SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 19, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

5165 Vincent Ramos, etc., Index 115629/05
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

Peter A. Frankel, New York (Meta S. Goldman of counsel), for appellants.

Wallace D. Gossett, Brooklyn (Steven S. Efron of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered December 12, 2007, which, in an action for personal injuries and wrongful death allegedly caused by the negligence of defendant Transit Authority's bus driver in discharging plaintiff's wheelchair-bound decedent from a bus, granted defendant's motion to dismiss the wrongful death cause of action for failure to serve a notice of claim alleging wrongful death, and denied plaintiff's cross motion to amend a notice of claim alleging personal injuries so as to add a claim for wrongful death, unanimously reversed, on the law and the facts, without costs, the motion to dismiss denied and the cross motion to amend granted.

The issue presented by this appeal is whether General Municipal Law (GML) § 50-e(6) authorizes amendment of a timely served notice of claim to add a wrongful death claim.

On July 28, 2004, Doris Ramos, age 66 and confined to a wheelchair, was traveling south on an M11 bus along on 9th Avenue in Manhattan. She alleged that she was injured when the bus driver negligently placed her in the wheelchair lift at 60th Street and 9th Avenue. Ramos claimed that her wheelchair rolled off the lift, and that she was thrown to the ground, face first, thereby sustaining serious injuries.

On September 10, 2004, Doris Ramos and Vincent Ramos timely served a notice of claim describing the accident and detailing the injuries at that point in time. Following Doris Ramos's death on January 5, 2005, letters of administration were granted to Vincent Ramos on September 26, 2005. On November 10, 2005, Ramos filed a verified summons and complaint setting forth causes of action for wrongful death, conscious pain and suffering, and loss of services; the summons and complaint were served on November 22, 2005. On or about January 23, 2006, defendant served a verified answer, and issue was joined.

By notice of motion dated May 22, 2007, defendant moved to dismiss the wrongful death cause of action, alleging that Ramos had failed to state a cause of action and had failed to meet the notice of claim requirements of GML 50-e and Public Authorities

Law § 1212.

Ramos opposed defendant's motion, and cross-moved to amend the original notice of claim to add a claim for wrongful death arising out of the same circumstances set forth in the original notice of claim. Ramos argued, among other things, that it was permissible under GML 50-e(6) to amend an existing and timely filed notice of claim to add a claim for wrongful death arising out of the circumstances enumerated in the original notice of claim.

By order entered on December 12, 2007, the motion court granted defendant's motion to dismiss, and denied Ramos's cross motion to amend the original notice of claim. The court determined that GML 50-e(6) authorized merely the amendment of technical defects or omissions, not substantive changes in the theory of liability. In that regard, the court found that an action to recover damages for conscious pain and suffering is materially distinct from a cause of action to recover damages resulting from a decedent's death. The court explained that recovery for conscious pain and suffering accrues to the decedent's estate, whereas the damages for wrongful death are for the benefit of the decedent's distributees who have suffered pecuniary injury, and thus are predicated on different theories of loss which accrue to different parties.

For the reasons set forth below, we find that it was error

for the motion court to deny Ramos's cross motion.

It is true that the summons and complaint served by plaintiff within 90 days of his appointment as the decedent's administrator were not a substitute for the notice of claim for wrongful death required by Public Authorities Law § 1212(2) and § 2980 and GML 50-e(1). However, GML 50-e(6) provides that any "mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section . . . may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby." In fact, we have consistently held that a plaintiff may amend a notice of claim to include derivative claims predicated on the same facts already included in the original notice of claim (*see Sciolto v New York City Tr. Auth.*, 288 AD2d 144 [2001]). Similarly, the Fourth Department has squarely held that a plaintiff may add a claim for wrongful death pursuant to GML 50-e(6) (*Matter of Scheel v City of Syracuse*, 97 AD2d 978 [1983]).

In the instant matter, it cannot be disputed that the wrongful death claim results from the same facts as were alleged in a timely and otherwise admittedly valid notice of claim for personal injuries. Because the wrongful death claim simply adds an item of damages that must be proven by the aggrieved party, we find that plaintiff should be granted leave to amend the notice

of claim pursuant to GML 50-e(6).

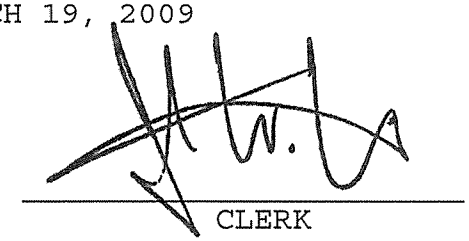
Furthermore, we find that allowing an amendment to the original notice of claim in order to add a claim for wrongful death does not cause defendant any prejudice (GML 50-e[6]). It is well settled that the purpose of the notice of claim requirement is to allow the municipality to investigate the claim while the information is still available and before witnesses depart or conditions change (*see Matter of Beary v City of Rye*, 44 NY2d 398, 412-413 [1978]). The test of the notice's sufficiency is "'whether it includes information sufficient to enable the city to investigate the claim'" (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 68 [2007], quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]).

We note that defendant waited two and one-half years to move to dismiss for failure to file a notice of claim. Setting that fact aside, there can be no dispute that the facts giving rise to the wrongful death claim are identical to that series of events which formed the basis for the original claim for personal injuries. Thus, the delay in asserting the wrongful death claim could not possibly have prejudiced defendant in maintaining its defense on the merits. Accordingly, the amendment to the

original notice of claim should be allowed (*see Scheel*, 97 AD2d at 978; *cf. Perry v City of New York*, 246 AD2d 380 [1998]). In view of the foregoing, we do not reach plaintiff's other arguments.

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

ENTERED: MARCH 19, 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 19, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Richard T. Andrias
Eugene Nardelli
John T. Buckley
Helen E. Freedman, Justices.

Application of Lana Callen, et al.,
Plaintiffs-Appellants,

Index 103287/07

-against-

4390

Vicki Morgan, et al.,
Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Edward H. Lehner, J.), entered May 9, 2008,

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 order so appealed from be and the same is hereby affirmed for the reasons stated by Lehner, J., without costs and disbursements.

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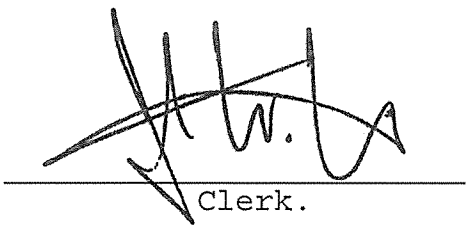


Clerk.

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

5248 Lisa Rose, Index 15109/06
Plaintiff-Respondent,

-against-

Citywide Auto Leasing, Inc.,
Defendant,

Ibrahima Sow, et al.,
Defendants-Appellants.

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

The Edelsteins, Faegenburg & Brown, LLP, New York (Evan M. Landa of counsel), for respondent.

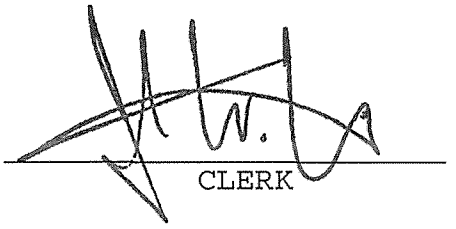
Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 11, 2008, which denied the motion of defendants Sow and Jejote for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against all defendants.

Defendants satisfied their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Based on their physical examinations of plaintiff and review of her MRI reports, as well as plaintiff's own statements, defendants' experts concluded that any limitations were either degenerative in nature or attributable to a workplace accident subsequent to the instant

occurrence (*see Valentin v Pomilla*, __ AD3d __, 2009 NY Slip Op 981 [1st Dept 2009]). Plaintiff failed to raise a triable issue by offering factually based medical opinions ruling out the subsequent accident and degenerative conditions as the cause of her limitations, and therefore summary judgment should have been granted to the moving defendants (*see Lunkins v Toure*, 50 AD3d 399 [2008]). We dismiss the complaint as against all defendants, since "if plaintiff cannot meet the threshold for serious injury against one defendant, she cannot meet it against the other[s]" (*Lopez v Simpson*, 39 AD3d 420, 421 [2007]).

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

ENTERED: MARCH 19, 2009



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

5391N Regina Carter, etc., Index 118304/04
Plaintiff-Appellant,

-against-

Isabella Geriatric Center, Inc.,
Defendant-Respondent.

Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellant.

McAloon & Friedman, P.C., New York (Timothy J. O'Shaughnessy of counsel), for respondent.

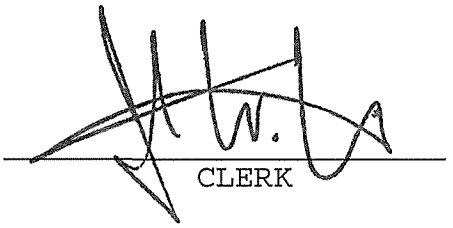
Appeal from an order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered on or about January 10, 2008, which precluded plaintiff from offering expert testimony at trial based on her failure to provide sufficient expert disclosure and, based on that preclusion, dismissed the complaint, unanimously dismissed, without costs.

The order on appeal, which was issued at a conference, is not appealable as of right because it did not decide a motion made on notice (*see* CPLR 5701[a][2]; *Sidilev v Tsal-Tsalko*, 52 AD3d 398 [2008]; *Turbel v Societe Generale*, 37 AD3d 187 [2007]). We decline to grant leave to appeal (*see* CPLR 5701[c]) because the record is not sufficiently developed to permit us to consider the issues raised by the parties. Notably, neither party made arguments or submitted evidence before Supreme Court touching on the fact-based issue of which of plaintiff's claims sound in

medical malpractice and which sound in ordinary negligence (*see Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 787-788 [1996]). Relatedly, neither party made arguments or submitted evidence addressing which of plaintiff's claims need to be supported by expert testimony and which do not. Plaintiff's remedy is a motion to vacate the order precluding her from calling expert witnesses and dismissing the complaint.

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

ENTERED: MARCH 19, 2009



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

5439 Cristobal Alicea, Index 117522/05
Plaintiff-Appellant,

-against-

Troy Trans, Inc., et al.,
Defendants-Respondents.

Stephen D. Chakwin, Jr., New York, for appellant.

Filip L. Tiffenberg, P.C., New York (Filip L. Tiffenberg of counsel), for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered December 24, 2007, which granted defendants' motion for summary judgment dismissing the complaint for lack of a serious injury as required by Insurance Law § 5102(d), unanimously affirmed, without costs.

The affirmed medical report of defendants' physician stating, inter alia, that he examined plaintiff on August 24, 2006 and found no objective clinical evidence of the injuries alleged in plaintiff's bill of particulars, nor any evidence of limited range of motion or other residual injury as a result of the accident of October 26, 2005, sufficed to show, prima facie, that plaintiff did not sustain a permanent or significant limitation as a result of the October 26, 2005 accident (*see Nagbe v Minigreen Hacking Group*, 22 AD3d 326, 326 [2005]). We decline to consider, because improperly raised for the first time on appeal, plaintiff's argument that the physician's affirmation

was rendered deficient by his acknowledgment that he did not receive or review medical records and diagnostic films (*see Vasquez v Reluzco*, 28 AD3d 365, 366 [2006]). Summary judgment was properly granted because plaintiff's opposition failed to adduce evidence of a limitation of range of motion based on objective medical findings made within a reasonable time after the accident (*see Thompson v Abbasi*, 15 AD3d 95, 99 [2005]; *Toulson v Young Han Pae*, 13 AD3d 317, 319 [2004]). The report of the physician who examined plaintiff five days after the accident, on October 31, 2005, may not considered for this purpose because it was not sworn or affirmed (*see Toulson, id.*; *Petinrin v Levering*, 17 AD3d 173, 174 [2005]).

In any event, we would reach the same conclusion even if we were to consider this physician's report, the records of the hospital to which plaintiff was taken after the accident, the unsworn MRI reports taken within two weeks of the accident, the unsworn report of the surgeon who operated on plaintiff's shoulder on January 24, 2006, the unsworn "follow-up examination" dated February 23, 2006, and the affidavit of the physician who examined plaintiff on January 29, 2007. While these materials show continuing complaints of pain, a shoulder tear, shoulder surgery, and bulging and herniated discs in the cervical and lumbar spine, they do not contain a contemporaneous quantitative or qualitative assessment of the extent and duration of resulting

range-of-motion limitations (*see Nagbe*, 22 AD3d at 326; *Thompson*, 15 AD3d at 97-98; *Arjona v Calcano*, 7 AD3d 279 [2004]). Such assessment is required even where there has been surgery (*see Danvers v New York City Tr. Auth.*, 57 AD3d 252, [2008]). The physician's affidavit fails in this respect because it merely describes tests that were performed in the past, and provides no specific, objective evidence of how the doctor arrived at his findings of limited range of motion at the time of his examination, or why he attributed the limitations to the accident (*see Bent v Jackson*, 15 AD3d 46, 49 [2005]).

Plaintiff's bill of particulars alleging that he stayed home from work for only two weeks after the accident establishes defendants' entitlement to summary judgment on plaintiff's 90/180-day claim (*see Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [2008]).

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

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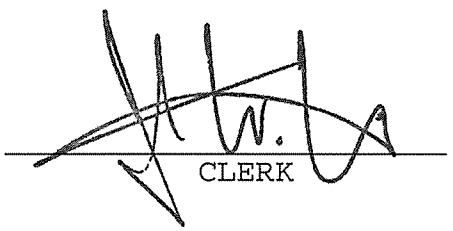


Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

99 The People of the State of New York, Ind. 1889/06
Respondent,

-against-

Anthony Emilione,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered March 22, 2007, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the seventh degree, and sentencing him to a term of 3 years' probation, unanimously affirmed.

The court properly denied defendant's suppression motion, and the jury's verdict was not against the weight of the evidence. In both instances, we find no basis for disturbing the respective factfinders' credibility determinations concerning the police account of the incident (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]; *People v Prochilo*, 41 NY2d 759, 761 [1977]).

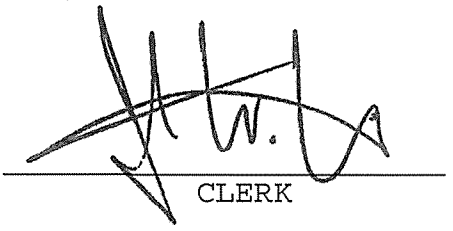
The court properly denied defendant's request for a missing witness charge since the record shows that the testimony of the uncalled witness, with respect to the crime of which defendant was convicted, would have been entirely cumulative to that of the

other witnesses (*see People v Macana*, 84 NY2d 173, 180 [1994]).

Defendant's remaining claims do not warrant reversal.

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

ENTERED: MARCH 19, 2009



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Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.,

100 Eleanor Capogrosso, Index 112291/06
Plaintiff-Appellant,

-against-

Tina Kansas,
Defendant-Respondent.

Eleanor Capogrosso, New York, appellant pro se.

Tina Kansas, New York, respondent pro se.

Judgment, Supreme Court, New York County (Debra A. James, J.), entered July 24, 2007, in an action for legal malpractice, dismissing the complaint pursuant to an order, which, inter alia, granted defendant's motion to dismiss the complaint and enjoined plaintiff from initiating any further litigation without prior approval of the administrative judge of the court in which she seeks to bring a further motion or future action, unanimously affirmed, with costs.

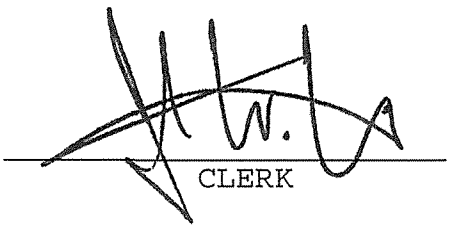
Plaintiff's action for legal malpractice is barred by the statute of limitations, which began to run no later than the day the order dismissing her underlying medical malpractice action was entered (*see McCoy v Feinman*, 99 NY2d 295, 298 [2002]). The injunction barring plaintiff from initiating further litigation without prior court approval was justified in light of the evidence of plaintiff's repeated abuse of the judicial process

and her penchant for vexatious conduct (*Sassower v Signorelli*, 99 AD2d 358 [1984]).

We have considered plaintiff's remaining contentions, including that the motion to dismiss was jurisdictionally defective, and find them unavailing.

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

ENTERED: MARCH 19, 2009



Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

101 Anthony Clarke, et al., Index 22929/06
Plaintiffs-Respondents,

-against-

The Morgan Contracting Corporation, etc.,
Defendant-Appellant.

[And A Third-Party Action]

Newman Myers Kreines Gross Harris, P.C., New York (Stephen N. Shapiro of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered July 15, 2008, which, insofar as appealed from, granted plaintiffs' motion for summary judgment on the issue of liability pursuant to Labor Law § 240(1), and denied defendant's cross motion for summary judgment dismissing plaintiffs' claim pursuant to Labor Law § 241(6), unanimously affirmed, without costs.

Plaintiff, who was employed to perform carpentry work on a construction project at SUNY Downstate Medical Center, was injured when two metal stud beams that were being hoisted from the street were dropped from a sidewalk bridge and landed on his face, chest and shoulders. Plaintiffs met their burden of demonstrating that defendant's failure to provide adequate safety devices was a contributing cause of plaintiff's injuries in

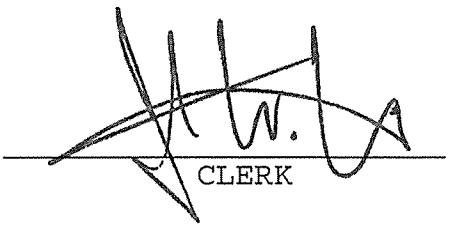
violation of § 240(1) (*see Kielar v Metro. Museum of Art*, 55 AD3d 456, 458 [2008]; *Greaves v Obayashi Corp.*, 55 AD3d 409 [2008]), and plaintiff was not, under any view of the evidence, the sole proximate cause of his injuries (*see Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 480 [2007]; *Kyle v City of New York*, 268 AD2d 192, 196 [2000], *lv denied* 97 NY2d 608 [2002]).

The court properly denied defendant's motion for summary judgment on plaintiffs' § 241(6) claim premised on Industrial Code (12 NYCRR) § 23-1.7(a)(1). This rule is sufficiently specific to support a cause of action under § 241(6) *(see Murtha v Integral Constr. Corp.*, 253 AD2d 637, 639 [1998]), and a material question of fact remains as to whether the area where the accident occurred was an area "normally exposed to falling material or objects," and as to whether the sidewalk bridge without safety netting provided appropriate overhead protection to workers in that area.

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 19, 2009



Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

102 In re Dimetreus A.,

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

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

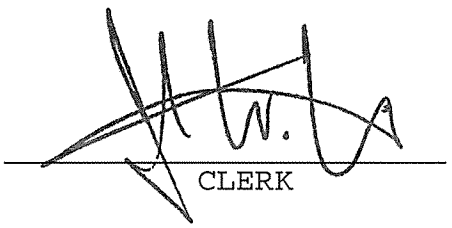
Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about June 12, 2008, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crimes of attempted robbery in the first and second degrees and menacing in the second degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

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

disturbing the court's decision to credit the complainant's testimony and not that of appellant.

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

ENTERED: MARCH 19, 2009



Tom, J.P., Saxe, Sweeny, Freedman, JJ.

103 Gerasimos Voultepsis, et al., Index 103370/04
Plaintiffs-Respondents-Appellants,

-against-

Gumley-Haft-Klierer, Inc.,
Defendant,

Gumley-Haft LLC,
Defendant-Appellant-Respondent.

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for appellant-respondent.

Kelner and Kelner, New York (Gail S. Kelner of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Joan Madden, J.), entered July 14, 2008, which denied defendant-appellant's motion for summary judgment dismissing the complaint, and denied plaintiffs' motion for partial summary judgment on the issue of liability on their claim under Labor Law § 240(1), to strike appellant's affirmative defense based on the Workers' Compensation Law, and to strike appellant's answer as a sanction for spoliation of evidence, unanimously modified, on the law, plaintiffs' motion granted solely to the extent of striking appellant's affirmative defense based on the Workers' Compensation Law, and otherwise affirmed, without costs.

This action arises out of an accident in a cooperative apartment building, where plaintiff was the superintendent, his employer was the cooperative corporation, and appellant was the

building's managing agent pursuant to an agreement with the cooperative corporation. Plaintiff was injured when, while replacing a wooden floor in the building's sub-basement, the ladder he was using slid, causing him to fall to the ground.

On plaintiffs' claim under Labor Law § 240(1), appellant can be held liable only if it was a "statutory agent" of the owner. Statutory agency turns on the authority to supervise and control the employee (*see Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 98-99 [1999]), and "[o]nly upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). Here, the motion court properly contrasted evidence that appellant was responsible for overseeing such special projects as the floor replacement, and that its employee assigned to manage the building had a role in ensuring that such projects were done safely, with proof that such authority was limited. Accordingly, there are questions of fact as to the "scope" of appellant's "oversight and control of the work" for statutory agency purposes (*see Aponte v City of New York*, 55 AD3d 485, 485 [2008]). The record also presents triable issues regarding plaintiffs' claim under Labor Law § 200, both as to whether appellant had the authority to control the activity that brought about plaintiff's alleged injury, and as to whether

appellant had actual or constructive notice of the alleged dangerous condition (*see e.g. Fresco v 157 E. 72nd St. Condominium*, 2 AD3d 326, 328 [2003], *lv dismissed* 3 NY3d 630 [2004]).

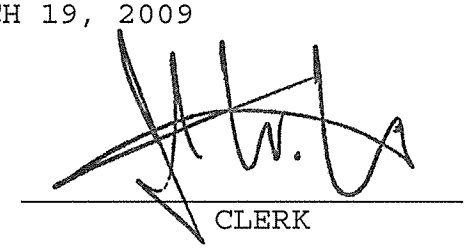
The Workers' Compensation Law defense, however, turns on the actual exercise by the defendant of authority to control plaintiff employee's work (*see Fox*, 266 AD2d at 99). The putative special employer must demonstrate that its actual working relationship with plaintiff employee allowed it to control and direct "the manner, details and ultimate result of" plaintiff's work, and determine "all essential, locational and commonly recognizable components" of that work (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 550 [2008] [internal quotation marks and citations omitted]). Here, appellant essentially concedes that it lacked the required level of control, and the record fails to raise any question of fact on the point.

Denial of plaintiffs' motion to strike appellant's answer as a sanction for spoliation of evidence was a provident exercise of discretion, where appellant explained that it searched for the

requested documents and could not find them (*see Positive Influence Fashions, Inc. v Seneca Ins. Co.*, 43 AD3d 796 [2007]; *Diaz v Rose*, 40 AD3d 429, 430 [2007]).

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

ENTERED: MARCH 19, 2009



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Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

104-
104A Muriel Siebert, Index 117696/05
Plaintiff-Appellant,

-against-

Nicholas Dermigny,
Defendant-Respondent.

Kramer Levin Naftalis & Frankel LLP, New York (Stephen M. Sinaiko of counsel), for appellant.

The Law Offices of Fred Van Remortel, P.C., New York (Allan J. Berlowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered May 30, 2007, after nonjury trial, dismissing the action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about same date, which dismissed the action after findings of fact and conclusions of law, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

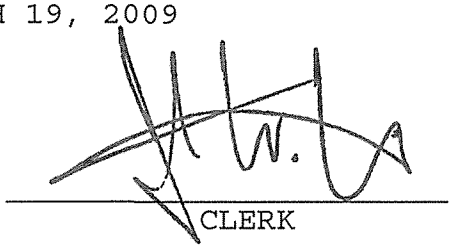
Plaintiff bore the burden of proof in this action on an unpaid loan. The question was whether the money advanced to defendant was actually a loan in the form of a down payment on a Manhattan co-op apartment, as alleged, or whether it was simply payment on a debt in the form of reimbursement of rent on a New Jersey apartment. As the trial court determined, the testimony of neither party was credible, and there is no basis for concluding that the findings of fact could not have been reached

under any fair interpretation of the evidence, especially where those findings rest in large part on witness credibility (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]).

The court noted the absence of a written agreement between the parties or any purpose memorialized on plaintiff's check that might have indicated the funds advanced to defendant constituted a loan. Furthermore, plaintiff failed to demand payment from defendant even after the latter received substantial bonuses. Whether a notation in plaintiff's check ledger (that the check represented a loan) constituted a contemporaneous writing rested on plaintiff's credibility, which the court found lacking.

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

ENTERED: MARCH 19, 2009



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Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

105 The People of the State of New York, Respondent, Ind. 2960/06

-against-

Kenneth Williams, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered October 10, 2007, convicting defendant, after a jury trial, of attempted robbery in the second degree, and sentencing him, as a second felony offender, to a term of 6 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's decision to credit the account of the incident provided by the People's witnesses, while discrediting that of defendant.

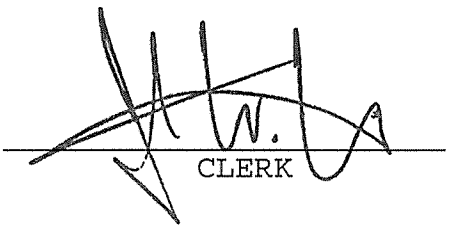
The imposition of mandatory surcharges and fees by way of court documents, but without mention of the particular amounts in the court's oral pronouncement of sentence, was lawful (*see People v Guerrero*, __ NY3d __, 2009 NY Slip Op 01242).

We perceive no basis for reducing the sentence.

Defendant's remaining claim, although arguably raised in a pretrial motion, was never addressed by the motion court, and defendant not only abandoned but affirmatively waived this claim at trial. As an alternative holding, we find no basis for reversal.

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

ENTERED: MARCH 19, 2009



Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

107 Janice Clement, Index 109799/07
Plaintiff-Respondent,

-against-

Kateri Residence,
Defendant-Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellant.

The Cochran Firm, New York (Paul A. Marber of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 30, 2008, which, insofar as appealed from as limited by the briefs, in this action for personal injury and negligent hiring and retention allegedly arising out of the care afforded plaintiff during her stay at defendant nursing home, granted plaintiff's motion to compel disclosure of certain documents and denied defendant's cross motion for a protective order, unanimously affirmed, without costs.

Plaintiff's disclosure demand for negative outcome and incident reports involving conditions and occurrences like those alleged in the complaint are not protected by the quality assurance privilege, since such reports, although utilized by defendant's quality assurance committee, were not prepared by or at the behest of such committee, but rather were of the type

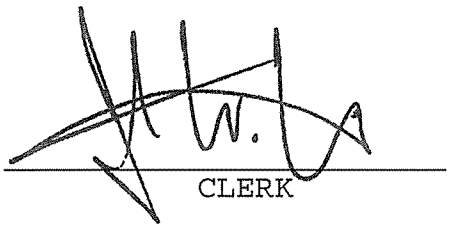
routinely prepared and maintained pursuant to 10 NYCRR 415.15(a)(3)(i) (*see Matter of Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434, 440 [2003]). As indicated in the affidavit of defendant's Director of Quality Management, the function of defendant's quality assurance committee, as it pertains to the negative outcome and incident reports, appears to be no more than one of compliance with the requirements 10 NYCRR 415.15(a)(3)(i), and, thus, subject to disclosure (*see Kivlehan v Waltner*, 36 AD3d 597, 599 [2007]).

Furthermore, plaintiff's demands, as time-limited by the court, as to, inter alia, personnel information regarding each employee who had contact with plaintiff while she was in defendant's residence, staff medical policies, and system-wide operational materials such as contracts, licenses, and by-laws, are material and necessary (*see generally Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 358 [2006]), and are not overly broad or unduly burdensome, inasmuch defendant is compelled by statute and regulation to maintain and continuously collect such information (*see e.g.* Public Health Law § 2805-e; 10 NYCRR 415.15[a][3][i]; 10 NYCRR 415.30[h], [n]; 10 NYCRR 412.1; *Simmons v Northern Manhattan Nursing Home, Inc.*, 52 AD3d 351 [2008]).

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

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

ENTERED: MARCH 19, 2009



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Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.,

108 R&R Capital LLC, et al., Index 604080/05
Plaintiffs-Appellants,

-against-

Linda Merritt, etc.,
Defendant-Respondent.

Hogan & Hartson LLP, New York (Paul B. Sweeney of counsel), for appellants.

Joseph M. Fioravanti, Media, PA (of the Pennsylvania Bar, admitted pro hac vice), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 12, 2008, which granted defendant's motion for disbursement of proceeds of the sale of certain property located in Pennsylvania, unanimously reversed, on the law, with costs, and the motion denied.

The motion court did not have jurisdiction over plaintiff's claim for a final accounting of the proceeds of the sale of the Pennsylvania property at issue, which was the sole asset of a limited liability corporation in which plaintiffs and defendant were equal members. Although plaintiffs initially commenced this action in New York relating to defendant's alleged mismanagement of several limited liability corporations, the claims were heard and dismissed after a nonjury trial.

Defendant subsequently sold the property at issue and plaintiff commenced an action in Pennsylvania for, inter alia, a

final accounting based on the sale of the property and defendant's alleged mishandling of the proceeds. The Pennsylvania court placed the proceeds of the sale in escrow pending a determination by Supreme Court, New York County regarding how the funds should be disbursed and defendant moved the court for disbursement of the funds pursuant to a schedule submitted with the motion.

The motion court, in granting the motion and permitting the disbursements sought by defendant with limited exceptions, lacked jurisdiction over plaintiff's claims, since the relief sought did not relate to a cause of action raised in the initial complaint, nor was the issue involved previously litigated in this action (*see P.A. Bldg. Co. v City of New York*, 236 AD2d 275 [1997]; *Ward-Carpenter Engrs. v Sassower*, 193 AD2d 730 [1993]).

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

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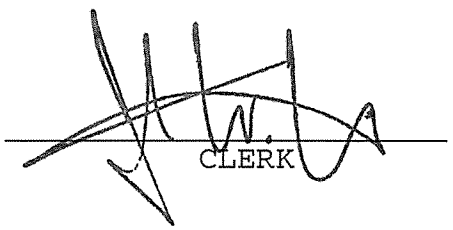


Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

111 The People of the State of New York, Ind. 99074/07
Respondent,

-against-

James Schlau,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about November 20, 2007, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

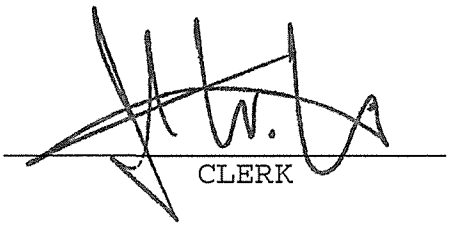
The court properly assessed defendant 15 points for history of drug or alcohol abuse based on his admissions to correctional officials and the results of a diagnostic assessment (*see People v Reyes*, 48 AD3d 267, 268 [2008], *lv denied* 10 NY3d 711 [2008]). The evidence of a single recent negative test for substance abuse, following defendant's extensive periods of incarceration, was insufficient to predict his behavior when no longer under supervision (*see People v Gonzalez*, 48 AD3d 284 [2008], *lv denied* 10 NY3d 711 [2008]).

The court properly found clear and convincing evidence of

aggravating factors supporting the court's discretionary upward departure. The risk assessment instrument did not adequately account for the full extent of defendant's prior record (*see People v Wilkens*, 33 AD3d 399 [2006], *lv denied* 8 NY3d 801 [2007]) and the serious circumstances of the current offense requiring registration (*see People v Ellis*, 52 AD3d 1272 [2008], *lv denied* 11 NY3d 707 [2008]).

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

ENTERED: MARCH 19, 2009



Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

112 Angelo Lopez, Index 108663/04
Plaintiff-Respondent,

-against-

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

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

Sullivan, Papain, Block, McGrath & Cannavo, P.C., New York (Brian J. Shoot of counsel), for respondent.

Judgment, Supreme Court, New York County (Donna M. Mills, J.; Robert D. Lippmann, J., at jury trial), entered March 26, 2007, awarding plaintiff $2,100,000 for past pain and suffering and $5,600,000 for future pain and suffering, after adjustment to reflect the jury's apportionment of responsibility, unanimously modified, on the facts, to vacate the award for future pain and suffering and remand for a new trial on that issue only and otherwise affirmed, without costs, unless plaintiff, within 20 days of service of a copy of this order, stipulates to reduce the award for future pain and suffering, after apportionment, to $4,600,000 and to entry of an amended judgment in accordance therewith.

Plaintiff was riding his bicycle when it collided with a bus owned and operated by defendants. The jury's conclusion was based on a fair interpretation of the evidence that, when

considered in a light most favorable to plaintiff, was legally sufficient to support the verdict (*see Cohen v Hallmark Cards*, 45 NY2d 493 [1978]). Great deference must be accorded to the fact-finding function of the jury, which had the opportunity to see and hear the witnesses and assess their credibility (*see Soto v New York City Tr. Auth.*, 6 NY3d 487, 493 [2006]), as well as the weight it gave to conflicting expert testimony. The jury was justified in crediting the opinion of plaintiff's expert witness that notwithstanding plaintiff's own negligence, the driver of the bus was much more at fault for making no effort to avert the accident (*id.* at 492-493).

The court did not err in permitting the jury to hear that the driver had violated Transit Authority rules by not remaining at the scene of the accident. Although an agency's internal rules and practices are inadmissible when they require a standard of care transcending that imposed by common law (*see Rahimi v Manhattan & Bronx Surface Tr. Operating Auth.*, 43 AD3d 802, 804 [2007]), the bulletin at issue merely declared that incidents involving injury or vehicle damage must be reported as soon as possible, which is no more than what is required under common law (*see Danbois v New York Cent. R.R. Co.*, 12 NY2d 234, 240 [1963]). Indeed, the jury was not informed that the Transit Authority had found the driver to be at fault, but was instead accurately advised that he continued without stopping for five blocks after

the event.

The amount of damages awarded plaintiff for future pain and suffering deviates materially from what is reasonable compensation under the circumstances (CPLR 5501[c]).

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

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

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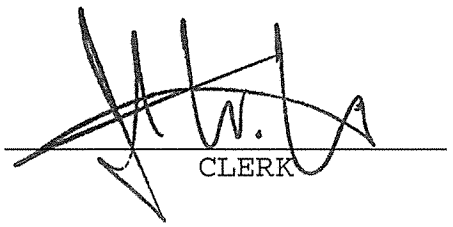


Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

114 In re Matter of Jewish Association for Services for the Aged Community Guardian Program, Petitioner-Respondent, Index 402583/07

-against-

David Kramer, Respondent-Appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Namita Gupta of counsel), for appellant.

Miller, Canfield, Paddock & Stone, P.L.L.C., New York (Susan I. Robbins of counsel), for respondent.

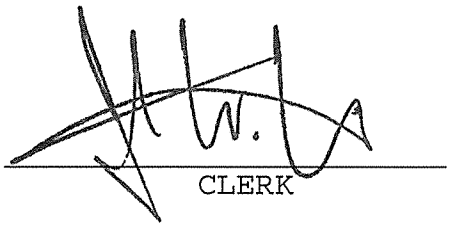
Order, Supreme Court, New York County (John E. H. Stackhouse, J.), entered April 8, 2008, which, to the extent appealed from, directed reimbursement of petitioner for $10,131.56 in temporary guardianship expenses and legal fees incurred in December 2007 in connection with an interim stay of the guardianship powers obtained by respondent's appointed Mental Hygiene Legal Services counsel, unanimously reversed, on the law, without costs, and the matter remanded for re-evaluation of the legal fees to be imposed, if any.

Attorney fees were improvidently imposed without the requisite written decision setting forth the basis for the award (22 NYCRR 36.4[b][3]) and an explanation as to the reasonableness of the fees imposed (*Matter of Martha O.J.*, 22 AD3d 756 [2005]; *cf. Matter of Freeman*, 34 NY2d 1 [1974]). An evaluation de novo

is further warranted as to whether the legal fees sought were occasioned by procedural mistakes possibly committed by respondent's counsel.

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

ENTERED: MARCH 19, 2009



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Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

115 The People of the State of New York, Ind. 3956/06
Respondent,

-against-

Jason Bolton,
Defendant-Appellant.

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

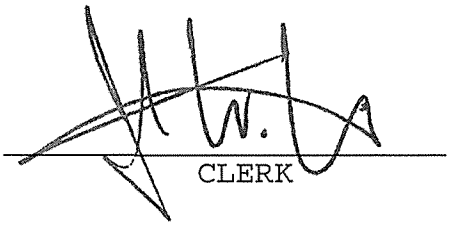
Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered August 6, 2007, convicting defendant, upon his plea of guilty, of five counts of robbery in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 12 years, unanimously affirmed.

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

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

ENTERED: MARCH 19, 2009



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Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

116 The People of the State of New York, Respondent, Ind. 1902/06

-against-

Christian Dilone, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David A. Crow of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered December 20, 2006, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to concurrent terms of 9 and 7 years, respectively, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence supporting his conviction of second-degree weapon possession is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also find that the evidence of defendant's intent to use the weapon unlawfully was legally sufficient in light of the statutory presumption of unlawful intent (Penal Law § 265.15[4]), which the court properly submitted to the jury. We further find that the verdict was not

against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

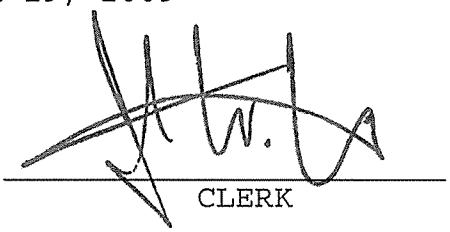
The court properly exercised its discretion in denying defendant's mistrial motion, made on the basis of a portion of the prosecutor's summation that allegedly misstated the law. Any possible confusion in this regard was prevented by the court's correct and thorough jury instruction on the particular subject at issue.

We decline to vacate the third-degree possession conviction in the interest of justice.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 19, 2009



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Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

117 110 Amity Associates, LLC, et al., Index 106263/07
Plaintiffs-Respondents,

-against-

Grubb & Ellis New York, Inc., et al.,
Defendants-Appellants.

Schwartz, Lichtenberg LLP, New York (Barry E. Lichtenberg of counsel), for appellants.

Carter Ledyard & Milburn LLP, New York (Alan Lewis of counsel), for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered September 19, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Plaintiffs brought this action, for tortious interference with a prospective contract, against real estate brokers and their firm in connection with plaintiffs' failed attempt to purchase property. The crux of the suit centers on a March 12, 2007 conversation between plaintiffs' counsel and the brokers that occurred after execution of the contract of sale but before its delivery to plaintiffs, which was required for the contract to be effective. During this conversation, it is undisputed that plaintiffs' counsel used the term "buyer's remorse" and requested

that the brokers provide evidence of a competing bid, which statement and request the brokers relayed to the owner.

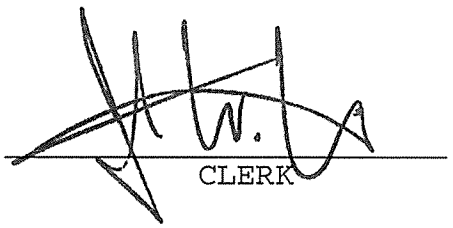
Plaintiffs claim that defendants acted wrongfully in failing to disclose to the owner the entirety of the March 12 conversation, and mischaracterizing their counsel's "buyer's remorse" statement, which was allegedly said in a jocular manner. These allegations do not rise to the level of such "wrongful means" as physical violence, fraud or misrepresentation, which are necessary to establish a claim for tortious interference with a contract (*see NBT Bancorp Inc. v Fleet/Norstar Fin. Group*, 87 NY2d 614, 624 [1996]). Similarly lacking is proof that defendants were solely motivated by malice, as defendants have set forth that they disclosed the subject telephone call to the owner based on their contractual and fiduciary duty to do so (*see Snyder v Sony Music Entertainment,* 252 AD2d 294, 300 [1999]). Indeed, as brokers, defendants had a clear economic interest in closing the deal, separate from any possible malice *(see Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]).

M-591 - *110 Amity Associates, LLC, et al.*
v Grubb & Ellis New York, Inc., et al.,

Motion seeking leave to strike portion of reply brief denied.

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

ENTERED: MARCH 19, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Eugene Nardelli
John T. Buckley
Karla Moskowitz
Dianne T. Renwick, JJ.

File 2807/01
4965

_____x

Probate Proceeding, Will of
Francine Meyer De Camaret Meyer,
also known as Francine Meyer,
Deceased.

_____

Patrick A. Gerschel,
Plaintiff-Appellant,

-against-

Andrew W. Heymann, et al.,
Defendants-Respondents,

Madeline Stamm, et al.,
Defendants.

_____x

Plaintiff appeals from an order of the Surrogate's Court, New York County (Renee R. Roth, S.), entered on or about November 15, 2007, which granted the motion by defendants Heymann and Emerald Foundation to dismiss the complaint.

McLaughlin & Stern, LLP, New York (Jon Paul Robbins of counsel), for appellant.

Holland & Knight LLP, New York (Charles F. Gibbs, Brian P. Corrigan and Faith L. Carter of counsel) and Solomon, Blum, Heymann & Stich LLP, New York (Andrew W. Heymann pro se and of counsel), for respondents.

RENWICK, J.

After Francine Meyer, a 77-year old French citizen, died in her Fifth Avenue condominium in New York City on July 28, 2001, her estranged son, Patrick A. Gerschel, who had not seen her for 25 five years, commenced this action, claiming forced heirship under French civil law. That law limits the right of a domiciliary of France to disinherit children through lifetime gifts or by will. Plaintiff seeks to recover forced heirship shares from several beneficiaries to whom Ms. Meyer gave lifetime gifts totaling more than $33 million. The main issue on this appeal involves whether New York would apply forced heirship rights under French law to a decedent's inter vivos disposition of New York property.

The following pertinent facts are not in dispute. Francine Meyer was born in France in 1924. Although she remained a French citizen throughout her life, she was truly a "citizen of the world." Ms. Meyer moved to Switzerland in the late 1960s or early 1970s, where she established her residence for more than 20 years. Later, she sold her Swiss home, surrendered her resident permit there, and in 1986 purchased a Fifth Avenue luxury condominium apartment in Manhattan.

Subsequently, around 1996, she also purchased a five-bedroom luxury condominium in Bermuda. In 1997, Ms. Meyer received a

Bermuda certificate of residence. She also obtained a library card and maintained a personal bank account in Bermuda. Her French passport listed Bermuda as her place of residence. Similarly, a certificate issued by the French Consul General in New York indicated that Ms. Meyer was registered as a resident of Bermuda from September 1998 to September 2001.

During the last four years of her life, Ms. Meyer spent much less time in Bermuda than in Europe and the United States, splitting her time equally between New York and Europe. Most of her time in Europe was spent in France, although she neither owned nor rented a residence there. She also spent time in Switzerland, Sweden, Denmark, the United Kingdom, Italy and Germany.

Upon her death on July 28, 2001, decedent Meyer was survived by three children -- Marianne Gerschel, Laurent Gerschel, and plaintiff Patrick A. Gerschel. Decedent left various testamentary instruments. She made a will and codicil disposing of her property in Bermuda. This Bermuda will, dated June 25, 1988, stated that she resided in Bermuda. She also made a separate will and two codicils disposing of her property in New York. In the New York will, dated April 20, 2000, she directed that her will be probated in this state and governed by its law, even though she was "domiciled and residing" in Bermuda. In both

wills, with the exception of a few specific bequests, decedent left her property in trust for the Emerald Foundation, a New York charity she had established to support medical research.

On March 16, 2006, plaintiff, a resident of New York, commenced this action pursuant to Articles 724 and 913-930 of the French Civil Code limiting the right of a domiciliary of France to disinherit children through lifetime gifts or by will.[1] He seeks to recover his alleged forced heirship share from the beneficiaries of various gifts made by decedent during her lifetime.[2] The property involved in the claim consists of gifts totaling more than $15 million that Ms. Meyer made to a charity and various individuals, as well as gifts in excess of $17 million that she made to the Emerald Foundation. The complaint alleges that at the time of her death, decedent was a citizen and domiciliary of France, and that applicable French forced heirship principles required decedent to leave 75% of her "augmented

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[1] Initially, plaintiff commenced this action in Supreme Court, New York County, which transferred it to Surrogate's Court.

[2] According to the complaint, defendants Gerard and Andrew are brothers. Gerard is an investment advisor who began giving decedent advice in the 1980's and Andrew was decedent's attorney who had a "close personal relationship" with her. The other individual defendants were friends of decedent. The defendant Foundations were founded by decedent.

estate" to her three children but she did not do so. The complaint further alleges that French law permits "disadvantaged" heirs to bring an action to recover from those who received gifts or other gratuitous transfers to the extent that these transfers encroached upon the forced heirship share.

In lieu of an answer, the Heymann and Emerald defendants moved for a dismissal of the complaint pursuant to CPLR 3211(a)(1),(2),(5) and (7), arguing that this case does not invoke French forced heirship claims because plaintiff cannot establish that his mother was a French domiciliary at the time of her death. They further noted that a French forced heirship claim is created by statute, and for purposes of the limitations period for commencing such an action, the accrual date is the date of the decedent's death. Finally, they argued that under French forced heirship laws, plaintiff can directly seek redress against the recipient of an inter vivos gift only if the value of the testamentary disposition is insufficient to satisfy his forced heirship claim. Surrogate's Court granted these defendants' motion to dismiss solely upon the finding that the documentary evidence conclusively established that decedent was not a domiciliary of France at the time of her demise. We affirm for the reason stated, as well as other grounds establishing that the action is untenable as a matter of law.

The parties in this case assumed incorrectly that inter vivos transfers made in New York by a French domiciliary are subject to French forced heirship laws. The Surrogate's Court appears to have operated under this assumption as well, dismissing solely on the ground that the decedent was not domiciled in France at the time of her death. Nevertheless, forced heirship provisions of a civil law jurisdiction like France are inapplicable to inter vivos transfers of property executed in New York, irrespective of whether the transferor's domicile was New York or France. This is because the validity and effect of these transfers, as well as the capacity to effect them, are governed by the law of the state where the property was situated at the time of the transfer.

Wyatt v Fulrath (16 NY2d 169 [1965]) illustrates this principle. There, husband and wife, both domiciliaries of Spain -- a community property jurisdiction -- established a series of joint tenancy bank accounts in New York. Upon opening the accounts, both executed survivorship agreements spelling out that the funds therein would pass to the survivor. The issue on demise of the husband was whether the law of Spain (the domicile) or New York would control. If Spanish law governed, the wife would take her half share as community property, with at least two-thirds of the decedent's half passing to his heirs, since

Spanish law provides forced-share rights for children in an amount equal to two-thirds of the decedent's assets (*see* Spanish Civil Code art 1000 *et seq.*). The Court of Appeals, relying both on the survivorship agreements and the local public policy of encouraging foreign persons to place assets in New York, held the New York survivorship feature controlled, with the husband's portion passing entirely to the benefit of the wife.

This Court reaffirmed the *Wyatt* principle in *De Werthein v Gotlib* (188 AD2d 108 [1993], *lv denied* 81 NY2d 711 [1993]), holding that New York law, rather than the laws of Argentina, governed the ownership and distribution of two New York "Totten trust" bank accounts a deceased Argentine national had established during his lifetime. The decedent had opened the accounts with his brother named as beneficiary. Upon the decedent's death, his surviving spouse and the daughter of a deceased prior spouse brought separate actions to recover the proceeds of the accounts. The Supreme Court consolidated the actions and granted summary judgment for the brother. On appeal, this Court affirmed. With regard to the surviving spouse's claim, we held that she was not entitled to a "forced share" of the accounts under Argentine law because New York law, rather than the law of the foreign country in which the spouse was domiciled, controlled as to whether she had any interest in the

accounts that were created before the marriage and never revoked.

New York law also clearly provides that when a non-domiciliarily directs her will to be probated in this state and governed by its law, the forced heirship laws of a foreign state do not apply.[3] Specifically, EPTL 3-5.1(h) permits a testator the option of having New York law apply to the disposition of property in New York in matters relating to the "intrinsic validity" of the disposition. In *Matter of Renard* (56 NY2d 973 [1982], *affd on op* of Surrogate Millard L. Midonick, 108 Misc 2d 31 [1981], the Court ruled that under this statute a French domiciliary could opt for the application of New York law to her New York property, thereby precluding her son from taking a share of it, as the French forced heirship law would have allowed.

We perceive no valid policy distinction that would allow a nonresidential testator to avoid French forced heirship claims by invoking New York law with respect to assets physically situated in New York (*id.*), but not with regard to previous inter vivos transfers of assets physically situated here. On the contrary, the policy rationale permitting testamentary freedom from forced

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[3] This explains plaintiff's conduct that, on first impression, seems incongruous, in seeking a French forced heirship claim only against the lifetime New York gifts made by his mother, but not with regard to the New York property passing under her New York will.

heirship rules should also prevail with equal force to inter vivos transfers (*see Wyatt v Fulrath*, 16 NY2d 169, *supra*; *see also Hutchison v Ross*, 262 NY 381 [1933], holding that if the transferor has the capacity to make a transfer according to the law of the situs of the chattel at the time of the conveyance, it is immaterial that he does not have that capacity according to the law of the state of his domicile; *cf. Neto v Thorner*, 718 F Supp 1222 [SD NY 1989], holding that a Brazilian domiciliary's establishment of a Totten trust account in New York was an election to have the trust funds governed by New York law, even if inconsistent with the law of the testatrix's domicile).

Even if plaintiff were to convince this Court that these inter vivos transfers were subject to France's forced heirship laws, plaintiff's action would still require dismissal. While the court below did not address this issue, we cannot ignore that the action is time-barred. Plaintiff's French forced heirship claims are "to recover upon a liability . . . created or imposed by statute" (CPLR 214[2]), and thus are governed by a three-year statute of limitations. CPLR 214(2) does not automatically apply to all causes of action in which a statutory remedy is sought, but rather only where liability "would not

exist but for a statute" (*Aetna Life & Cas. Co v Nelson*, 67 NY2d 169, 174 [1986]). Thus, the statute does not apply to liabilities existing at common law that have been recognized or implemented by statute (*id.*). When this is the case, the statute of limitations is the one for common-law causes of action the statute codified or implemented (*see State of New York v Cortelle Corp.*, 38 NY2d 83 [1975]).

Plaintiff's argument that his claim for forced heirship is not created by statute but rather is based on pre-1804 French customs is unavailing. Plaintiff's action exists solely by virtue of the French Civil Code, which completely replaced all prior law dealing with any matter it covered. Because, under French law, the accrual date for the French action is the date of decedent's death (*see* Article 913-930 of the French Civil Code), the applicable 3-year limitations period expired on July 28, 2004. Because plaintiff commenced this action on March 16, 2006, his claim is time-barred (*see McConnell v Caribbean Petroleum Co.*, 278 NY 189 [1938], holding that the statute of limitations applicable to liabilities created by statute governs when a claim is based on a foreign civil code statute).

Finally, as Surrogate's Court properly found, the documentary evidence clearly and convincingly established that decedent was not a domiciliary of France at the time of her

death. A person may have several residences, but only one domicile. Residence means living in a particular place; domicile means "living in that locality with intent to make it a fixed and permanent home" (*Matter of Newcomb*, 192 NY 238, 250 [1908]), or, as it has more recently been put, "one's principal and permanent place of residence where one always intends to return to from wherever one may be temporarily located" (*Laufer v Hauge*, 140 AD2d 671, 672 [1988], *lv dismissed* 72 NY2d 1041 [1988]; *see also* SCPA 103[15]; *Rosenzweig v Glen's Truck Serv.*, 136 AD2d 689 [1988]).

An actual change of residence coupled with an intention to abandon the former domicile and acquire a new one may affect domicile (*cf. Rubin v. Irving Trust Co.*, 280 App Div 348 [1952], *affd* 305 NY 288 [1958]; *Matter of Johnson*, 259 App Div 290 [1940], *affd* 284 NY 733 [1940]). Intention is an essential factor in effecting a change of domicile (*Newcomb, supra*, 192 NY at 250-251; *Dupuy v Wurtz*, 53 NY 556 [1873]; *Matter of Minsky v Tully*, 78 AD2d 955 [1980]). Intent is determined by the conduct of the person and all the surrounding circumstances (*Matter of Ferris*, 286 App Div 631 [1955], *appeal dismissed* 1 NY2d [1956]), and may be proven by acts and declarations (*Dupuy, 53 NY at 562*). Declarations are not self-serving unless they are made with

intent to deceive or circumvent the law (*see Newcomb*, 191 NY at 252). Motives are relevant only insofar as they confirm intention (*id.*).

Measured against this standard, decedent's conduct and declarations establish her clear and unequivocal intent to establish domicile in Bermuda. Not only did she buy a condominium there in 1997, but she later obtained a certificate of residence and listed Bermuda as such on her French passport. Furthermore, the certificate issued by the French Consul General in New York indicated that decedent was registered as a resident of Bermuda since September 14, 1998, and in all of the documents prepared for decedent, including both her American and Bermudan wills, decedent declared that her residence was her address in Bermuda. In addition, she maintained a personal bank account in Bermuda, obtained a library card there and her death certificate stated that her usual residence was in Bermuda.

Plaintiff makes much of the fact that decedent never relinquished her French citizenship, and spent a significant amount of time in France during the last four years of her life. Under the circumstances of the case, however, decedent's continuing presence in France is not inconsistent with her expressed intent to retain her Bermudan domicile. Indeed, she was not residing in France at the time of her death, nor did she

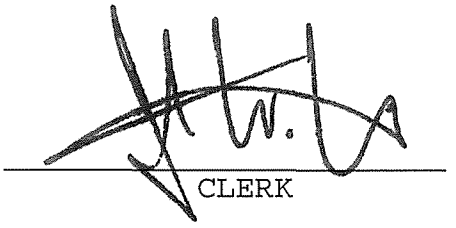
own or rent a home there. In fact, she only owned apartments in New York and Bermuda. There was also no evidence that decedent maintained any personal property or assets in France. There is no indication that she ever considered France her domicile or that she intended to change her domicile to France.

For the foregoing reasons, the order of the Surrogate's Court, New York County (Renee R. Roth, S.), entered on or about November 15, 2007, which granted the motion by defendants Heymann and Emerald Foundation to dismiss the complaint, should be unanimously affirmed, without costs.

All concur.

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

ENTERED: MARCH 19, 2009



CLERK