SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 17, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

5283 Lawrence P. Berlinger, Index 113433/05
Plaintiff-Respondent,

-against-

Ronald B. Kraft, et al.,
Defendants-Appellants,

John C. McCabe, et al.,
Defendants.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for Ronald B. Kraft, Cornell Medical Associates and Cornell University, appellants.

Peltz & Walker, New York (Bhalinder L. Rikhye of counsel), for Scott Gerst and Lenox Hill Radiology and Medical Imaging Associates, P.C., appellants.

Toberoff, Tessler & Schochet, LLP, New York (Brian Schochet of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered May 20, 2008, which, to the extent appealed from, in an action seeking damages for personal injuries arising out of purported medical malpractice, denied the motions of defendants Dr. Ronald Kraft, Cornell University, Dr. Scott Gerst and Lenox Hill Radiology and Medical Imaging Associates, P.C., for summary judgment dismissing the complaint as against them, unanimously modified on the law, to the extent of dismissing the complaint as

against Dr. Ronald Kraft and Cornell University, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff commenced this action to recover damages for personal injuries sustained in connection with the alleged unnecessary removal of two-thirds of his right lung due to a misdiagnosis of his condition. Specifically, the radiologist who interpreted a PET scan performed on plaintiff's chest found that plaintiff had a pulmonary lesion that was "most suspicious for primary lung carcinoma." However, an analysis of the lung tissue following the surgery disclosed that there was no cancer and that, as indicated by plaintiff's first CT scan, the lesion had been caused by an atypical mycobacterial infection, a condition that the radiologist admitted can look exactly like cancer.

A review of the expert affirmations submitted by the respective parties reveals that plaintiff's opposition to the motions for summary judgment submitted by the radiology defendants was sufficient to establish the existence of triable questions of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). The evidence indicates that the radiologist's reading of the PET scan may have been misleading and that the surgeon, who was unfamiliar with the test, may have unduly relied upon it in electing to perform the surgery upon plaintiff. However, for the reasons stated below, a trier of fact could not

reasonably conclude that the internist's alleged delay in referring plaintiff to a pulmonologist for a consultation was a contributing factor to the decision to perform the surgery.

Robert B. Kraft, the internist, examined plaintiff for the first time in August 2002, after he had been seen by an otolaryngologist. The latter had ordered a CT scan after plaintiff experienced a single incident of spitting blood a month earlier. The CT scan indicated that the incident of spitting blood (hemoptysis) may have been caused by an atypical mycobacterial infection. Based on that diagnosis, the radiologist who performed the CT scan recommended a follow-up CT scan in six months. At that time, plaintiff did not have any symptoms that the infection was progressing, such as fatigue or weight loss. He continued treatment with Dr. Kraft for various other unrelated conditions.

There were three follow-up visits to Dr. Kraft before plaintiff underwent the second CT scan. At the October 2002 visit, plaintiff reported feeling better and had had no recurrence of spitting blood. At the December 2002 visit, plaintiff complained of breathing difficulty, which he himself attributed to a nasal obstruction. After ascertaining that plaintiff's lungs were clear, Dr. Kraft prescribed Nasonex. At the third visit in January 2003, Plaintiff reported improvement in his breathing since he had begun taking the medication. There

were no other incidents of hemoptysis. It was on April 7, 2003, after plaintiff complained of mild shortness of breath, that Dr. Kraft ordered the repeat CT scan. Based on a radiologist's report of a mass seen on the CT scan, Dr. Kraft referred plaintiff to a pulmonologist, who ordered testing for TB, which was negative. Plaintiff then saw another pulmonologist, Mark Spero, M.D. Dr. Spero ordered the aforementioned PET scan that indicated the presence of a lesion suspicious for primary carcinoma in the right lower lobe. He then sent plaintiff to a thoracic surgeon, who recommended a biopsy. Plaintiff went to another surgeon, John McCabe, M.D., to have the biopsy performed. Dr. McCabe ended up removing a portion of plaintiff's right lung, which he claimed was necessary to reach the mass shown on the PET scan.

Dr. Kraft proffered the affidavit of Dr. Bruce F. Farber, an internist with a sub-specialty in infectious diseases, who opined that Dr. Kraft treated plaintiff in accordance with good and accepted practices. Dr. Farber averred that the proper treatment for mycobacterial infection is to monitor symptoms to determine if there is progression and repeat the CT scan after six months to determine if the condition has progressed or cleared. Based on the symptoms reported at the visits between August and April, Dr. Farber found that there was no evidence of progression of disease before April 2003, at which time Dr. Kraft did refer

plaintiff to two pulmonologists.

Plaintiff submitted the affidavit of an unnamed thoracic surgeon who opined that Dr. Kraft deviated from good and accepted practices by not referring plaintiff to a pulmonologist earlier, contending that, had such a referral been made, the pulmonologist would have performed a bronchoscopy or needle biopsy that would have determined that plaintiff suffered from a mycobacterial infection and would have prescribed appropriate antibiotics.

However, neither pulmonologist whom plaintiff did consult performed or ordered a bronchoscopy or needle biopsy and neither one prescribed or suggested prescribing an antibiotic -- despite the fact that there had already been a diagnosis of atypical mycobacterial infection, based on the August CT scan. The expert's contention that it was too late to do a bronchoscopy belies common sense if, indeed, a bronchoscopy would have been the appropriate diagnostic procedure. In any event, presumably a bronchoscopy would have furnished information that was already known. If antibiotic treatment were indicated, at least one of the pulmonologists would have prescribed or recommended it, and neither did. Even after the surgery, when a substantial amount of tissue was available for culture, if antibiotic treatment were appropriate, it would have been prescribed to contain any remaining infection. The only treatment given was a TB medication although plaintiff had not tested positive for TB, and

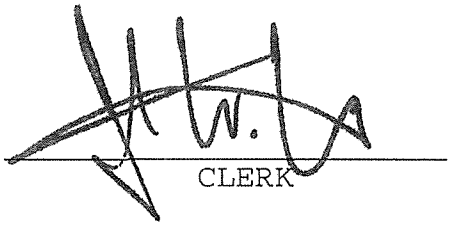
that medication was discontinued shortly thereafter. Dr. McCabe, the surgeon, who initially planned to perform a biopsy but ended up performing a partial lung resection, stated that a needle biopsy was not indicated because it might miss malignant tissue.

Since plaintiff offered no evidence that the mycobacterial infection was progressing or even present between October 2002 and January 2003 (the visit prior to April 2003), it would be pure speculation to find that an earlier referral would have prevented the allegedly unnecessary surgery *(see e.g. Brown v Bauman,* 42 AD3d 390, 392 [2007]).

Since plaintiff's claim against Cornell University is based on its vicarious liability for the acts of Dr. Kraft, the complaint should also be dismissed as against Cornell (*see Perry v Costa,* 97 AD2d 655 [1983], *affd sub nom. Perry v Inter-County Sav. Bank,* 62 NY2d 630 [1984]).

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

ENTERED: MARCH 17, 2009



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Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5355 Natalia Amaro, an infant under the age of fourteen years by her mother and natural guardian, Francisca Almazan, Plaintiffs-Respondents, Index 16023/07

-against-

Gani Realty Corporation, et al., Defendants-Appellants,

Hajdar Bajraktari, et al., Defendants.

Jeffrey F. Cohen, Bronx, for appellants.

Gorayeb & Associates, P.C., New York (Mark J. Elder of counsel), for respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered May 1, 2008, which, in an action for personal injuries allegedly caused by lead-based paint, insofar as appealed from, denied defendants landlord and managing agent's cross motion to dismiss the complaint, deemed the amended complaint and second supplemental bill of particulars timely served, and sua sponte consolidated the action with another action brought by plaintiffs against the owner of the building they moved into after moving out of defendants' building, unanimously affirmed, without costs.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts

alleged in the complaint as true and accord the plaintiffs the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d at 87). Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, the criterion being not whether the proponent of the pleading has simply stated a cause of action, but whether he or she actually has one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [motion must be denied if "from [the] four corners [of the pleading] factual allegations are discerned which taken together manifest any cause of action cognizable at law"]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114 [1998]).

Giving plaintiffs the benefit of every possible favorable inference (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]), defendants' evidence that plaintiffs were not the tenants of record, that plaintiffs' occupancy of the apartment was not known to them, and that they did not have notice that a child under seven years old was living in the apartment is rebutted by plaintiffs' evidence that, for approximately two months during the summer of 2004, they lived in the apartment

with the tenant of record, who was the adult plaintiff's sister, and the latter's two daughters, one of whom was under seven years old at the time. It thus appears that defendants had notice that at least one child under seven was living in the apartment (*see Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646 [1996]). For present purposes, the contradiction between the original complaint's allegation that plaintiffs were living in the apartment during the summer of 2003, and plaintiffs' pleadings in the other action that they were living in Chicago during the summer of 2003, was adequately explained as a typographical error or miscommunication with counsel, and, like the inconsistent statements made in the pleadings in the other action concerning plaintiffs' residence during the summer of 2004, merely raises issues of credibility for the factfinder.

The court properly permitted plaintiffs to amend the complaint and serve the second supplemental bill of particulars, dispensing with a motion for leave to amend, where there was no showing of prejudice by defendants (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [2007]), and, in opposition to defendants' cross motion to dismiss, plaintiffs submitted evidentiary proof that would have satisfied their

burden on a motion for leave. The motion court properly consolidated two actions that concern the same injuries to the same plaintiffs and involve many common issues of law and fact.

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

ENTERED: MARCH 17, 2009

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

59 The People of the State of New York, Ind. 5480/05
Respondent,

-against-

Victor Cardona,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered August 8, 2006, convicting defendant, after a jury trial, of two counts of rape in the second degree, and sentencing him to consecutive terms of 2⅓ to 7 years, unanimously affirmed.

The court properly exercised its discretion in admitting evidence that, in an incident that occurred shortly before the charged rapes, defendant showed pornographic pictures to the 13-year-old victim. This evidence was properly admitted to demonstrate defendant's pattern of increasingly serious sexual conduct toward the victim leading up to the charged crimes (*see People v Rosario*, 34 AD3d 370 [2006], *lv denied* 8 NY3d 949 [2007]). The evidence constituted highly probative background information that tended to explain the relationship between defendant and the victim and place the events in question in a

believable context (*see People v Dorm*, __NY3d__, 2009 NY Slip Op 01065). We have considered and rejected defendant's remaining arguments relating to this evidence.

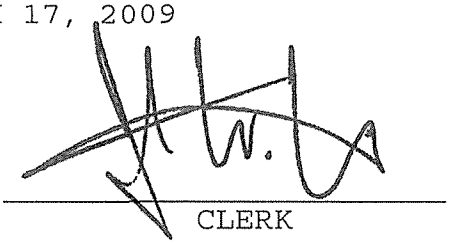
The court's *Sandoval* ruling, which permitted the People to elicit defendant's prior sexual abuse conviction without mentioning any underlying facts, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Pavao*, 59 NY2d 282, 292 [1983]; *People v Rosado*, 53 AD3d 455 [2008], *lv denied* 11 NY3d 835 [2008]).

The court properly permitted the People to rebut a claim of recent fabrication by introducing a prior consistent statement made by the victim, since this statement predated a particular motive to falsify that had been asserted by the defense (*see People v McDaniel*, 81 NY2d 10, 18 [1993]; *People v Whitley*, 14 AD3d 403, 406 [2005], *lv denied* 4 NY3d 892 [2005]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 17, 2009



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Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

60 In re Javone C.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about June 19, 2008, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act, which, if committed by an adult, would constitute the crime of reckless endangerment in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for a dismissal of the petition or an adjournment in contemplation of dismissal (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The court properly determined that appellant required supervision (*see* Family Ct Act § 352.1[1]) and that probation was the least restrictive available alternative (*see* Family Ct Act § 352.2[2]). Given the gravity of

appellant's acts and his need for psychiatric treatment, the 12-month period of probation supervision is appropriate.

THIS CONSTITUTES THE DECISION AND ORDER
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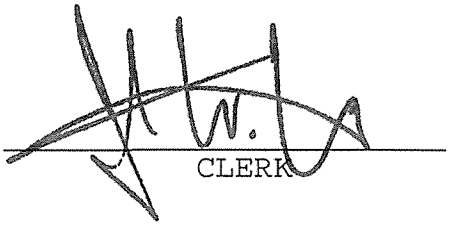

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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 17, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Richard T. Andrias
Luis A. Gonzalez
Karla Moskowitz
Dianne T. Renwick, Justices.

The People of the State of New York, SCI. 1831/05
Respondent,

-against- 61

Anonymous,
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 (Anthony Ferrara, J.), rendered on or about August 29, 2006,

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

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

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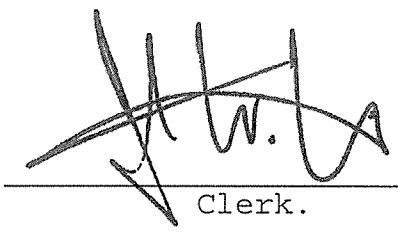

Clerk.

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

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

62 Janie Harris, Index 14970/06
Plaintiff-Appellant,

-against

Juan Dizon, MD, etc. et al.,
Defendants-Respondents.

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

Shaub Ahmuty Citrin & Spratt LLP, Lake Success (Steven J. Ahmuty, Jr. of counsel), for respondents.

Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered November 30, 2007, which, in an action for medical malpractice, granted defendants' motion for summary judgment dismissing the complaint as barred by the statute of limitations, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

The record presents triable issues of fact as to whether plaintiff received continuous treatment with respect to her colon, where her expert opined that she was receiving treatment for gastroinestinal disorders which were symptomatic of the colon cancer defendants failed to diagnose (*see Hein v Cornwall Hosp.*, 302 AD2d 170, 174 [2003]; *Hill v Manhattan W. Med. Group--H.I.P.*, 242 AD2d 255 [1997]. There are also questions regarding whether there was an expectation of further treatment demonstrated by defendant doctor's instructions that plaintiff return for

continued treatment following her last appointment (*compare O'Donnell v Siegel* 49 AD3d 415, 417 [2008]).

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

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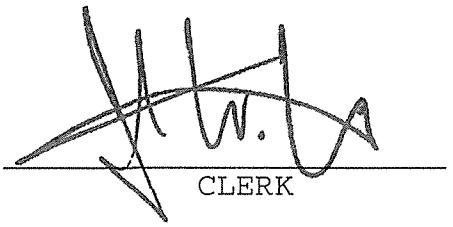

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Mazzarelli, J.P., Andrias, Gonzalez, Renwick, JJ.

63 Appalachian Insurance Company, Index 122807/96
Plaintiff,

-against-

Riunione Adriatic Di Sicurata, etc., et al.,
Defendants,

Century Indemnity Company, etc., et al.,
Defendants-Respondents,

General Electric Company,
Defendant-Appellant.

McCarter & English, LLP, New York (Brian J. Osias of counsel), for appellant.

White and Williams LLP, Philadelphia, PA (Daniel M. Isaacs of counsel), for Century Indemnity Company, Pacific Employers Insurance Company and One Beacon American Insurance Company, respondents.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Elizabeth M. DeCristofaro of counsel), for Continental Casualty Company, Continental Insurance Company and Pacific Insurance Company, respondents.

Rivkin Radler LLP, Hackensack, NJ (Brian R. Ade of counsel), for Federal Insurance Company, respondent.

Landman Corsi Ballaine & Ford, P.C., New York (Michael L. Gioia of counsel), for Republic Insurance Company, respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 18, 2008, which granted defendants-respondents' motions for partial summary judgment, denied defendant-appellant General Electric (GE)'s cross motion for partial summary

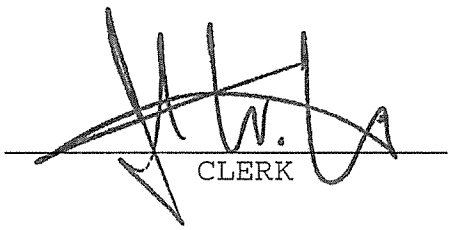
judgment, and determined that New York law governs the insurance coverage issues raised in this action, unanimously affirmed, with costs.

We have held that a contract of liability insurance is "governed by the law of 'the state which the parties understood was to be the principal location of the insured risk ...'" (*Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 22-23 [2006], *affd* 9 NY3d 928 [2007]), that "where it is necessary to determine the law governing a liability insurance policy covering risks in multiple states, the state of the insured's domicile should be regarded as a proxy for the principal location of the insured risk" (*id.* at 24) and that a corporate insured's domicile is the state of its principal place of business (*id.* at 25). The contracts of liability insurance at issue here, which do not contain choice-of-law clauses and cover risks that are spread through multiple states, were purchased by GE, which, having obtained rulings in its favor as to its principal place of business (*see e.g. Gafford v General Elec. Co.*, 997 F2d 150, 161-163 [6th Cir 1993]; *Northeast Nuclear Energy Co. v General Elec. Co.*, 435 F Supp 344, 347-348 [D Conn 1977]), is judicially estopped from denying that its principal place of

business is New York (*see e.g. D & L Holdings, LLC v RGC Goldman Co.*, 287 AD2d 65, 71 [2001], *lv denied* 97 NY2d 611 [2002]; *Bankers Trustee Co. Ltd. v First Mexican Acceptance Corp.*, 273 AD2d 81, 81 [2000], *lv denied* 95 NY2d 766 [2000]). Accordingly, we find New York law controlling in this matter.

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

ENTERED: MARCH 17, 2009



Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

64 The People of the State of New York, Ind. 5893/05
Respondent,

-against-

Sean Webb,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J. on dismissal motions; James A. Yates, J. at jury trial and sentence), rendered August 16, 2006, convicting defendant of robbery in the second degree, and sentencing him, as a second felony offender, to a term of 11 years, unanimously affirmed.

The court properly declined to dismiss the indictment based on alleged deprivation of the right to testify before the grand jury, and alleged ineffective assistance of counsel in that regard. The People's written notice to defense counsel of the date and time of the grand jury proceedings sufficiently complied with CPL 190.50(5)(b), and service upon defendant personally was not required (*People v Helm*, 51 NY2d 853 [1980]; *see also People ex rel. Knowles v Smith*, 54 NY2d 259, 266 [1981]; CPLR 2103[b]). Defense counsel's failure to effectuate defendant's request to

testify does not, by itself, constitute ineffective assistance of counsel warranting dismissal of the indictment (*see People v Simmons*, 10 NY3d 946, 949 [2008]; *People v Wiggins*, 89 NY2d 872 [1996]). Defendant made no showing that his appearance before the grand jury would have altered the result (*People v Sutton*, 43 AD3d 133, 136 [2007], *lv denied* 9 NY3d 1010 [2007]). Even if defendant had testified along the lines of his statement to the police, there is no reason to believe the grand jury would have credited that testimony.

The trial court, after ascertaining on the record that the possibility that a sworn juror may have had a casual encounter with the prosecution's main witness seven or eight years before the trial did not bias the juror, properly determined that the juror was not grossly unqualified to continue serving (*see* CPL 270.35[1]; *People v Condes*, 23 AD3d 1149, 1150 [2005], *lv denied* 6 NY3d 774 [2006]). Defendant's request to replace the juror did not preserve his distinct argument that the trial court should have conducted a further inquiry (*see People v Cruz*, 48 AD3d 205 [2008], *lv denied* 10 NY3d 957 [2008]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits, because the court's inquiry was sufficient. The juror's possible contact with the witness was so fleeting that the juror was not even sure that the witness was the same person she recalled meeting once, many years before.

This fell far short of an acquaintance or relationship between the two.

We perceive no basis for reducing the sentence.

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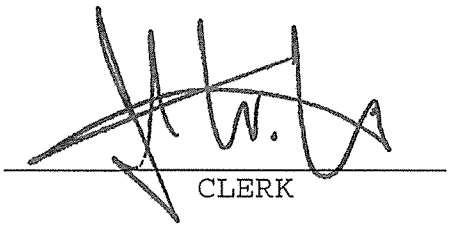

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Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

65 Morgan Stanley Altabridge Ltd., Plaintiff-Respondent, Index 603292/07 602608/07

-against-

ESE Funding SPC Ltd., Defendant,

Dynamic Credit Partners, LLC, Defendant-Appellant.

Scarola Ellis LLP, New York (Richard J.J. Scarola of counsel), for appellant.

Venable LLP, New York (Edward P. Boyle of counsel), for respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered January 8, 2008, which denied defendant Dynamic Credit Partners, LLC's motion to dismiss the complaint as against it for failure to state a cause of action, unanimously affirmed, with costs.

Plaintiff's complaint as against Dynamic states a single cause of action for breach of the participation agreement to which Dynamic was a party. The complaint sets forth the existence of a valid contract, plaintiff's performance of its obligations thereunder, Dynamic's breach by its failure to place sufficient capital in the South Beach Segregated Portfolio so that its affiliate, co-defendant ESE Funding SPC Ltd. (ESE), could meet its obligations under other parts of the participation agreement, and resulting damages in the amount of $3.2 million,

the remaining 1/6 of the risk contemplated by the agreement in the event of a decline in value of South Beach's assets (*see Morris v 702 East Fifth Street HDFC*, 46 AD3d 478, 479 [2007]). That the amount of damages, if any, is not yet known due to a related action brought against plaintiff by ESE does not preclude the assertion of plaintiff's contract claim against Dynamic (*see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]).

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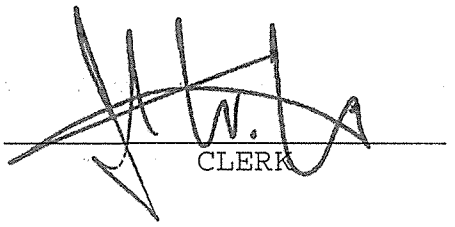

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

66 Larry E. Knight, Inc., et al., Plaintiffs-Respondents, Index 600892/06

-against-

QBE Insurance Corp., et al., Defendants-Appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellants.

Camacho Mauro Mulholland, LLP, New York (Eric L. Cooper of counsel), for respondents.

Order, Supreme Court, New York County (Martin Shulman, J.), entered July 7, 2008, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, so much of the motion as sought dismissal of the first, second, third, and fifth causes of action granted, and otherwise affirmed, without costs.

In this declaratory judgment action, there are issues of fact as to whether plaintiffs' injuries in the underlying action were caused by negligence on the part of defendant JEM Erectors, which in turn generate issues of fact as to JEM's duty to indemnify the corporate Knight plaintiff under their subcontract (*see Carboy v Cauldwell-Wingate Co.*, 43 AD3d 261 [2007]; *Medina v New York El. Co.*, 250 AD2d 656 [1998]). Plaintiffs' argument that the indemnity provision in the Knight-JEM subcontract imports with it a duty to insure fails, because the duty to

indemnify is distinct from, and does not inherently contain, a duty to insure (*see Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Since the subcontract contains no obligation on the part of JEM to procure insurance for Knight, Knight cannot be deemed an additional insured under the additional-insured endorsement to JEM's commercial general liability policy (*see International Couriers Corp. v North Riv. Ins. Co.*, 44 AD3d 568 [2007]; *Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 32-34 [1979], *affd* 49 NY2d 924 [1980]). Because defendants demonstrably have no duty to procure insurance for Knight, plaintiffs' claim for breach of the duty to procure insurance must also fail.

There is no basis in this record for interfering with the motion court's discretionary decision to decline to dismiss plaintiffs' request for declaratory relief in the fourth cause of action, in light of the prior pendency of claims asserted in the context of the underlying personal injury action (*see Whitney v Whitney*, 57 NY2d 731 [1982]).

THIS CONSTITUTES THE DECISION AND ORDER
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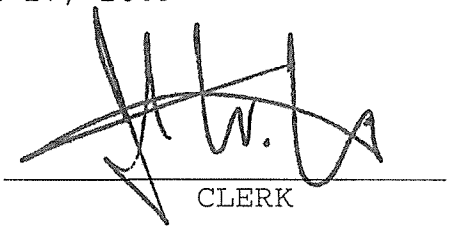

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Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

70 The People of the State of New York, Ind. 4775/06
Respondent,

-against-

Ernest Brannon,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Nivritha Casi Ketty of counsel), for respondent.

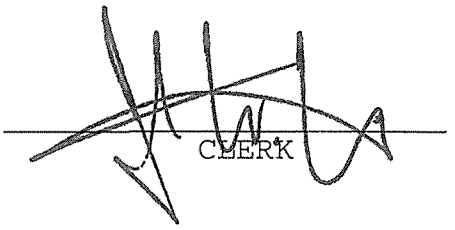
Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered February 13, 2007, as amended April 19, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The combination of defendant's suspiciously evasive conduct, the officer's observation that defendant was carrying what was at the least a large and possibly dangerous knife, and defendant's acknowledgment, in response to a proper common-law inquiry, that he had a knife, permitted the officer to conduct a self-

protective frisk (*see People v Batista*, 88 NY2d 650, 654 [1996]; *People v Benjamin*, 51 NY2d 267, 271 [1980]; *see also People v King*, 102 AD2d 710 [1984], *affd* 65 NY2d 702 [1985]).

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

ENTERED: MARCH 17, 2009



Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

71-
71A Graubard Miller, Index 603932/04
Plaintiff-Respondent,

-against-

Ronald I. Nadler,
Defendant-Appellant.

Akerman Senterfitt LLP, New York (Brian A. Bloom of counsel), for appellant.

Graubard Miller, New York (Nancy R. Sills of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 10, 2007, which, insofar as appealed from as limited by the briefs, in this action seeking payment of legal fees, granted plaintiff's motion for summary judgment on its causes of action for an account stated and for quantum meruit, and directed entry of judgment in favor of plaintiff in the principal amount of $103,492.44 plus costs and disbursements, and denied defendant's cross motion for summary judgment dismissing the quantum meruit claim, and order, same court and Justice, entered November 16, 2007, granting defendant's motion to reargue and, upon reargument, adhering to its prior determination, unanimously affirmed, with one bill of costs.

Plaintiff law firm established entitlement to summary judgment on its claim for an account stated by production of documentary evidence showing that defendant received and retained

the invoice without objection (*see Federal Express Corp. v Federal Jeans, Inc.*, 14 AD3d 424 [2005]). Defendant's "self-serving, bald allegations of oral protests were insufficient to raise a triable issue of fact as to the existence of an account stated" (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]).

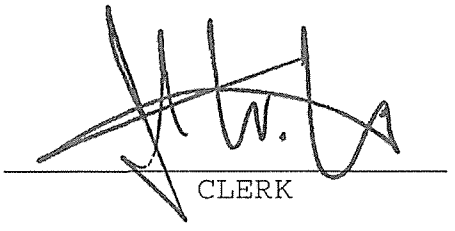
Plaintiff also established its claim for quantum meruit by the production of documentary evidence demonstrating the firm's performance of services in connection with the subject transaction, the acceptance of such services, the firm's expectation of payment therefor, and the reasonable value of the services (*see e.g. Soumayah v Minnelli*, 41 AD3d 390, 391 [2007]).

Plaintiff's failure to comply with the rules on retainer agreements (22 NYCRR 1215.1) does not preclude it from suing to recover legal fees for the services it provided (*see Egnotovich v Katten Muchin Zavis & Roseman LLP*, 55 AD3d 462, 464 [2008]; *Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 63-64 [2007]).

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 17, 2009



CLERK

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

73 Zaraiz Santos, etc., et al., Index 22969/04
Plaintiffs-Respondents,

-against-

Mark A. Rosing, M.D., et al.,
Defendants,

Frank Allen, M.D.,
Defendant-Appellant.

Brown & Tarantino, LLC, Buffalo (Ann M. Campbell of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for Zaraiz Santos and Ana Castillo Santos, respondents.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital and St. Barnabas Community Enterprises, Inc., respondents.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered August 25, 2008, which granted plaintiffs' motion for reargument, and, upon reargument, denied the motion of defendant Allen Frank, M.D., sued herein as Frank Allen, M.D., for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

The court correctly found, upon reargument of defendant's motion for summary judgment, that the evidence submitted by plaintiffs raised an issue of fact that precluded summary judgment. The motion was based on defendant's factual contention that he never provided any prenatal treatment to plaintiff mother

and was never consulted by any of the medical personnel who rendered care and treatment to her during her prenatal visits or during her labor and delivery. However, a certified nurse midwife testified that she had consulted and collaborated with the attending physician in the labor and delivery department when plaintiff presented there a week before she experienced placental abruption, and the medical record identifies defendant as the attending physician that day. This evidence raises the issues whether the midwife consulted with defendant concerning the treatment of plaintiff and, if so, whether an implied physician-patient relationship arose from the consultation (*see Raptis-Smith v St. Joseph's Med. Ctr.*, 302 AD2d 246 [2003]; *Cogswell v Chapman*, 249 AD2d 865, 866-867 [1998]; *see also* Education Law § 6951).

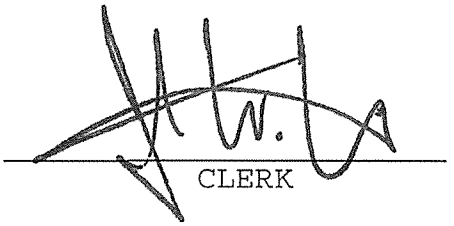
Since defendant's motion was based solely on his assertion that he did not render any treatment to plaintiff, the burden did not shift to plaintiffs to submit evidence to raise issues of fact as to compliance with the standard of care and proximate cause (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). In any event, however, the motion court properly granted reargument to consider plaintiffs' expert's affirmation, which had been submitted initially in redacted form (*see Mattis v Keen, Zhao*, 54 AD3d 610, 611-612 [2008]), and the affirmation was

sufficient to raise said issues of fact (*see Cruz v St. Barnabas Hosp.*, 50 AD3d 382 [2008]).

We have considered defendant's remaining contention and find it without merit.

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

ENTERED: MARCH 17, 2009



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Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

75 The People of the State of New York, Ind. 9996/96
Respondent,

-against-

Charlie Quintero,
Defendant-Appellant.

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

Order, Supreme Court, New York County (Michael Ambrecht, J.), entered on or about February 13, 2008, unanimously affirmed.

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

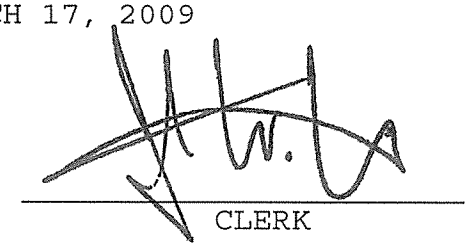
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: MARCH 17, 2009



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Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

76 The People of the State of New York, Ind. 2923/05
Respondent,

-against-

Devin Keitt,
Defendant-Appellant.

Donald E. Cameron, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Patricia Curran of counsel), for respondent.

Judgment, Supreme Court, New York County (Micki A. Scherer, J. at initial severance motion and request for adjournment; William A. Wetzel, J. at renewed severance motion, jury trial and sentence), rendered April 4, 2006, convicting defendant of robbery in the first degree, robbery in the second degree (two counts), criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree (two counts), and sentencing him, as a second felony offender, to an aggregate term of 23 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Although the robbery victim did not see the robbers' faces and could not identify them, there was extensive evidence connecting defendant to the robbery, including, among other things, testimony from a police officer who pursued the robbers from the scene and made a prompt and

reliable identification of defendant, as well as testimony from an occupant of an apartment to which the robbers fled, and where they deposited incriminating evidence.

The court properly exercised its discretion when it denied defendant's application to proceed pro se, made during the presentation of the People's case, since defendant did not assert any compelling circumstances or legitimate basis for his belated request (*see People v McIntyre*, 36 NY2d 10, 17 [1974]). There is no merit to defendant's argument that he was constitutionally entitled to represent himself notwithstanding the fact that the trial had begun.

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]). Defendant was not deprived of effective assistance by his attorney's failure to seek to introduce expert testimony on identification. The pursuing officer identified defendant under circumstances that made mistaken identity highly unlikely, and this identification was supported by powerful corroborating evidence. Accordingly, there is no reason to believe that an application to call an identification expert would have been successful (*see People v LeGrand*, 8 NY3d 449 [2007]; *People v Young*, 7 NY3d 40, 45-46 [2006]), or that such testimony would have affected the verdict.

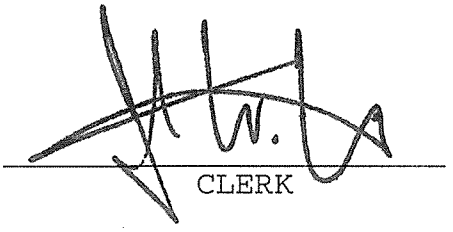
In his initial and renewed severance motions, defendant did not establish a sufficient basis for severance. At the time of these motions, the information before the court concerning the proposed defenses of defendant and his codefendant, including the codefendant's attorney's outline of his client's proposed testimony, did not reveal any irreconcilable conflict (*see People v Mahboubian*, 74 NY2d 174, 183-184 [1989]). On appeal, defendant asserts that a particular portion of the codefendant's testimony and summation argument tended to inculpate defendant. Under the circumstances, the prior severance motions did not preserve this issue, and a further renewed motion would have been necessary. We decline to review this unpreserved issue in the interest of justice. As an alternative holding, we also reject it on the merits, because the defenses of defendant and the codefendant remained compatible throughout the trial, and defendant was not prejudiced by the joint trial. A midtrial severance motion would have been untimely in any event, since specifics as to the allegedly prejudicial aspect of the codefendant's defense could have been ascertained and presented to the court prior to trial (*see People v Funches*, 4 AD3d 206, 207 [2004], *lv denied* 3 NY3d 640 [2004]).

The court properly exercised its discretion in denying defendant's request for a one-week adjournment to consult with a DNA expert. Defense counsel received a suitable opportunity to

consult with his expert before the People's DNA expert testified, and the court's refusal to adjourn the trial did not cause defendant any prejudice (*see People v Roberts*, 50 AD3d 530 [2008], *lv denied* 10 NY3d 963 [2008]). Furthermore, DNA proof linking defendant to some of the physical evidence was only a small component of the People's extensive case.

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

ENTERED: MARCH 17, 2009



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Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

80 Iqbal Singh, Index 1185/06
Plaintiff-Appellant,

-against-

The City of New York Division of Housing Preservation and Development,
Defendant-Respondent.

Iqbal Singh, appellant pro se.

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

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 5, 2008, which, to the extent appealable, denied plaintiff's motion for renewal of a prior order that had denied his motion for partial summary judgment for $500,000 in damages, and granted defendant's cross motion to dismiss the complaint, unanimously affirmed, without costs.

The pro se plaintiff landlord had stipulated in 2005 to the appointment of an Article 7-A administrator (RPAPL 778) to remedy dangerous conditions existing at the 1072 Findlay Avenue premises in the Bronx. Plaintiff's third effort, in June 2008, to have this administrator removed was barred by collateral estoppel (*see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343 [1999]).

In moving for reconsideration, plaintiff failed to demonstrate new or additional facts warranting renewal.

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

ENTERED: MARCH 17, 2009

Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

82-
82A-
82B Paula A.,
Petitioner-Respondent,

-against-

Jose A.,
Respondent-Appellant.

Neal D. Futeras, White Plains, for appellant.

Orders, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about October 11, 2007, which granted petitioner and the parties' son a five-year order of protection against respondent, and determined that respondent violated a temporary order of protection and committed him to the New York City Department of Corrections for a term of 30 days, and order, same court and Judge, entered on or about October 11, 2007, which awarded custody of the parties' son to petitioner and directed that respondent's access to the child must be court authorized, unanimously reversed, on the law, without costs, and the matter remanded for a hearing on the family offense and custody petitions.

The court erred in issuing a custody order without the benefit of a hearing, where the best interests of the parties'

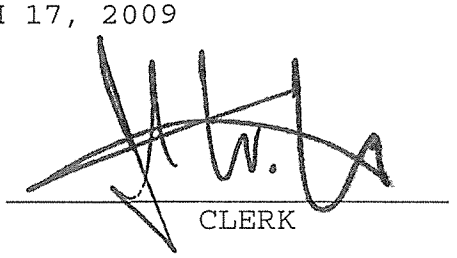
son could be fully considered (*see Matter of Linda J. v Nakisha P.*, 10 AD3d 287, 288 [2004]; *Matter of Hudgins v Goodley*, 301 AD2d 524 [2003]).

Similarly, the court erred in issuing a permanent order of protection without having held a fact-finding or a dispositional hearing (*see Matter of Shevlin v Minas*, 253 AD2d 435 [1998]), and its finding that aggravating circumstances existed is not supported by the record (*see* Family Court Act § 827[a][vii]).

Furthermore, the court improperly held respondent in civil contempt in the absence of an evidentiary hearing, and because neither petitioner nor the court filed a petition alleging a violation of the temporary order of protection (*see* Family Court Act § 846; § 846-a; *Matter of Janczuk v Janczuk*, 305 AD2d 680 [2003]; *see also James W.D. v Sandra C.*, 44 AD3d 423, 424 [2007]). "Inasmuch as enduring consequences potentially flow from an order adjudicating a party in civil contempt, an appeal from that order is not rendered moot simply because the resulting prison sentence has already been served" (*Matter of Bickwid v Deutsch*, 87 NY2d 862, 863 [1995]).

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

ENTERED: MARCH 17, 2009



CLERK

Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

84 Gabrielle Lequerique, etc., Index 115195/05
Plaintiff-Appellant,

-against-

Stella Lequerique,
Defendant-Respondent,

Lekerika, LLC,
Defendant.

Annette G. Hasapidis, South Salem, for appellant.

Kantrowitz, Goldhamer & Graifman, P.C., Chestnut Ridge (John M. Chakan of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered November 19, 2007, which granted the motion of defendant Stella Lequerique for summary judgment dismissing the complaint and declared that she is the owner of the subject property, unanimously affirmed, without costs.

In 2000, plaintiff's decedent, her father, who held title to certain real property in his own name, conveyed the property to himself and defendant - plaintiff's mother and decedent's surviving spouse - thereby creating a tenancy by the entirety (*see Buddle v Buddle*, 53 AD3d 745 [2008]). At that time, the decedent had a will which left his entire estate to defendant.

In 2004, after decedent was diagnosed with terminal cancer, he decided to transfer ownership of the property to a limited

liability company. The attorney handling the transaction was given an earlier deed which showed decedent as the sole owner of the property and prepared a deed transferring ownership from decedent to the LLC, in which decedent and defendant each had a 50% interest. Subsequently, decedent changed his will, leaving defendant the minimum statutory share and bequeathing 80% of the residuary estate to plaintiff. In this action, plaintiff seeks a declaration that the LLC is the beneficial owner of the property, reformation of the deed and a constructive trust.

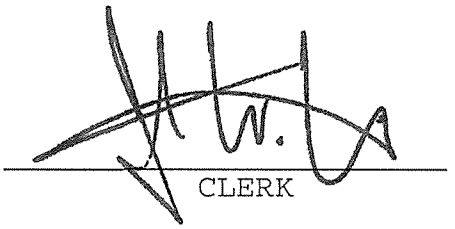
Tenancy by the entirety confers on the surviving spouse a right to absolute ownership of the property upon the other spouse's death (*V.R.W., Inc. v Klein*, 68 NY2d 560, 564 [1986]). Since the deed transferring the property, held by decedent and his wife as tenants by the entirety, was signed only by decedent, it was ineffective to transfer title to the LLC. Where spouses own property as tenants by the entirety, a conveyance by one spouse, to which the other has not consented, cannot impair the non-consenting spouse's survivorship interest (*id.*).

Plaintiff has failed to raise a triable issue of fact with respect to her claim that defendant intended to transfer her interest in the property to the LLC. At best, the evidence shows only that defendant acquiesced in the transaction; there is no evidence, however, that she knowingly surrendered her survivorship rights. Accordingly, the court properly denied

reformation of the deed (*see Lieberman v Greens at Half Hollow, LLC*, 54 AD3d 908, 909 [2008]). For the same reason, plaintiff's claim that defendant ratified decedent's attempt to transfer title to the LLC is unavailing (*see Lipman v Vebeliunas*, 39 AD3d 488 [2007]).

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

ENTERED: MARCH 17, 2009



CLERK

Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

86 Centennial Insurance Company, Index 603784/06
Plaintiff-Respondent,

-against-

Apple Builders & Renovators, Inc.,
Defendant-Appellant,

Jagganathan Kuttambakkam, et al.,
Defendants.

Lindabury, McCormick, Estabrook & Cooper, P.C., New York (Scott M. Yaffe of counsel), for appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, Morristown, NJ (Robert S. Moskow II of counsel), for respondent.

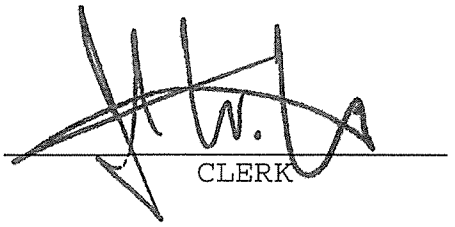
Order, Supreme Court, New York County (Karla Moskowitz, J.), entered November 5, 2007, which, insofar as appealed from, denied defendants' cross motion to disqualify plaintiff's attorneys, unanimously affirmed, with costs.

The motion court properly denied defendants' cross motion, since defendant Apple Builders & Renovators, Inc. had executed a written waiver in its retainer agreement with the same law firm specifically waiving any conflict of interest that might arise from the firm's representation of Centennial and Apple. Apple cannot compel the disqualification of plaintiff's counsel simply because the representation to which it consented has since devolved into litigation (*see St. Barnabas Hosp. v New York City Health and Hospitals Corp.*, 7 AD3d 83, 92 [2004]). Apple's claim

that it did not understand the implications of the waiver is unsupported by the clear language of the retainer agreement and the record evidence.

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

ENTERED: MARCH 17, 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 17, 2009.

Present - Hon. David Friedman, Justice Presiding
Eugene Nardelli
James M. Catterson
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 2590/06
Respondent,

-against- 87

Jeffrey Goodson,
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 (Charles H. Solomon, J.), rendered on or about March 13, 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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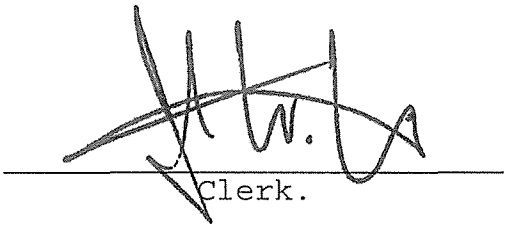


Clerk.

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

Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

88 David Goldstein, Index 102136/07
Plaintiff-Appellant,

-against-

Massachusetts Mutual Life Insurance Company,
Defendant-Respondent.

Niehaus LLP, New York (Paul R. Niehaus of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Harris J. Zakarin of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered February 19, 2008, which, to the extent appealed from, granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

In 1992, plaintiff chiropractor purchased a disability insurance policy from defendant's predecessor-in-interest. In 1993, he sustained nerve damage which impaired the use of his left arm as a result of a motor vehicle accident, and in 1994, he was directed to stop working as a chiropractor and began receiving disability benefits. Later that year plaintiff was diagnosed with Epstein Barr virus/chronic fatigue syndrome, and in May 1999, with generalized anxiety disorder, accompanied by obsessive compulsive disorder.

Plaintiff commenced his first action against defendant in New York County in 1999 alleging that he was "Presumptively

Totally Disabled" under the terms of the policy, and seeking a declaration that the requirement that he submit monthly progress reports and remain under a physician's care be waived. That complaint was dismissed on the basis that plaintiff's injury did not meet the policy's definition of "presumptive disability."

Plaintiff commenced a second action against defendant in Queens County in 2005, asserting claims for, inter alia, a declaration that the requirement of a doctor's care be waived and intentional and negligent infliction of emotional distress by undertaking conduct to aggravate his chronic fatigue syndrome. That action was dismissed upon a finding that the claim for declaratory relief was barred by res judicata and that the tort claims were time barred (*see Goldstein v Massachusetts Mut. Life Ins. Co.*, 32 AD3d 821 [2006]).

Plaintiff commenced this action in 2007 alleging that defendant engaged in a campaign of harassment in administering the subject policy by, inter alia, requiring him to submit monthly reports, delaying payments, and refusing to acknowledge the permanence of his injury, most of which conduct was alleged to have occurred before 2005. As a result of this conduct, plaintiff allegedly suffered severe emotional distress.

All three actions involve the same parties, insurance policy, claim and challenge to the frequency of reports demanded. Thus, plaintiff's claims for intentional and negligent infliction

of emotional distress, to the extent they arise from pre-2005 conduct, were properly dismissed on the ground of res judicata, as the claims arise out of the same series of transactions as the prior actions (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]; *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). For the same reason, the claim for breach of the covenant of good faith and fair dealing arising out of pre-2005 conduct, was subject to dismissal on res judicata grounds. The claims for intentional and negligent infliction of emotional distress, as they relate to pre-2005 acts, are also barred by the doctrine of collateral estoppel as identical claims were dismissed in 2005 (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]), and plaintiff cannot relitigate his dismissed claims by adding allegations that could have been brought earlier.

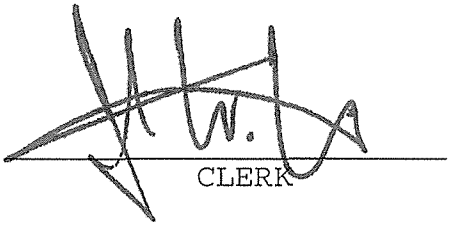
Plaintiff's claims for intentional and negligent infliction of emotional distress, to the extent not otherwise barred, fail to state a cause of action as they lack the necessary element of "extreme and outrageous conduct" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]; *see Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362 [2005]). This element requires conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Howell*, 81 NY2d at 122 [internal quotation marks and citations

omitted]), and defendant's demand of progress and physician's reports at a permissible frequency and the occasional delay in the payment of benefits, clearly does not rise to such a level of conduct.

Furthermore, plaintiff's claim for breach of the covenant of good faith and fair dealing was properly dismissed, since he failed to allege the deprivation of any right under the policy (*see Ezrasons, Inc. v American Credit Indem. Co.*, 257 AD2d 447, 448 [1999]), or that defendant failed to perform under the policy (*see Odingo v Allstate Ins. Co.*, 251 AD2d 81 [1998], *lv denied* 92 NY2d 810 [1998]).

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

ENTERED: MARCH 17, 2009



CLERK

Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

90 The People of the State of New York, Ind. 6192/00
Respondent,

-against-

Jesus Marchena,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Order, Supreme Court, New York County (Edwin Torres, J.), entered on or about February 9, 2006, which denied defendant's motion for resentencing under the Drug Law Reform Act, unanimously affirmed.

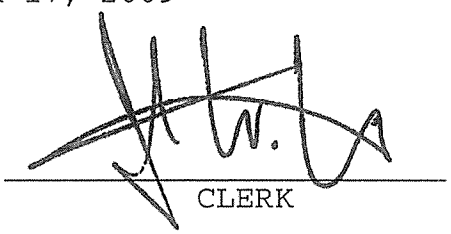
Defendant, who is similarly situated to the defendant in *People v Paniagua* (45 AD3d 98 [2007], *lv denied* 9 NY3d 992 [2007]), is ineligible for resentencing on his class A-II felony conviction, notwithstanding the fact that he was resentenced on his A-I felony conviction under the 2004 DLRA (L 2004, ch 738). We find no basis upon which to distinguish *Paniagua*, and we have no authority to rewrite, or grant dispensations from, the applicable statutes.

To the extent that defendant is requesting, in the alternative, that this Court reduce the present sentence of 8⅓ years to life on his A-II conviction to a term of 3 years to

life, that request is not properly before this Court. Defendant has already unsuccessfully appealed from the underlying judgment of conviction (303 AD2d 295 [2003], *lv denied* 100 NY2d 584 [2003]), and this appeal is only from the order denying resentencing under the DLRA.

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

ENTERED: MARCH 17, 2009



CLERK

Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

91 In re Vicente Rivera, Petitioner, Index 104508/07

-against-

The New York City Housing Authority, Respondent.

Michael Stepper, New York, for petitioner.

Ricardo Elias Morales, New York (Joseph P. Fusco of counsel), for respondent.

Determination of respondent, dated January 3, 2007, which denied petitioner's grievance seeking to succeed to the tenancy of the deceased tenant as a remaining family member, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Richard F. Braun, J.], entered October 15, 2007), dismissed, without costs.

The determination is supported by substantial evidence. Petitioner did not qualify as a remaining family member, since he did not enter the apartment lawfully, respondent never gave the tenant of record written permission for petitioner to join her household, and petitioner acknowledged that no such permission was ever obtained prior to the tenant's death (*see Jamison v New York City Hous. Auth.-Lincoln Houses*, 25 AD3d 501, 502 [2006]). The record, including, inter alia, the annual income affidavits submitted by the tenant of record from 1995 until her death in

2001, and her transfer request to respondent two years prior to her death, showed that she listed only herself and her minor daughter as occupants of the apartment. The Housing Assistant also testified that the tenant's folder contained no indication that she ever requested respondent's permission for petitioner to move into the subject apartment (*see Matter of Abreu v New York City Hous. Auth. E. Riv. Houses*, 52 AD3d 432, 433 [2008]).

Petitioner's argument that both he and the tenant of record were unable to register his occupancy because of respondent's failure to make reasonable accommodations for their severe disabilities in violation of the Americans with Disabilities Act (ADA) (*see* 42 USC § 12132) is unavailing. Petitioner cannot invoke the Act because he is not a "qualified individual with a disability" as that term is defined (*see* 42 USC § 12131[2]), since he does not meet the essential eligibility requirements for admission into public housing, i.e., he never submitted an application for public housing, he was neither born nor adopted into an existing tenancy, and the tenant of record never applied for or obtained respondent's written permission for his occupancy. Furthermore, even if petitioner was a "qualified individual," both the lease and respondent's rules and regulations place the obligation on the tenant of record to obtain written permission before allowing someone to move into the apartment.

Petitioner's attempt to invoke the ADA on behalf of the tenant of record (his companion) fails since he does not have standing to assert such a claim (*see Willson v Association of Graduates of the U.S. Military Academy*, 946 F Supp 294, 296 [SD NY 1996]). In any event, although the evidence at the hearing established that the tenant was physically debilitated because of cancer, no evidence was presented to indicate that she lacked the mental capacity to request written permission for petitioner's occupancy. The tenant remained in telephone contact with her Housing Assistant as recently as two weeks before her death, and at no time did she mention petitioner's occupancy. There is also no explanation as to why the tenant was unable to seek written permission to add petitioner to her household at any time between 1995 when he allegedly moved in, and the onset of her illness in 1998.

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

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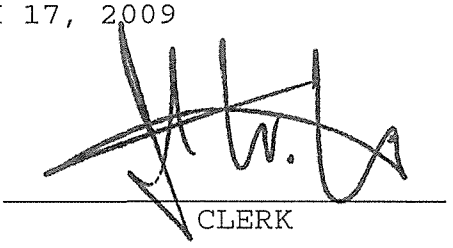


CLERK

Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

92 Arthur Picchione, 113518/04
Plaintiff-Respondent, 590694/05
591040/05
-against- 591106/06
590667/06
Sweet Construction Corp., et al., 590436/07
Defendants-Respondents-Appellants,

First Lexington Corporation, et al.,
Defendants-Appellants.
- - - - -
First Lexington Corporation, et al.,
Second Third-Party Plaintiffs-Appellants,

-against-

Discovery Communications, Inc.,
Second Third-Party
Defendant-Respondent-Appellant,

Schindler Elevator Corporation, et al.,
Second Third-Party Defendants.
- - - - -
Discovery Communications, Inc.,
Third Third-Party Plaintiff-Appellant,

-against-

Arc Electric Construction Co.,
Third Third-Party Defendant-Appellant.
- - - - -
First Lexington Corporation, et al.,
Fifth Third-Party Plaintiffs-Appellants,

-against-

Discovery New York, Inc.,
Fifth Third-Party
Defendant-Respondent.

[and two other third-party actions]

Herzfeld & Rubin P.C., New York (David B. Hamm of counsel), for First Lexington Corporation and Rudin Management Co., Inc. appellants.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for Sweet Construction Corp. and Arc Electric Construction Co., respondents-appellants.

Churbuck Calabria Jones & Materazo, P.C., Hicksville (Nicholas P. Calabria of counsel), for Discovery Communications, Inc., appellant, and Discovery New York, Inc., respondent.

Field Law Firm, P.C., New York (John G. Korman of counsel), for Arthur Picchione, respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered July 1, 2008, which, inter alia, denied the motion by defendants First Lexington and Rudin Management for summary judgment dismissing the complaint and for indemnification on their cross claim against co-defendant Sweet Construction and their claims against defendant-third-party defendant Discovery Communications and third-party defendant Discovery New York, denied the motion by Sweet and third-party defendant Arc Electric for summary judgment dismissing all claims against them, granted the cross motion by Discovery Communications for summary judgment dismissing the complaint as against it and for common-law indemnification against Sweet, and denied the cross motion by Discovery Communications, Discovery New York and third-party defendant Hartford Insurance for summary judgment with respect to plaintiff's Labor Law § 241(6) cause of action and for common-law indemnification against Arc, unanimously modified, on the law, the motion by First Lexington and Rudin granted to the extent of dismissing the common-law negligence and Labor Law § 200 causes

of action against them, and granting their claims for contractual and common-law indemnification against Sweet and contractual indemnification against Discovery New York, the cross motion by Discovery Communications for summary judgment for contractual indemnification against Arc granted, and otherwise affirmed, without costs.

Plaintiff was employed as a foreman by Arc, a subcontractor working on the gut renovation and build-out of office space on the eighth floor of a building owned by First Lexington and managed by Rudin. Sweet was the general contractor, hired by Discovery Communications, the tenant occupying the premises under a lease between First Lexington and Discovery New York, the parent of Discovery Communications.

Plaintiff allegedly sustained a lower back injury while pushing a 300-400-pound loaded equipment cart along a hallway at the site when a wheel caught in a groove in the unfinished floor and broke, causing the cart to tip over and push him against a wall. He seeks recovery for common-law negligence and pursuant to Labor Law § 200 and § 241(6). With respect to § 241(6), plaintiff claims that the floor was broken up, uneven and filled with holes, depressions and other defects constituting a tripping hazard, in violation of Industrial Code (12 NYCRR) § 23-1.7(e)(1), and that the wheel of the cart was not "free-running and well secured" to its frame (§ 23-1.28[b]).

The motion court properly denied dismissal of the § 241(6) claim. Contrary to defendants' contentions, the Industrial Code sections relied upon are sufficiently specific positive mandates to impose liability under the statute (*see Vieira v Tishman Constr. Corp.*, 255 AD2d 235 [1998]; *Freitas v New York City Tr. Auth.*, 249 AD2d 184, 185 [1998]; *see generally Morris v Pavarini Constr.*, 9 NY3d 47, 50 [2007]). Moreover, in light of the testimony regarding defects in the raw floor, the fact that there was neither debris nor loose pieces of concrete in the hallway where the alleged accident occurred is irrelevant. Since First Lexington and Rudin failed to carry their burden as movants to show that the wheel was not defective (*cf. Ruggiero v Cardella Trucking Co.*, 16 AD3d 342, 343-344 [2005]), the burden never shifted to plaintiff to submit an expert opinion to show that it was. In the absence of evidence that plaintiff destroyed the cart, rather than merely having it removed from the area, there is no basis for any spoliation sanction; plaintiff's explanatory affidavit was properly considered, inasmuch as it did not contradict his earlier deposition testimony (*see e.g. Meyer v Moreno*, 258 AD2d 315, 316 [1999]).

The court also properly denied Sweet's motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims. In view of the evidence that Sweet or its demolition contractor created the allegedly defective condition of the

floor, the question whether it exercised supervision or control over the work or had notice of the defective condition is irrelevant (*see Piazza v Shaw Contr. Flooring Servs., Inc.*, 39 AD3d 1218 [2007]). There was no issue of fact as to where the alleged accident occurred, since the unsworn physician reports suggesting a different location were inadmissible hearsay and, in any event, insufficient (*see Flaherty v American Turners N.Y.*, 291 AD2d 256, 257-258 [2002]); moreover, the apparent discrepancy was reconciled by plaintiff's deposition testimony.

Contribution and common-law indemnification were properly denied against Arc, plaintiff's employer, since there was no showing of "grave injury" (*see* Workers' Compensation Law § 11; *Konior v Zucker*, 299 AD2d 320 [2002]).

However, the Labor Law § 200 and common-law negligence claims against First Lexington and Rudin should have been dismissed. The fact that their employee had walked the construction site to monitor compliance with their alteration specifications, which contained virtually no directives regarding safety, constituted the type of general supervision that does not establish liability against an owner (*see Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272-273 [2007], *lv denied* 10 NY3d 710 [2008]; *see also Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [2008]).

First Lexington and Rudin should also have been granted

common-law and contractual indemnification from Sweet. The common-law indemnification claim prevails since these defendants were not liable for common-law negligence or pursuant to Labor Law § 200, and were only vicariously liable under § 241(6) (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), while indemnitor Sweet was negligent (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 64-65 [1999]). With respect to contractual indemnification, the stand-alone Sweet indemnity agreement was an enforceable writing, containing sufficient detail and signed by the party to be charged. Even if this agreement purported to indemnify First Lexington and Rudin for their own negligence, it would be enforceable under General Obligations Law § 5-322.1 because they were in fact not negligent (*see Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 434 [2007]); granting indemnification would not be premature (*see e.g. Mejia v Levenbaum*, 57 AD3d 216 [2008]), even though a judgment has not been entered or paid in the main action.

First Lexington and Rudin should also have been granted summary judgment on their claim against Discovery New York for contractual indemnification under the lease. While managing agent Rudin was not a party to the lease, the provision nonetheless indemnified it as the "owner's agent." Such an

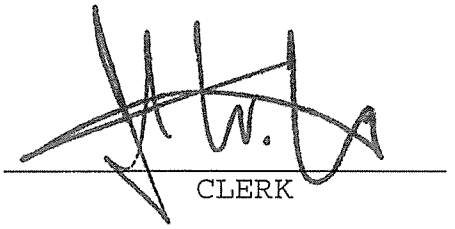
indemnity provision does not run afoul of General Obligations Law § 5-322.1.

Discovery Communications should also have been granted summary judgment on its claim for contractual indemnification pursuant to the Sweet-Arc subcontract. It is undisputed that Discovery Communications hired Sweet for the alterations, and First Lexington played no role in the hiring; therefore, contrary to the understanding of the motion court, Discovery Communications was "the owner" contemplated by the indemnification provision. It is thus unnecessary to speculate whether the parties, for contractual purposes, adopted the Labor Law meaning of "owner," which encompasses a person with an interest in the property who contracts to have work performed for his benefit (*Zaher v Shopwell, Inc.*, 18 AD3d 339 [2005]), or whether Discovery Communications was an intended beneficiary of the provision merely because the subcontract indicated that the work was to be performed at its premises. Since Discovery Communications was not negligent, the indemnification provision is enforceable under the General Obligations Law (*see Rhodes-Evans*, 44 AD3d at 434). Moreover, the agreement to indemnify "to the fullest extent permitted by law" should be read in a manner giving effect to this provision, rather than rendering it void (*see Murphy v Columbia Univ.*, 4 AD3d 200, 202-203 [2004]).

We have considered the parties' other contentions for affirmative relief and find them unavailing.

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

ENTERED: MARCH 17, 2009



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Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

93 Becky Drywall Corp., Index 600514/08
Plaintiff-Respondent,

-against-

Hudson Meridian Construction Group, LLC,
Defendant-Appellant.

Bauman Katz & Grill LLP, New York (Jonah C. Grill of counsel), for appellant.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered July 14, 2008, which denied defendant's motion to dismiss the complaint for failure to state a cause of action, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

The explicit language of the contract between the parties precludes any recovery by plaintiff.

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

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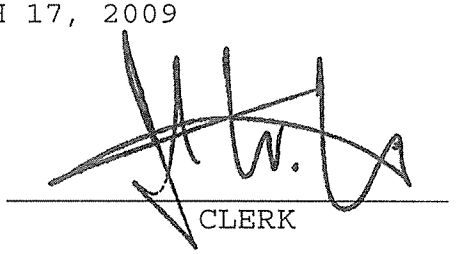

CLERK

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 17, 2009.

Present - Hon. David Friedman, Justice Presiding
Eugene Nardelli
James M. Catterson
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 5753/90
Respondent,

-against- 94

Louis Torres,
Defendant-Appellant.

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

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

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

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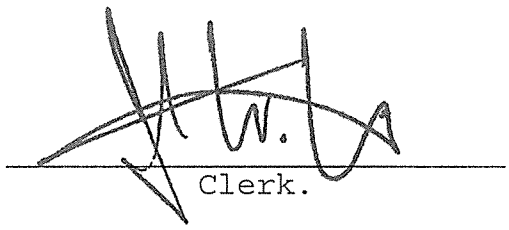

Clerk.

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

Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

96 Julien M. Dieujuste, Jr., Plaintiff-Respondent, Index 8089/07 302721/07

-against-

Kiss Management Corporation, et al., Defendants-Appellants.

- - - - -

[And Another Action]

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

Louis A. Badolato, Roslyn Harbor, for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered September 8, 2008, which, insofar as appealed from, denied defendants-appellants' motion for summary judgment dismissing the complaint for lack of a serious injury under Insurance Law § 5102(d), unanimously modified, on the law, to dismiss the claims alleging injury to the lumbar spine and a 90/180-day curtailment of plaintiff's activities, and otherwise affirmed, without costs.

An issue of fact as to whether plaintiff sustained a serious injury to his right wrist is raised by the affirmed reports of plaintiff's treating physician, who initially examined plaintiff 11 days after the accident and determined that the pain, tenderness, and limited range of motion and grip strength in plaintiff's right wrist, coupled with plaintiff's abnormal MRI showing several sprains and the absence of any preexisting

injury, indicated that plaintiff had sustained significant injury to his right wrist as a result of the accident. Plaintiff's treating physician further concluded that, even though plaintiff showed some improvement in wrist extension and grip strength approximately eight months after the accident, further treatment would be only palliative in nature, the prognosis for a full recovery was guarded, and plaintiff's wrist injury was therefore permanent. Plaintiff's expert physician corroborated these findings, reporting that, nearly one year after the accident, plaintiff still exhibited significant limitations on all range of motion tests performed on his right wrist, and concluding that plaintiff demonstrated a 20% loss of use of his right arm, and that plaintiff's right wrist injuries are permanent in nature and will have a substantial qualitative effect on his life (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]).

Plaintiff, however, fails to raise an issue of fact as to whether he sustained a serious injury to his lumbar spine. While plaintiff's treating physician found that plaintiff exhibited pain and tenderness in his lumbar spine upon palpation and his range of motion in that area was slightly limited immediately after the accident, he also found that plaintiff's lumbar spine MRI was within normal limits and that, within six months after the accident, plaintiff's range of motion was almost completely normal. Clearly, any injury to plaintiff's lower back was minor

or insignificant (*see Licari v Elliott*, 57 NY2d 230, 236 [1982]).

Nor is an issue of fact raised as to whether plaintiff sustained a 90/180-day injury by the conclusory statements in his expert's affirmation that his right wrist injury rendered him unable to perform substantially all of his usual daily activities during the seven-month period immediately following the accident and that plaintiff's treating physician maintained plaintiff on light duty status from the time of the accident until at least five months later. It appears from plaintiff's deposition that he missed no time from work as a construction worker, and there is no evidence that plaintiff was unable to perform all significant aspects of his job (*see Ronda v Friendly Baptist Church* , 52 AD3d 440, 441 [2008]; *Lopez v Simpson*, 39 AD3d 420, 421 [2007]; *cf. Nigro v Penree*, 238 AD2d 908, 909 [1997]), or that his leisure activities were substantially curtailed (*see Nelson v Distant*, 308 AD2d 338, 340 [2003]).

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

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

ENTERED: MARCH 17, 2009

CLERK

Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

97N A1 Entertainment LLC, Index 104271/08
Plaintiff-Appellant-Respondent,

-against-

27th Street Property LLC, et al.,
Defendants-Respondents-Appellants.

Nesenoff & Miltenberg, LLP, New York (Philip A. Byler of counsel), for appellant-respondent.

Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered August 21, 2008, which denied plaintiff's motion for a preliminary injunction, granted that portion of defendants' cross motion seeking dismissal of the complaint and denied that portion of the cross motion seeking the imposition of sanctions, unanimously modified, on the law, to declare that there was no merger of estates between defendants 27th Street Property LLC (Property) and 27th Street Lessee LLC (Lessee), and otherwise affirmed, with costs in favor of defendants.

To obtain a preliminary injunction, plaintiff was required to demonstrate a likelihood of ultimate success on the merits, irreparable injury absent provisional relief, and a balancing of the equities in its favor. Although irreparable injury is

presumed since plaintiff's commercial lease has been terminated, plaintiff failed to demonstrate a likelihood that it will succeed in proving that it was not aware of the termination provision contained in the overlease. Plaintiff's claim of a merger of estates is reliant on the premise that Property and Lessee are alter egos of each other, such that piercing the corporate is warranted. Plaintiff, however, has failed to make the requisite showing of domination of either entity which was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences (*see Kali Corp. v A. Goldner Inc.*, 49 AD3d 397, 398 [2008]). Dismissal of the cause of action for a declaration required that the court make some declaration in favor of defendants, and we modify accordingly (*Decana, Inc. v Contogouris*, 55 AD3d 325, 326 [2008]). Absent a showing that a preliminary injunction is warranted, the remaining issues are common landlord tenant issues which were properly dismissed since they should be litigated in Civil Court (*see Post v 120 East End Ave. Corp.*, 62 NY2d 19, 28 [1984]; *Cox v J.D. Realty Assocs.*, 217 AD2d 179, 181 [1995]).

The court providently exercised its discretion in declining to impose sanctions on plaintiff for its questionable conduct in this litigation.

THIS CONSTITUTES THE DECISION AND ORDER
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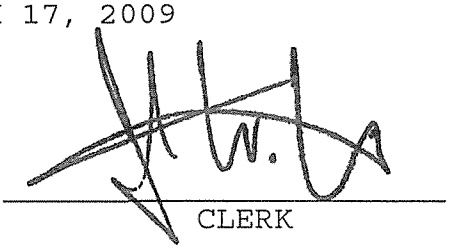

CLERK

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 17, 2009.

Present - Hon. David Friedman, Justice Presiding
Eugene Nardelli
James M. Catterson
Leland G. DeGrasse, Justices.

In re Carl Wells
Petitioner,

Ind. 6548/06
41/07

-against-

98
[M-428]

Hon. Gregory Carro, 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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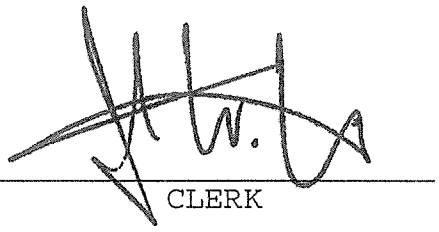

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Eugene Nardelli
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, JJ.

4563
Index 350049/08

Howard S.,
Plaintiff-Appellant,

-against-

Lillian S.,
Defendant-Respondent,

Ryan M.,
Co-Respondent.

Plaintiff appeals from the order of the Supreme Court, New York County (Harold B. Beeler, J.), entered July 11, 2008, which, to the extent appealed from, denied his cross motion for "liberal discovery," and limited his recovery of compensatory damages for his fraud claim against his wife to his share of the collaborative law process fees.

Blank Rome, LLP, New York (Donald Frank, Leonard G. Florescue and Jennifer S. Smith of counsel), for appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), and Berkman, Bottger & Rodd, LLP, for Lillian S., respondent.

FREEDMAN, J.

This interlocutory appeal in a matrimonial action raises two issues. The first is whether defendant-wife's alleged misrepresentation to her plaintiff-husband that he was the biological father of one of their children, when in fact the child was conceived during her adultery and fathered by her lover, constitutes "egregious fault" sufficient to be considered in equitably distributing the marital property. We affirm the motion court's holding that, under the circumstances here, it should not. The second is whether the motion court properly limited plaintiff's recovery for his fraud cause of action. Again, we affirm the motion court's holding.

According to the verified complaint filed in March 2008, plaintiff married defendant in May 1997 and they have four children. In or about February 2004, defendant had an extramarital affair with an unnamed man and became pregnant with a child, Charles, who was born in December 2004. Plaintiff contends that defendant knew or should have known that plaintiff was not Charles's biological father, but concealed that information from him. Plaintiff states that he "raised Charles as his own child, nurturing him and providing the same financial

and emotional support as all his other children."[1]

The complaint further alleges that in or about February 2007 defendant began another affair with the named co-respondent which "continues to this day." Defendant also concealed this second adulterous relationship from plaintiff, but in the spring of 2007, she suggested that they separate and enter into a collaborative law process.

During this period plaintiff had become suspicious about Charles's parentage, allegedly "due to all the jokes within his and [defendant's] circle of family and friends that Charles looked nothing like him." Without telling his wife, plaintiff in February 2008 arranged for a DNA test of himself and Charles. The test confirmed that plaintiff was not Charles's biological father. Defendant now acknowledges that plaintiff is not Charles's biological father, but claims that she learned this from the DNA test results and denies that she deliberately concealed the truth about Charles's parentage from plaintiff.

The complaint asserts causes of action for divorce based on both cruel and inhuman treatment and adultery, and asserts a separate claim based on fraud. As damages for the fraud claim,

---

[1]Plaintiff is also not the biological father of another of his children, defendant's daughter Kimberly, whom plaintiff adopted.

plaintiff seeks to recover his child support expenses for Charles, the fees for the parties' collaborative law process, and profits from the couple's investments "from the time of Charles's conception until the commencement of this action." Defendant answered and counterclaimed for divorce on the ground of abandonment.

In May 2008, defendant moved for an order dismissing or severing the fraud claim; plaintiff opposed and cross-moved for "expanded discovery" to prove "defendant's egregious fault," the fraud claim, and her lack of contribution to and dissipation of the marital property. The motion court denied the motion to dismiss or sever the fraud claim, but limited the recoverable damages to plaintiff's share of the fees for the collaborative law process. The court also denied plaintiff's cross motion for expanded discovery as to defendant's marital fault on the ground that defendant's alleged misconduct did not constitute egregious fault and had no bearing on prospective spousal maintenance and equitable distribution. Finally, the court held that "[a]ll relief not expressly granted is denied." Plaintiff appealed on the grounds that the court (1) erred by holding that he had failed to state a claim for egregious fault and (2) erred by holding that he could not recover child support payments and certain real estate investments as damages for his fraud claim.

Defendant has not appealed the court's order in connection with the fraud claim, and accordingly the issues before this Court concern the rulings on plaintiff's cross motion. The first concerns whether defendant's conduct constitutes "egregious fault" that should be considered in distributing the marital property and which entitles him to further discovery about her misconduct. As a threshold matter, we reject defendant's assertion that plaintiff failed to preserve this issue on appeal. Although the complaint does not specifically characterize defendant's alleged misconduct as egregious fault, plaintiff raised that argument before the motion court in his cross motion papers.

The motion court properly ruled that the wife's infidelity and concealment of Charles's parentage has no bearing on the equitable distribution of the marital property. As a rule, the marital fault of a party is not a relevant consideration under the Equitable Distribution Law. (*Havell v Islam*, 301 AD2d 339, 344 [2002], *lv denied* 100 NY2d 505 [2003]). However, it is well settled that Domestic Relations Law § 236(B)(5)(d), which lists the specific factors that a court is to weigh in determining equitable distribution, provides that, in limited circumstances, marital fault may be considered pursuant to clause (d)(13) of the statute, the "catchall" provision that allows the court to take

"any other factor" which may be "just and proper" into account (*O'Brien v O'Brien*, 66 NY2d 576, 589-590 [1985]; *Blickstein v Blickstein*, 99 AD2d 287, 292 [1984], *appeal dismissed* 62 NY2d 802 [1984]). Marital fault can only be considered where the misconduct "is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship - misconduct that 'shocks the conscience' of the court[,] thereby compelling it to invoke its equitable power to do justice between the parties" (*Blickstein*, 99 AD2d at 292; *accord O'Brien*, 66 NY2d at 589).

In *Havell*, this Court adopted the analysis set forth in *McCann v McCann* (156 Misc 2d 540 [1993]), which concerned a husband who had married with the express promise to his wife to make every effort to have children. He subsequently refused to fulfill that promise after several years of lying, and as a result his wife became infertile because of her advanced age. The court found that, while the husband's misconduct showed "a blatant disregard for the marital relationship" and was "morally reprehensible," it did not constitute egregious marital conduct sufficient to be considered in equitably distributing the marital assets (*McCann*, 156 Misc 2d at 547, 549). To be deemed egregious, the court concluded, conduct must "callously imperil[] the value our society places on human life and the integrity of the human body" (*id.* at 547; *accord Havell*, 301 AD2d at 345).

The only cases in which reprehensible behavior has been deemed to constitute egregious fault sufficient to affect equitable distribution have involved extreme violence. In *Havell*, for example, this Court upheld the matrimonial court's award of more than 95% of the marital estate to a wife where her husband beat her with a barbell and a piece of pipe, thereby breaking her nose, jaw and some of her teeth, causing multiple contusions and lacerations, along with neurological damage and other serious injuries. While the husband pleaded guilty to first-degree assault on his wife, this Court supported the matrimonial court's finding that the husband's attack amounted to attempted murder and constituted egregious marital fault. Egregious fault has also been found in instances of rape (*see Thompson v Thompson*, NYLJ, Jan. 5, 1990, at 31, col 4 [husband raped his stepdaughter]), kidnapping (*see Safah v Safah*, NYLJ, Jan. 8, 1992, at 26, col 5 [in midst of hearing on equitable distribution and custody, husband took couple's two children and fled to Lebanon with them, where he left them in a "war zone"]), and protracted and severe physical abuse (*see Debeny v Debeny*, NYLJ, Jan. 24, 1991, at 29, col 2 [over course of 37-year marriage, husband broke wife's foot by stamping on it, broke one of her fingers, pulled her arm out of its shoulder socket, cracked two of her teeth by punching her cheek, pushed her

causing her to break her arm, pushed her on another occasion causing her to fall and break her ankle, slapped her face between 50 and 70 times per year, and committed other violent acts against her]).

Conversely, conduct that courts have found not to be egregious include adultery *(see Lestrange v Lestrange*, 148 AD2d 587, 588 [1989]), alcoholism (*see Weilert v Weilert*, 167 AD2d 463 [1990]), abandonment (*see Wilson v Wilson*, 101 AD2d 536 [1984], *lv denied* 64 NY2d 607 [1985]), and verbal harassment coupled with several acts of minor domestic violence (*see Kellerman v Kellerman*, 187 AD2d 906 [1992]).

Here, while defendant's alleged misconduct cannot be condoned and is clearly violative of the marital relationship, it does not rise to the level of egregious fault, since defendant neither endangered the lives or physical well-being of family members, nor deliberately embarked on a course designed to inflict extreme emotional or physical abuse upon them.

We find the dissent's arguments to the contrary to be unpersuasive. While the dissent first contends that defendant, by allegedly concealing Charles's parentage from plaintiff and allowing him to "raise the child as his own and develop a strong father-son bond," showed "a blatant disregard for the health and emotional well-being of plaintiff and the other children," that

alleged deception has not harmed either plaintiff's health or the children's health and well-being. While plaintiff's emotional state may be affected by learning that a child he nurtured and bonded with is not biologically related to him, his parental relationship with Charles is not necessarily affected. Moreover, in the vast majority of cases divorce causes emotional trauma to spouses and their family, yet the fault of the parties who caused their marriages to fail has never been deemed egregious merely because that failure inflicted emotional pain on their spouses or other family members.

The dissent also makes much of a belief that defendant "risked and continues to place" Charles's health "in jeopardy" by misrepresenting his parentage to doctors and hospitals, and by concealing the biological father's medical history from them. However, plaintiff does not contend that defendant has ever made any such misrepresentations to or concealed information from medical providers or personnel concerning Charles, and the record is barren of any evidence of her having done so. Moreover, there is no basis to assume that any prior concealment jeopardized Charles's health, or that defendant would dissemble or refuse to disclose information about his parentage in the future if the need were to arise, especially since she undisputedly is now aware that plaintiff is not Charles's biological father.

Given the absence of egregious fault, the motion court correctly precluded any disclosure in connection with defendant's marital fault.

The second issue on appeal concerns the extent of the damages that are recoverable on the fraud claim, which is based on allegations that defendant concealed her adultery and Charles's parentage from plaintiff. We agree with the court that plaintiff's recovery is limited to the actual pecuniary losses he suffered as a direct result of the alleged fraud (*see Geary v Hunton & Williams*, 257 AD2d 482 [1999] [out-of-pocket rule barred attorney from recovering for lost enhanced earning potential allegedly caused by firm's exaggeration about the profitability of its practice]). Plaintiff's pecuniary loss is limited to the calculable expenditure flowing directly from defendant's fraud, specifically the fees plaintiff paid for the parties' collaborative law process. Since lost profits are not recoverable in fraud (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]), plaintiff cannot seek to recover the profits from the couple's investments which may be distributed to defendant.

Nor can plaintiff recover in fraud for moneys he expended for Charles' support. He argues that if he had known about defendant's infidelity earlier, he might have immediately filed

for divorce and ensured that Charles's biological father supported him. The nexus between the particular fraud and the injury that plaintiff now claims is too remote and speculative to support a claim for damages. (*see e.g. National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1999]).

While the court did not squarely address whether plaintiff could seek punitive damages for defendant's alleged fraud, it implicitly rejected that claim when it held that "[a]ll relief not expressly granted is denied." We agree that punitive damages are inappropriate here, in that such damages have been limited to "conduct evinc[ing] a high degree of moral turpitude and demonstrat[ing] such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Walker v Sheldon*, 10 NY2d 401, 405 [1961]). A wife's infidelity and her alleged concealment from her spouse of their child's paternity does not rise to such a high degree of moral turpitude. Insofar as *Kujek v Goldman* (150 NY 176, 177-179 [1896]) lends any support for plaintiff's punitive damages claim, it is rejected. In *Kujek*, the Court held that a plaintiff could recover punitive damages from a defendant when he falsely induced plaintiff to marry a woman by misrepresenting that she was "a virtuous girl," although she was at that time pregnant with defendant's child. The facts

of *Kujek* are inapposite in that it involves a third person and its holding reflects the moral standards of an earlier era.

Defendant's motion for an order directing the use of an anonymous caption is denied, since she has not shown that anonymity is necessary to protect Charles's interests (*see Anonymous v Anonymous*, 27 AD3d 356, 361 [2006]).

Accordingly, the order of Supreme Court, New York County (Harold B. Beeler, J.), entered July 11, 2008, which, to the extent appealed from, denied plaintiff's cross motion for "liberal discovery," and limited his recovery of compensatory damages for his fraud claim against his wife to his share of the collaborative law process fees, should be affirmed, without costs.

All concur except Nardelli, J. who dissents in an Opinion:

NARDELLI, J. (dissenting)

I respectfully dissent to the extent that I find, inter alia, that it was premature for the motion court, at this juncture in the proceedings, to rule that defendant-wife's behavior does not, as a matter of law, constitute egregious misconduct for the purposes of equitable distribution under the Domestic Relations Law.

The New York State Legislature, in 1980, enacted the Equitable Distribution Law (EDL) (Domestic Relations Law § 236 B, as added by L 1980, ch 281, § 9), the adoption of which had been advocated because the traditional common law theory of property resulted in inequities upon the dissolution of a marriage. The EDL was premised on the entirely new theory that a marriage is an economic partnership to which both parties contribute as spouse, wage earner or homemaker, and mandates the equitable distribution of marital assets based upon the circumstances of each particular case (*O'Brien v O'Brien*, 66 NY2d 576, 585-586 [1985], citing Assembly Memorandum, 1980 NY Legis Ann, at 129-130; Governor's Memorandum of Approval, 1980 McKinney's Session Laws of NY at 1863; *see also K v B.*, 13 AD3d 12, 17 [2004], *lv dismissed* 4 NY3d 776 [2005], quoting *Brennan v Brennan*, 103 AD2d 48, 52 [1984], ["The distribution of marital assets depends not only on the financial contribution of the parties 'but also on a wide range

of nonenumerated services to the joint enterprise, such as homemaking, raising children and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home"]). Domestic Relations Law (DRL) section 236(B)(5)(d) lists 13 factors to be considered when making an equitable distribution award, which factors encompass, among other things, the income and property of each party at the time of the marriage and at the time the divorce action was commenced, the duration of the marriage, the age and health of the parties, a maintenance award if one had been issued, and the non-titled spouse's direct or indirect contributions to the marriage.

While the courts of this State initially wrestled with the concept of whether marital fault is a relevant consideration in the distribution of marital assets, as well as how that fault should be defined (*see McCann v McCann*, 156 Misc 2d 540, 543-544 [1993]), it is now recognized that marital fault may be taken into account under the EDL's "catchall provision," which allows for the consideration of "any other factor which the court shall expressly find to be just and proper" (DRL § 236[B][5][d][13]; *see also Levi v Levi*, 46 AD3d 520, 521 [2007], *lv dismissed* 10 NY3d 882 [2008]; *Havell v Islam*, 301 AD2d 339, 344 [2002], *lv denied* 100 NY2d 505 [2003]). The criteria which must be

considered when evaluating whether marital fault should play a role in any particular case were first enunciated by the Appellate Division, Second Department, in *Blickstein v Blickstein* (99 AD2d 287 [1984], *appeal dismissed* 62 NY2d 502 [1984]), which stated that the "marital misconduct [must be] so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship - misconduct that 'shocks the conscience' of the court thereby compelling it to invoke its equitable power to do justice between the parties" (*id.* at 292). This guideline was explicitly adopted by the Court of Appeals in *O'Brien v O'Brien* (66 NY2d at 589-590).

In the matter at bar, plaintiff alleges[2] that the parties met in 1993 while defendant, a single mother, was employed in the World Trade Center (WTC) checking employee and visitor identifications in the reception area. Plaintiff, a corporate attorney, worked in a law firm located within the WTC complex. The parties were married in 1996, had a son in March 1998 and a daughter in May 1999, and plaintiff legally adopted defendant's

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[2]In evaluating a motion to dismiss brought pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994], *see also Morone v Morone*, 50 NY2d 481, 484 [1980]).

then eight-year-old daughter in December 1999.

In early 2004, defendant became pregnant by an as yet unidentified man with whom she was conducting an extramarital affair, and thereafter gave birth to a son in December 2004. Plaintiff, at the time unaware of the affair, had no reason to suspect that the son defendant gave birth to was not his biological child, and defendant made no effort to inform him of the possibility, allowing plaintiff to raise the child believing it to be of his own issue.

In February 2007, defendant began another affair with co-respondent Ryan M., a representative from the Port Authority's general contractor for the WTC reconstruction site, who had been dispatched to the parties' marital residence to check on possible damage to their building caused by construction in the area. Defendant thereafter began spending large blocks of time away from plaintiff and her children while embarking on numerous trips with M., including one in which they traveled to Argentina for 18 days. During the course of these trips, plaintiff was left to care for the children, in at least one instance taking them on vacation by himself, while defendant remained largely incommunicado, refusing to provide contact information to her husband. Plaintiff also avers that during one family vacation to San Diego, M. secretly followed the family to the West Coast,

where defendant shunned dinner and day trips with her husband and children so that she could spend time with M.

Plaintiff states that in the face of defendant's repeated and extended absences, her increased spending habits, and frequent jokes from family and friends about the lack of physical resemblance between himself and his youngest child, he brought his son for a DNA marker test while defendant was in Argentina with M. Plaintiff was subsequently informed that there was a 0% chance he was the biological father of the youngest child, and plaintiff eventually commenced this divorce action.

Defendant thereafter moved, by order to show cause, to dismiss plaintiff's third cause of action sounding in fraud, and plaintiff cross-moved for liberal discovery in order to demonstrate that he properly pled allegations of fraud, to establish defendant's egregious conduct, to demonstrate defendant's lack of contribution to the acquisition of marital property, and to prove her dissipation of marital assets. The motion court denied plaintiff's cross motion for liberal discovery, finding, among other things, that defendant's misconduct did not rise to the level set forth in *Blickstein*, and limited plaintiff's recovery of compensatory damages for fraud to

his share of the collaborative law process fees.[3]

In analyzing whether defendant's conduct satisfies the egregious misconduct standard set forth in *Blickstein*, there can be, in my view, no dispute that defendant's actions "bespeak of a blatant disregard of the marital relationship," the foundation of which relationship must rest on mutual love, trust and respect. The question then becomes whether defendant's behavior was so egregious as to shock the conscience of the court or, stated another way, "whether the social values contravened by the offending spouse's behavior is [*sic*] so important that some punitive response in the context of equitable distribution is appropriate" (*McCann v McCann*, 156 Misc 2d at 548). The majority, on the other hand, limits the misconduct necessary to establish the standard for marital fault - misconduct "so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship" (*Blickstein)* to misconduct of a physical nature.

Defendant contends that plaintiff's request for expanded discovery reflects the actions of a vengeful husband and that her behavior equates to nothing more than adultery, which is

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[3]Plaintiff and defendant, apparently some time after they separated in mid-2007, entered into a joint effort to reach a legal resolution of their marital problems.

insufficient to shock the conscience of the court.[4] The majority, in apparent agreement with defendant, employs the considerable understatement that defendant's multiple affairs, her concealment from plaintiff, for more than four years, that he was likely not the father of her youngest child, allowing him to raise him as his own, and her continued refusal to identify the father, despite plaintiff's appeals that the information is necessary for medical reasons, constitutes nothing more than "alleged misconduct [that] cannot be condoned and is clearly violative of the marital relationship."

Defendant accurately depicts the current state of the law in New York when she opines that adultery per se does not fall within the parameters of egregious conduct for the purposes of determining marital fault (*see, e.g., Newton v Newton*, 246 AD2d 765 [1998], *lv denied* 91 NY2d 813 [1998]; *Smith v Smith*, 151 AD2d 232 [1989]; *Rosenberg v Rosenberg*, 126 AD2d 537 [1987], *lv denied* 70 NY2d 601 [1987]; *Wilbur v Wilbur*, 116 AD2d 953 [1986]).

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[4]Defendant ruminates that "[e]ven if one assumes that the [defendant] knew to a certainty that the [plaintiff] was not [the child's] biological father, the alleged silence is just as likely to have been an attempt to preserve marital and family relationships as to disregard them." It is unclear, however, how this generous gesture ties in with defendant's subsequent dalliances and numerous, prolonged "vacations" and, in fact, lends itself more readily to plaintiff's theory that defendant was deliberately delaying the end of the marriage in order to increase her share of a rapidly rising financial portfolio.

Nevertheless, "[w]hile serious and egregious marital misconduct ... [is more often found to include] spousal abuse, domestic violence, and attempted murder, it is not limited solely to physical or mental cruelty; adultery that substantially contributes to the dissolution of a marriage is also recognized as a relevant fault-based factor in a substantial majority of jurisdictions" (Swister, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 Regent Univ L Rev 243, 257 [2004-2005]). We must, however, also take into account plaintiff's assertion that defendant conceived a child during the course of one of her affairs and intentionally concealed the parentage of that child from plaintiff for a number of years, allowing him to raise the child as his own and develop a strong father-son bond, which evinces nothing less than a blatant disregard for the health and emotional well-being of plaintiff and the other children (*Winner v Winner*, 171 Wis 413, 177 NW 680, 682 [1920] ["the concealment by the woman of the paternity of her child is a fault so grievous that there is no excuse or palliation for it";[5] *see also* Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit that*

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[5]It is unclear if the majority's rejection of any significant social value component to "the moral standards of an earlier era" also applies to the early twentieth century and the observation of the Wisconsin Supreme Court.

Interferes with Parent-Child Relationships 33 Loyola LA L Rev 449 [2000] [Having a close and loving parent-child relationship suddenly destabilized by the revelation that no biological relationship exists has the potential to cause grief, anxiety, shock and fear]).

Plaintiff, in fact, is faced with the unenviable choice of devastating the child immediately by revealing the truth, and in the course of doing so risking his relationship with the child and the child's relationship with his siblings, or lying to the child indefinitely and continually despairing about the consequences when the truth is finally revealed.

Finally, and most importantly, defendant risked, and continues to place in jeopardy, the health of the child by misrepresenting medically necessary parental information to doctors and hospitals, conveying to them that plaintiff was the child's father and, after the truth was revealed, and despite plaintiff's protestations, continuing to refuse to provide the biological father's medical history, thereby allowing the child's medical history to contain significant, potentially life-threatening gaps. While the majority finds that this conduct "does not rise to the level of egregious fault," I take a dimmer view.

In *Havell v Islam,* this Court cited with approval Justice

Saxe's interpretation, as set forth in *McCann v McCann*, of "egregious" and "conscience-shocking" as having "no meaning outside of a specific context, and that conduct is 'conscience-shocking, evil, or outrageous' only when 'the act in question grievously injures some highly valued social principle'" (*Havell*, 301 AD2d at 345, quoting *McCann*, 156 Misc 2d at 545). "Therefore, the court concluded, conduct no matter how violent or repugnant is 'egregious' only where it substantially implicates an important social value. The court [in *McCann*] further noted that the cases that have taken marital fault into consideration involved the paramount social values: preservation of human life and 'the integrity of the human body'" (*Havell* at 345, quoting *McCann* at 547).

One commentator, in discussing why paternity establishment is important and, specifically, how that issue affects medical interests, opined:

> "*With the growing ability to diagnose and treat genetically based and genetically influenced diseases, having access to information about one's genetic heritage is increasingly important.* Individuals who lack the medical history of both parents are at a disadvantage in the diagnosis and treatment of a variety of diseases compared to those who possess such information. Those who have a false belief about the identity of their genetic father are further disadvantaged: they lack knowledge of their true genetic ancestry, hold false beliefs about it, and

> are generally unaware of their ignorance and false beliefs. *For their entire lives, they may unwittingly be giving doctors false information with potentially lethal consequences. Children receive a clear medical benefit from paternity establishment based simply on the increased knowledge of their genetic endowment. Those who deny a person the right to knowledge of his genetic ancestry-or, worse, mislead him about it-are harming the person in ways that could result in the needless death of that person.*
>
> "The child's medical interest in the establishment of paternity is not simply limited to the genetic predisposition towards disease. Should illness or injury necessitate an organ replacement, genetic relatives are the best candidates for donors. Consequently, children whose paternity has not been established are disadvantaged because their pool of potential donors is reduced. In addition, since the likelihood of organ donation presumably is increased when parents and children are tied to one another by bonds of affection-rather than the relatively sterile cognitive consciousness of genetic relatedness-children have an interest, based on the possibility of organ donation, in the early establishment of paternity and fostering a parent/child relationship with their genetic father throughout their lives" [internal footnotes omitted] (emphasis added) (Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 Cornell JL & Pub Policy 29, 32-33 [2003]).

Indeed, in 1983, the New York State Legislature, recognizing the vital role genetics plays in the medical history, diagnosis and treatment of a child for any number of illnesses, or in

preparation for a multitude of medical procedures, enacted Social Services Law § 373-a (L 1983, ch 326, as amended by L 1985, chs 103, 142), which provides that medical histories should be disclosed to preadoptive parents and adult adoptees, with the 1985 amendment expanding the coverage of the statute to include adoptive parents. In a memorandum to Alice Daniel, Counsel to the Governor, seeking approval of the bill, Cesar A. Perales, Commissioner of the New York State Department of Social Services, states that the medical history of children is "helpful in diagnosing an illness or deciding on a course of treatment for the child. Such information could contain data relating to hereditary disorders which may have been passed on to the child from the child's natural parents or to data concerning drugs to which the child is allergic" (Mem From Cesar A. Perales, June 3, 1983, Bill Jacket, L. 1983, ch 326, at 13).

In this matter, taking the allegations as set forth by plaintiff as true, I find defendant's willingness to play fast and loose with the health of her child by knowingly misleading his health care providers as to his true genetic background, thereby providing, in essence, a false medical history, and then refusing to rectify the situation when asked to do so, implicates and contravenes the paramount social values discussed in *Havell v Islam* and *McCann v McCann*. Moreover, when considering the

foregoing conduct, coupled with defendant's multiple acts of adultery, her numerous, sometimes lengthy trips with her lover during which she maintained no contact with her husband and children, her willingness to allow her lover to secretly accompany her on a family vacation, and her dissipation of assets, I find it is sufficient, at this juncture, to state a claim that defendant engaged in egregious conduct as set forth in *Blickstein*, and further, to foreclose dismissal of any of plaintiff's claims and to warrant granting the liberal discovery sought in his cross motion.

M-5112 - Howard S. v Lillian S.

Motion seeking leave for anonymous caption and for other related relief denied.

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

ENTERED: MARCH 17, 2009