Renwick, JJ.

44-
44A-
44B-
44C-
44D-
44E-
44F

American International Group, Inc.,
Plaintiff-Respondent,

-against-

Maurice R. Greenberg, et al.,
Defendants-Appellants.

Index 600885/08

Boies, Schiller & Flexner LLP, New York (Christopher E. Duffy of counsel), for Maurice R. Greenberg, appellant.

Winston & Strawn LLP, New York (Vincent A. Sama of counsel), for Howard I. Smith of counsel), for Howard I. Smith, appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (John L. Gardiner of counsel), for Edward E. Matthews, appellant.

Sercarz & Riopelle, LLP, New York (Roland G. Riopelle of counsel), for Ernest E. Stempel, appellant.

Flemming Zulack Williamson Zauderer LLP, New York (Jonathan D. Lupkin of counsel), for L. Michael Murphy, appellant.

Law Offices of Alan S. Futerfas, New York (Alan S. Futerfas of counsel), for John J. Roberts, appellant.

O'Shea Partners LLP, New York (Sean F. O'Shea of counsel), for Houghton Freeman, appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Robert A. Atkins of counsel), for respondent.

Orders, Supreme Court, New York County (Charles E. Ramos, J.), all seven of which were entered November 14, 2008, which, to the extent appealed from, denied defendants' motions for a stay of proceedings, unanimously affirmed, with costs.

The motion court properly declined to grant a stay of proceedings pending resolution of a related action in federal

court (*see* CPLR 2201; *952 Assoc., LLC v Palmer*, 52 AD3d 236, 236-237 [2008]; *Mt. McKinley Ins. Co. v Corning Inc.*, 33 AD3d 51, 58-59 [2006]). Defendants are former executives and/or directors of plaintiff American International Group, Inc. (AIG), the defendant in the federal action; they are current and/or former directors and/or voting shareholders of the plaintiff in the federal action, Starr International Co., Inc. (SICO). In the federal action, AIG asserted counterclaims against SICO arising out of SICO's alleged obligations to AIG in connection with certain stock. AIG's allegations herein arise out of defendants' alleged independent fiduciary duties to AIG by virtue of their express pledges to preserve the value of said stock. A finding as to SICO's duty to AIG would not affect defendants' potential liability as independent fiduciaries of AIG and would not dispose of or significantly limit the issues involved in this action or pose a risk of inconsistent rulings (*see Belopolsky v Renew Data Corp.*, 41 AD3d 322 [2007]); *Asher v Abbott Labs.*, 307 AD2d 211 [2003]).

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

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

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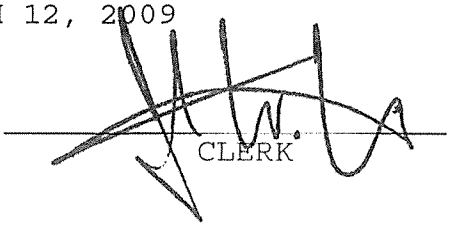


Andrias, J.P., Saxe, Acosta, Renwick, JJ.

45-
46 The People of the State of New York, Ind. 5098/03
Respondent,

-against-

Nathaniel Cherry,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Karen M. Kalikow of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Eduardo Padro, J.), entered on or about February 15, 2007, which adjudicated defendant a level three offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to a level three sex offender adjudication. There was clear and convincing evidence of factors, not adequately accounted for in the risk assessment instrument, demonstrating that defendant has a high risk of reoffending (*see e.g. People v O'Flaherty*, 23 AD3d 237 [2005], *lv denied* 6 NY3d 705 [2006]).

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

ENTERED: MARCH 12, 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 12, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
David B. Saxe
Rolando T. Acosta
Dianne E. Renwick, Justices.

The People of the State of New York, Ind. 3687/05
Respondent,

-against- 47

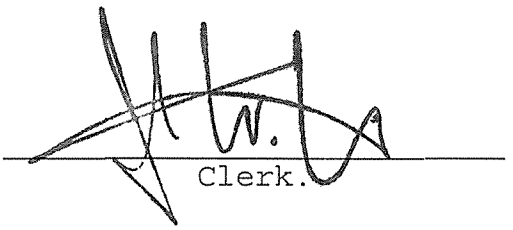
Carlos Duran de la Rosa,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael R. Ambrecht, J.), rendered on or about June 28, 2006,

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

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

ENTER:



Clerk.

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

Andrias, J.P., Saxe, Acosta, Renwick, JJ.

49 The People of the State of New York, Ind. 6623/05
Respondent,

-against-

Arayind Johnson,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered December 13, 2006, convicting defendant, after a jury trial, of three counts of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 3½ to 7 years, unanimously affirmed.

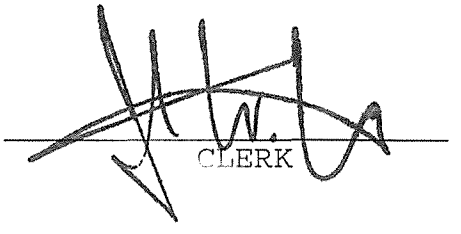
The court properly denied defendant's severance motion. The motion, made as jury selection was about to commence, was untimely, and defendant failed to show good cause for his failure to make a timely motion, or good cause for the trial court to nevertheless entertain the motion in the exercise of its discretion (CPL 255.10[1][g]; 255.20[1],[3]). Although defense counsel claimed to have learned of the codefendant's planned defense at the last minute, he offered no explanation for his failure to ascertain that information earlier, and the record

indicates he was in a position to do so well before trial (*see e.g. People v Funches*, 4 AD3d 206, 207 [2004]; *lv denied* 3 NY3d 640 [2004]). The motion also lacked merit because the defenses of defendant and his codefendant were not so irreconcilable as to require severance (*see People v Mahboubian*, 74 NY2d 174, 183-184 [1989]). The core of both defenses was lack of knowledge that the credit cards at issue were fraudulent, and there was no significant inconsistency between the codefendant's arguments and defendant's own defense. Furthermore, during the trial the codefendant's attorney did not act as a "second prosecutor" (*People v Cardwell*, 78 NY2d 996, 998 [1991]), or otherwise cause defendant any prejudice (*see People v Peisahkman*, 29 AD3d 352 [2006]).

Defendant did not preserve his constitutional argument concerning the denial of his severance motion, or his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: MARCH 12, 2009



Andrias, J.P., Saxe, Acosta, Renwick, JJ.

50 Jacques Sebag, Index 105104/07
Plaintiff-Appellant,

-against-

Carlos Narvaez,
Defendant-Respondent.

Jacques Sebag, appellant pro se.

Green & Cohen, P.C., New York (Michael R. Cohen of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 1, 2008, which, after a nonjury trial, dismissed the complaint, unanimously dismissed, without costs, for failure to perfect the appeal in accordance with the CPLR and the rules of this Court.

An appellant is obliged to assemble a proper record on appeal including the transcript, if any, of the proceedings (*see* CPLR 5526; Rules of App Div, 1st Dept [22 NYCRR] § 600.5). The pro se appellant's failure to include the trial transcript in the record before us renders meaningful appellate review of this matter impossible (*see Allstate Ins. Co. v Vargas*, 288 AD2d 309, 310 [2001]).

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

ENTERED: MARCH 12, 2009

CLERK

Andrias, J.P., Saxe, Acosta, Renwick, JJ.

51 The People of the State of New York, Ind. 1820/06
Respondent,

-against-

Major Harden,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

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

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about October 22, 2007, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three adjudication. The risk factor for deviant sexual intercourse was established by grand jury testimony that was corroborated by a laboratory report. We conclude that this evidence was sufficiently reliable to meet the clear and convincing standard notwithstanding the presence of some inconsistencies. The court also properly assessed points under the factor for drug abuse based on defendant's own

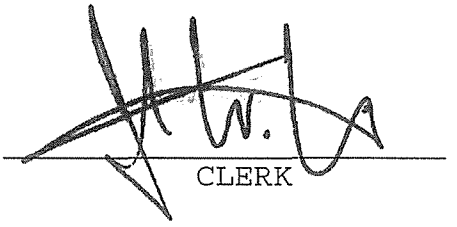
admission, coupled with his criminal history (*see People v Reyes*, 48 AD3d 267 [2008]), and assessed an appropriate number of points under the factor for lack of supervised release, although this was a matter beyond defendant's control (*see People v Lewis*, 37 AD3d 689, 690 [2007], *lv denied* 8 NY3d 814 [2007]).

M-455 - *People v Major Harden*

Motion seeking leave to strike portions of brief denied.

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

ENTERED: MARCH 12, 2009



Andrias, J.P., Saxe, Acosta, Renwick, JJ.

52 Ernest E. Pascucci, etc., et al., Index 111990/99
Plaintiffs-Appellants,

-against-

Agnes Wilke, M.D.,
Defendant-Respondent.

Arnold E. DiJoseph, III, New York, for appellants.

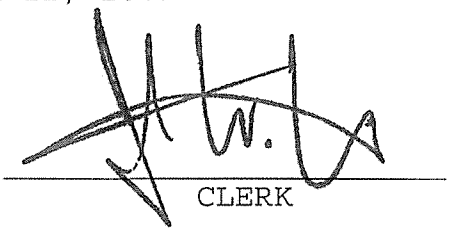
Callan, Koster, Brady & Brennan, LLP, New York (Michael P. Kandler of counsel), for respondent.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered July 24, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's failure to submit the clinical psychologist's opinion in admissible form left him with no admissible medical opinion evidence to rebut defendant's prima facie showing that she did not commit malpractice in treating the decedent (*see* CPLR 2106; *Sanchez v Romano*, 292 AD2d 202, 203 [2002]).

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

ENTERED: MARCH 12, 2009



CLERK

Andrias, J.P., Saxe, Acosta, Renwick, JJ.

56 Nkiambi Jean Lema, Index 104980/04
Plaintiff-Appellant,

-against-

The Bank of New York,
Defendant-Respondent,

Cassa Di Risparmio Di Dadova E. Rovigo,
Defendant.

Nkiambi Jean Lema, appellant pro se.

Saiber LLC, New York (Rina G. Tamburro of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered January 23, 2008, which granted the motion of defendant Bank of New York (BNY) for summary judgment dismissing the complaint against it, and sua sponte dismissed the complaint against defendant Cassa, unanimously affirmed, without costs.

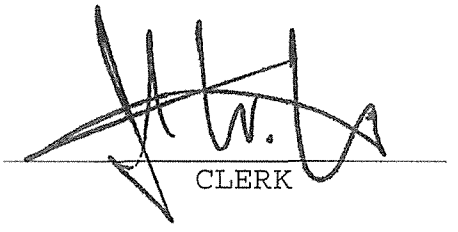
A thief known to plaintiff intercepted an unendorsed check drawn by Cassa on its account at BNY. The drawee then paid on the unendorsed check, which the thief earmarked for a corporate account (LemaCo) held by plaintiff at Bank of America (BOA). As plaintiff had no direct rights in connection with the Cassa check, any viable claim against BNY could not be founded on the terms of the check, but rather upon BNY's alleged mistakes in handling both its deposit and collection.

Title 4 of the Maryland Commercial Law governs bank deposits and collections. Section 4-111 provides that "An action to enforce an obligation, duty, or right arising under this title must be commenced within 3 years after the cause of action accrues." As the IAS court correctly found, plaintiff's injury accrued, at the latest, on February 22, 2000, when BOA notified him that it had debited his corporate account in the amount of $60,000. Plaintiff's commencement of the instant action more than three years later, in March 2004, was untimely under § 4-111. Maryland law was appropriately applied since that was the state where plaintiff resided, where LemaCo was located, and where the cause of action accrued when LemaCo's account at a BOA branch was debited and plaintiff was notified of such debit by mail at his residence (CPLR 202; *Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525 [1999]).

We have considered plaintiff's remaining arguments and find them without merit.

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

ENTERED: MARCH 12, 2009



Andrias, J.P., Saxe, Acosta, Renwick, JJ.

57 MapleWood Equity Partners, L.P., et al., Plaintiffs-Appellants, Index 111690/07

-against-

Casita, L.P., et al., Defendants-Respondents.

Stevens & Lee, P.C., New York (Chester B. Salomon of counsel), for appellants.

Butzel Long, P.C., New York (Martin E. Karlinsky of counsel), for Casita, L.P., respondent.

Gibson, Dunn & Crutcher LLP, New York (Mitchell A. Karlan of counsel), for Eagle Advisors, Inc., David Alexander and Ekkehart Hassels-Weiler, respondents.

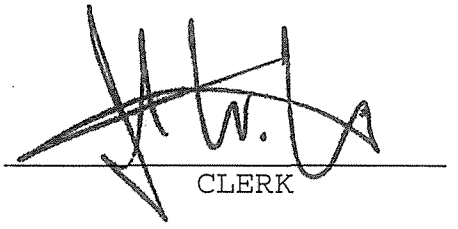
Order, Supreme Court, New York County (Helen E. Freedman, J.), entered January 2, 2008, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

This action, filed approximately 20 months after the publication of the allegedly defamatory statements, is barred by the one-year statute of limitations (CPLR 215[3]), and there was no basis for tolling the statute (*see Shared Communications Servs. of ESR, Inc. v Goldman, Sachs & Co.*, 38 AD3d 325 [2007]). In any event, these statements were either privileged under Civil Rights Law § 74 (*see Freeze Right Refrig. & A.C. Servs. v City of New York*, 101 AD2d 175 [1984]), subject to a qualified privilege (*see Foster v Churchill*, 87 NY2d 744, 751 [1996]), protected as

pure opinion (*see Milkovich v Lorain Journal Co.*, 497 US 1, 17-21 [1990]), or not pleaded with sufficient particularity (*see Murganti v Weber*, 248 AD2d 208 [1998]).

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

ENTERED: MARCH 12, 2009



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Andrias, J.P., Saxe, Acosta, Renwick, JJ.

58N-
58NA Casita, LP, Index 603525/05
Plaintiff-Respondent, 600966/06

-against-

Maplewood Equity Partners (Offshore) Ltd.,
Defendant-Appellant.

[And Another Action]

Stevens & Lee, P.C., New York (Chester B. Salomon of counsel), for appellant.

Katten Muchin Rosenman LLP, New York (Martin E. Karlinsky of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered January 4, 2008, which granted plaintiff's cross motion for a preliminary injunction enjoining defendant from declaring or holding plaintiff in default under the parties' Articles of Association and Subscription Agreement, or acting upon any default by plaintiff, as a consequence of plaintiff's refusal to fund certain capital calls, and order, same court and Justice, entered July 3, 2008, which, insofar as appealed from, as limited by the brief, granted plaintiff's cross motion to dismiss defendant's counterclaims based on two of the capital calls, unanimously affirmed, with costs.

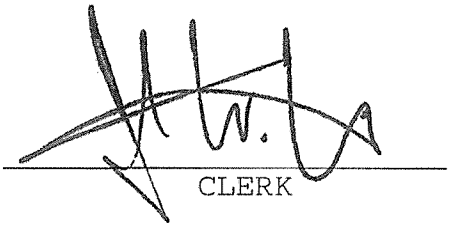
The court providently exercised its discretion in granting plaintiff's application for preliminary injunctive relief upon its clear showing of a likelihood of success on the merits of its

claim that defendant's calls for capital contributions (capital calls) were not authorized under the controlling Articles of Association and Subscription Agreement, that plaintiff would suffer irreparable injury unless the relief sought was granted, and that the balancing of the equities lies in favor of plaintiff (*see W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]). The record evidence establishes that defendant's capital calls for litigation expenses and for "Follow-on Investments" were untimely, causing the potential for plaintiff's default and the loss of plaintiff's voting power and decision-making rights appurtenant to its shares.

Since the documentary evidence conclusively establishes that the capital calls issued for Follow-on Investments were untimely, the court properly granted plaintiff's cross motion to dismiss defendant's counterclaims for breach of contract and for a declaratory judgment that it was entitled to issue those capital calls.

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

ENTERED: MARCH 12, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Rolando T. Acosta
Dianne T. Renwick, JJ.

54
Ind. 89/06

The People of the State of New York,
Respondent,

-against-

Jonathan Casanova,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered October 25, 2007, convicting him, after a jury trial, of attempted murder in the second degree, assault in the first degree and criminal use of a firearm in the first degree, and imposing sentence.

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

Robert M. Morgenthau, District Attorney, New York (Mark Dwyer of counsel), for respondent.

SAXE, J.

In this appeal, defendant argues that his conviction of attempted murder in the second degree and related charges must be reversed because in the course of jury selection, the trial court, *without objection*, employed a preselection screening procedure in which it allowed any panel members who concluded that they would have scheduling problems to opt out of being considered for service on this case. Defendant argues that this procedure represented an abdication by the court of its judicial function, thereby violating his constitutional as well as statutory rights, necessitating reversal despite his failure to object.

The complainant, livery cab driver Mamadou Bah, was standing by the door of his cab, arguing with the two passengers he had just dropped off because they did not have the $15 fare, when four young men walked toward the cab. One, described by witnesses as in his early 20s, about six-feet one-inch tall, wearing his hair in "braids" or "twists," grabbed Bah from behind, pressed a gun to the side of his head, threatened to kill him, demanded money, and then forced Bah into the cab. Another of the men, wearing a blue cast, entered the front of the cab on the passenger's side and removed $212 from Bah's right pocket. Bah cursed the man holding him, who responded by pointing his gun

at Bah and pulling the trigger. Although the gun "clicked," it did not fire. The man walked a few steps away and adjusted the weapon, then returned to Bah, pointed the gun at him, and shot him in the face. The four men then walked away.

The bullet shot passed in one of Bah's cheeks and out the other. Bah, bleeding profusely, managed to drive to a nearby precinct, from where he was taken to a hospital.

Defendant was identified by eyewitnesses as the shooter. Another witness testified that one night defendant had come into her apartment where he'd been staying, "kind of shaken up and tired" and out of breath, and told a story about how he shot and robbed a cab driver, in which he specified that he had shot the cabbie in the face, and that the gun had jammed once before he fired it successfully. The witness also testified that after wanted posters appeared in the area, defendant shaved off his hair.

Defendant was acquitted of robbery in the first degree, but was convicted of attempted murder in the second degree, assault in the first degree and one count of criminal use of a firearm in the first degree.

The trial court employed a somewhat unorthodox preselection screening process in the belief that jury service on a two-week attempted murder trial during the latter part of August would be

likely to present scheduling problems for an unusually large number of potential jurors due to school schedules, vacation plans or work requirements. Rather than employing the usual preliminary process in which the court typically engages, by which individual panel members come up to the bench one at a time and the court listens to a long series of explanations of why serving as a juror on that case at that time would pose a hardship for each one, the court attempted to streamline the process. After informing the panel of the nature of the matter and the time it was expected to take, and answering panel members' questions, the court announced that any panel member who had such a scheduling problem would simply be excused from serving on this case, and should report back to the central jury room.

Defendant contends that by excusing all potential jurors who believed their schedules or other personal issues would not allow them to serve on a case of this length or of this seriousness, instead of rendering individual determinations as to juror hardship, the court abdicated its judicial function, thereby violating his constitutional and statutory rights to a jury selected in accordance with the law.

However, the issue was not preserved for appellate review. Not only did defendant fail to object to the jury selection screening procedure employed by the trial court, but the record creates the impression that the procedure was discussed and agreed upon beforehand, even though there was no affirmative agreement on the record regarding the procedure. In particular, the court told a jury panel, without correction or objection, that "the parties recognize" that it wouldn't make sense to keep panel members through the voir dire process if scheduling problems would make service on the case too difficult.

The rule of preservation is not a mere formality; the requirement of a timely objection to a procedure at the trial level ensures that "errors of law which might otherwise necessitate retrial can be avoided or promptly cured" (*see People v Martin*, 50 NY2d 1029, 1031 [1980]). By failing to object to the pre-screening selection procedure, defendant left the trial court without the opportunity to consider the arguments raised here. The argument must therefore be precluded as unpreserved; moreover, exercise of our interest of justice jurisdiction is not warranted (*see People v Solares*, 309 AD2d 502 [2003], *lv denied* 1 NY3d 581 [2003]; *People v Boozer*, 298 AD2d 261 [2002], *lv denied* 99 NY2d 555 [2002]; *People v Coleman*, 262 AD2d 219 [1999], *lv denied* 94 NY2d 798 [1994]).

Defendant contends that the failure to object is of no consequence, since the trial court's pre-screening procedure was the type of error that is so fundamental that preservation is not required. It is true that there are "certain errors [that] need not be preserved" (*People v Ahmed*, 66 NY2d 307, 310 [1985]). "[S]uch errors have been classified as those 'that would affect the organization of the court or the mode of proceedings prescribed by law'" (*id.*, quoting *People v Patterson*, 39 NY2d 288, 295 [1976], *affd sub nom. Patterson v New York*, 432 US 197 [1977]; *see also People v Mehmedi*, 69 NY2d 759, 760 [1987]). It is noteworthy, however, that the Court of Appeals has recently emphasized that "mode of proceedings" errors exempt from the preservation requirement should be treated as a "very narrow category" (*see People v Kelly*, 5 NY3d 116, 119 [2005]).

The *Ahmed* decision (66 NY2d at 310) presents a thorough list of trial errors that have been held to fall within this exception to the preservation requirement: trial before fewer than 12 jurors in a criminal case (*Cancemi v People*, 18 NY 128, 137 [1858]); trial before a court not of competent jurisdiction (*People v Bradner*, 107 NY 1 [1887]); trial for an 'infamous

crime' upon an information rather than by indictment (*People ex rel. Battista v Christian*, 249 NY 314 [1928]); a court's comment on the defendant's failure to testify (*People v McLucas*, 15 NY2d 167 [1965]); an improper instruction on the burden of persuasion (*People v Patterson*, 39 NY2d at 295-296); violation of the right to counsel (*People v Kinchen*, 60 NY2d 772 [1983]); and violation of the ban on double jeopardy (*People v Michael*, 48 NY2d 1 [1979]).

In *People v Ahmed*, the Court of Appeals viewed as a "mode of proceedings" error a situation in which the trial judge absented himself from the courtroom and allowed his law secretary to reread jury instructions to the jury in response to its questions. The Court concluded that the defendant's failure to object -- indeed, the defense's affirmative consent to the procedure -- did not preclude consideration of the propriety of the procedure, since the Constitution guarantees a right to a proper trial by jury, and "the presence and active supervision of a judge constitute[s] an integral component of the common-law right" (66 NY2d at 312, citing *Capital Traction Co. v Hof*, 174 US 1, 13 [1899]). Because "by delegating his function, at least in part, to his law secretary, the trial judge deprived the defendant of his right to a trial by jury" (*id.*), the *Ahmed* Court reversed the defendant's conviction and ordered a new trial.

We conclude that the procedure at issue in the present case does not fit within the "mode of proceedings" exception to the preservation requirement. Defendant's constitutional right to a jury trial was not impaired; at most, what was violated here was a statutorily prescribed jury selection procedure. Moreover, the applicable statutes, rules and case law give the trial court discretion on the matter of excusing jurors (*see* Judiciary Law § 517[b]; 22 NYCRR 128.6-a; *People v Boozer*, 298 AD2d at 261; *People v Coleman*, 262 AD2d at 220; *People v Olmo*, 260 AD2d 410 [1999], *lv denied* 93 NY2d 975 [1999]). While the foregoing cases considered circumstances in which some degree of individual inquiry was made of jurors, they reflect that the preliminary excusing of potential jurors, even without the consent or input of counsel, need not be viewed as impairing a defendant's constitutional right to trial by jury.

Finally, regarding defendant's contention that the court erred in permitting the prosecutor to elicit testimony that judges determine the fairness of lineups in pretrial proceedings, it is unpreserved; in any event, any such error would be harmless in view of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

Accordingly, the judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered October 25, 2007, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree and criminal use of a firearm in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 20 years, should be affirmed.

All concur.

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

ENTERED: MARCH 12, 2009