SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 24, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

120 The People of the State of New York, Ind. 2132/07
Respondent,

-against-

Theodore Cantey,
Defendant-Appellant.

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

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

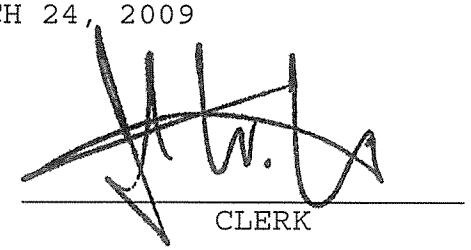
Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered October 29, 2007, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The jury's verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The credible evidence clearly established that defendant knew he was not permitted to enter any

Duane Reade store, including the store where this crime was committed.

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

ENTERED: MARCH 24, 2009



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

123 In re Khalif H.,

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

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

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

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about July 24, 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 robbery in the second degree and grand larceny in the fourth degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's fact-finding determination 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 determinations concerning credibility. The testimony of the victim as to appellant's conduct throughout this incident warrants the conclusion that appellant intended to aid his companion in taking

the victim's property (*see Matter of Juan J.*, 81 NY2d 739, 740-741 [1992]; *People v Mendez*, 34 AD3d 697, 698-699 [2006]). While appellant's anger over a prior incident may have contributed to the targeting of this victim, the evidence demonstrates that appellant intended to take part in a robbery and not merely to menace or intimidate the victim (*see People v Stewart*, 57 AD3d 301 [2008]).

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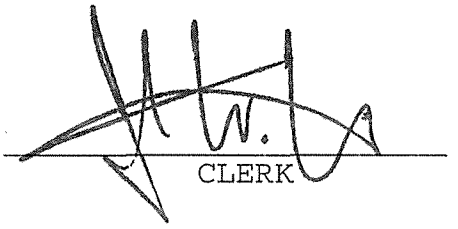


Tom, J.P., Mazzarelli, Nardelli, Catterson, Moskowitz, JJ.

124 George Amsel, et al., Index 110944/05
Plaintiffs-Respondents,

-against-

New York Convention Center
Operating Corporation, also known as
The Jacob K. Javits Convention Center,
Defendant-Appellant.

The McDonough Law Firm, L.L.P., New Rochelle (Jeffrey S. Peshe of counsel), for appellant.

Ephrem J. Wertenteil, New York, for respondent.

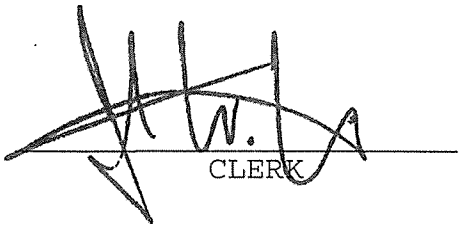
Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 9, 2008, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Defendant established prima facie its entitlement to summary judgment by demonstrating that it had rained earlier in the day and was raining at the time of plaintiff's accident and that defendant had taken reasonable precautions to prevent the tracked-in water from accumulating by placing mats on the lobby floor and mopping the floor throughout the day and had neither actual nor constructive notice of the particular wet condition

that allegedly caused the accident (*see Garcia v Delgado Travel Agency*, 4 AD3d 204 [2004]). In opposition, plaintiffs failed to raise a triable issue of fact.

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

ENTERED: MARCH 24, 2009



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

125-
126 Phillip R. Woodie, Index 603582/04
Plaintiff-Respondent,

-against-

Azteca International Corporation, etc., et al.,
Defendants-Appellants,

Luis J. Escharte, etc., et al.,
Defendants.

Nixon Peabody LLP, New York (Roger R. Crane of counsel), for appellants.

Melvyn R. Leventhal, New York, for respondent.

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 26, 2007, after jury trial, inter alia, awarding plaintiff the principal sum of $559,086 against defendants Azteca International, TV Azteca and San Roman, plus an additional $26,615.89 from Azteca International, and order, same court and Justice, entered December 21, 2007, which denied said defendants' motion to set aside the verdict, unanimously affirmed, without costs.

A three-part analysis is required for proving employment discrimination under Executive Law § 296 (*see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270-271 [2006]). The employee must first establish a prima facie case of discrimination. The burden then shifts to the employer

to rebut the prima facie case with a legitimate reason, in which case the burden shifts back to the employee to show that the proffered reasons are pretextual.

Here, after plaintiff made a prima facie case of discrimination, defendants offered nondiscriminatory reasons for plaintiff's dismissal, and plaintiff then adduced facts permitting a reasonable inference that the reasons proffered for his termination were false and merely a pretext for discrimination. The verdict was not against the weight of the evidence because the jury could have reached its conclusion on a fair interpretation of the evidence. Furthermore, inasmuch as a valid line of reasoning and permissible inferences could have led rational jurors to the conclusion they reached, the evidence was legally sufficient to support the verdict (*see Young v Geoghegan*, 250 AD2d 423 [1998]).

The court did not improvidently exercise its discretion in granting plaintiff's motion in limine to preclude the introduction of certain extrinsic evidence at trial (*see Caster v Increda-Meal, Inc.*, 238 AD2d 917, 918 [1997]). The court did not err in charging the jury that to meet his prima facie burden on his discrimination claim, plaintiff initially had to show simply that he was "qualified to hold the position of president of sales" (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). Nor did the court err in declining to give the jury a

"same actor inference" charge (*see Copeland v Rosen*, 38 F Supp 2d 298, 305 [SD NY 1999]). Given the evidence in this case, the failure to give the legitimate expectations charge was harmless (*see* NY PJI 9:1, comment, at 1471 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
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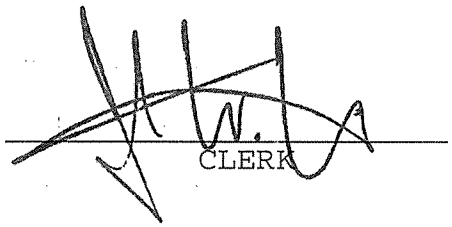


Tom, J.P., Mazzarelli, Nardelli, Catterson, Moskowitz, JJ.

130 6085 Strickland Associates, LLC, Index 402980/06
Plaintiff-Appellant,

-against-

The Whitmore Group, Ltd., et al.,
Defendants-Respondents.

Certilman Balin Adler & Hyman, LLP, East Meadow (Edward G. McCabe of counsel), for appellant.

Kral Clerkin Redmond Ryan Perry & Girvan, LLP, Mineola (Michael G. Walker of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered June 26, 2008, which, in an action for negligent failure to procure insurance, denied plaintiff's motion for summary judgment and granted defendants insurance brokers' cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

It appears that the Genstar policy was procured to cover the subject property while vacant; that upon commencement of construction on the property, the Genstar policy was canceled for nonpayment of premium and replaced by the Sirius policy specifically designed for construction-related liabilities; and that plaintiff incurred out-of-pocket litigation costs because the limits of the Sirius policy were insufficient to settle a lawsuit brought by an injured construction worker. Plaintiff asserts that it instructed defendants, or justifiably expected

them, to leave the Genstar policy in effect as a supplement to the Sirius policy; that defendants therefore had a duty to procure reinstatement of the Genstar policy after its cancellation, or procure replacement insurance, or inform plaintiff of their inability to do so; and that plaintiff would not have incurred the litigation costs it seeks to recover had the Genstar policy been in effect at the time of the accident. Because plaintiff received a notice of cancellation of the Genstar policy for nonpayment of premium but did not pay defendants the premium due on that policy within 15 days of the notice (*see* Insurance Law § 3426[a][3]), there could be no breach by defendants of any duty to keep the Genstar policy in effect (*cf. Murphy v Kuhn*, 90 NY2d 266, 271 [1997] [plaintiff insured's lack of initiative in inquiring of broker concerning his insurance needs does not qualify as legally recognizable reliance on broker's expertise]). No issues of fact exist as to whether plaintiff ever requested defendants to keep the Genstar policy in effect. Plaintiff's principal admits that he has no recollection of ever having specifically requested defendants to renew or reinstate the Genstar policy or to procure replacement coverage, or of defendants having ever advised him that the Genstar and Sirius policies were to be in effect simultaneously, and defendants' contemporaneous internal memoranda clearly indicate that they intended the Genstar policy to be completely replaced

by the Sirius policy. We reject plaintiff's argument that its requests and defendants' advice are evidenced by the checks it sent to defendants after the cancellation of the Genstar policy that were applied to that policy by defendants. While it appears that defendants temporarily misapplied plaintiff's checks to the cancelled Genstar policy, plaintiff's principal's letters to defendants accompanying these checks make no references to the Genstar policy but simply state that the checks represent partial payment for amounts due on the subject property. By obtaining the Sirius policy, defendants met their obligation to procure coverage for the construction on the property, and there is no evidence of any requests by plaintiff for insurance over and above the Sirius policy. We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: MARCH 24, 2009

CLERK

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

131 The People of the State of New York, Ind. 776/07
Respondent,

-against-

Musa Ndure,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Marvin Marcus, J.), rendered 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.

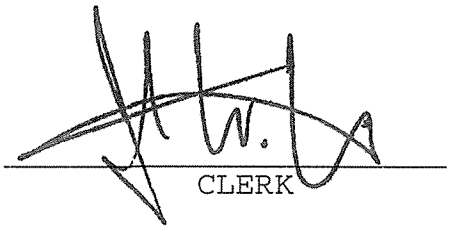
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 24, 2009



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

132 In re Rhino Assets, LLC, et al., Index 112206/06
Petitioners-Appellants,

-against-

New York City Department for the Aging,
(SCRIE Programs),
Respondent-Respondent.

Kucker & Bruh, LLP, New York (James R. Marino of counsel), for appellants.

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

Judgment, Supreme Court, New York County (Karen S. Smith, J.), entered December 28, 2007, dismissing the petition to compel disclosure of documents under the Freedom of Information Law (FOIL) relating to certain tenants receiving benefits under the Senior Citizens Rent Increase Exemption (SCRIE) program, unanimously affirmed, without costs.

Respondent met its burden of "articulating a particularized and specific justification" (*Matter of Capital Newspapers Div. of Hearst Corp.*, 67 NY2d 562, 566 [1986]) for denying access to the requested documents on the grounds that disclosure would constitute an "unwarranted invasion of personal privacy" of the named tenants and members of their households (Public Officers Law §§ 87[2][b], 89[2][b]). SCRIE benefits are available only to households headed by a tenant at least 62 years old, and in which total household income is less than a prescribed amount --

$26,000 per year as of the date of the document request in 2006 (*see* Real Property Tax Law § 467-b[3][a]; NY City Admin Code §§ 26-405[m][2][ii], 26-509[b][ii]). Hence, the remedy of redacting financial information, proposed by petitioners on their administrative appeal, would not cure privacy concerns, inasmuch as disclosure of the documents, even redacted, would still permit the public to determine the general income level of the SCRIE tenants and members of their households. This very concern was expressed in a 1998 advisory opinion of the New York State Committee on Open Government (FOIL-AO-10747).

Petitioners' argument that their FOIL request should be granted because they are already entitled to know the identities of members of the tenants' households under the Rent Stabilization Law (*see* Rent Stabilization Code [9 NYCRR] § 2523.5[e]) is unavailing, since FOIL requests are analyzed from the perspective of the general public (*see Matter of John P. v Whalen*, 54 NY2d 89, 99 [1981]). Therefore, the fact that petitioners already know the identities of the subjects of the FOIL requests is irrelevant in assessing privacy concerns generated by the requests (*see Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 748 [2001]).

Given the highly specific nature of petitioners' requests for all documents relating to individually named tenants, it is questionable whether privacy concerns could be satisfied by

redacting the files to eliminate all identifying information under Public Officers Law § 89(2)(c)(i). In any event, in light of petitioners' stipulation at the invitation of Supreme Court that they "do not desire to supplement the record of these proceedings," there is no basis on the record before us to remand for further consideration of this issue. In so stipulating, petitioners "chart[ed] their own procedural course" and fixed the record upon which this matter must be decided (*see Kass v Kass*, 91 NY2d 554, 568 n 5 [1998]).

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

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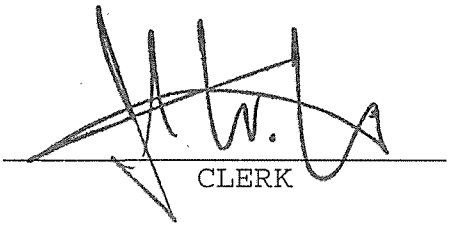

Tom, J.P., Mazzarelli, Nardelli, Catterson, Moskowitz, JJ.

133 The People of the State of New York, ex. rel. Herbert Lewis, Petitioner-Appellant, Index 75056/07

-against-

New York State Division of Parole, Respondent-Respondent.

Susanna De La Pava, New York, for appellant.

Andrew M. Cuomo, Attorney General, New York (Marion R. Buchbinder of counsel), for respondent.

Order, Supreme Court, Bronx County (Ralph Fabrizio, J.), entered June 4, 2007, which denied petitioner's application for a writ of habeas corpus and dismissed the proceeding, unanimously affirmed, without costs.

Although the remedy of habeas corpus is unavailable because petitioner is no longer in custody, this proceeding is not moot because, among other things, it affects parole time credited to petitioner. Therefore, we consider the matter as a CPLR article 78 proceeding (*see* CPLR 103[c]). Nevertheless, petitioner's arguments are without merit. Regardless of any alleged indications to the contrary, petitioner's 1994 sentence ran

consecutively to his previous sentences (*see People ex rel. Gill v Greene*, __ NY3d __, 2009 NY Slip Op 01067).

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

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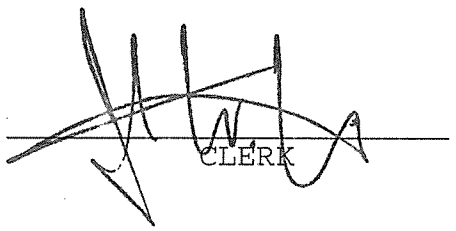

Tom, J.P., Mazzarelli, Nardelli, Catterson, Moskowitz, JJ.

134 Charles Khoury, et al., Index 7918/07
Plaintiffs-Appellants,

-against-

Katherine Khoury, etc.,
Defendant-Respondent.

Reingold & Tucker, Brooklyn (Abraham Reingold of counsel), for appellants.

McCullough, Goldberger & Staudt, LLP, White Plains (Ruth F-L. Post of counsel), for respondent.

Order, Supreme Court, Bronx County (Alan Saks, J.), entered on or about January 2, 2008, which granted defendant's motion to dismiss the complaint for failure to state a cause of action for constructive trust, unanimously affirmed, without costs.

The complaint contains no allegation that defendant promised the decedent that she would allow his relatives to continue to live in the subject building if he bequeathed the building to her (*see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]).

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

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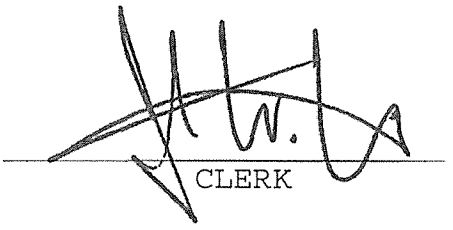

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Tom, J.P., Mazzarelli, Nardelli, Catterson, Moskowitz, JJ.

135 Ernestine Engler, Index 119255/06
Plaintiff-Respondent,

-against-

Mark Kalmanowitz, etc., et al.,
Defendants-Appellants.

Catalano Gallardo & Petropoulos, LLP, Jericho (Matthew K. Flanagan of counsel), for appellants.

A. Paul Bogaty, New York (Joan P. Brody of counsel), for respondent.

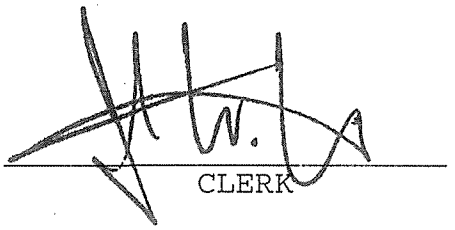
Order, Supreme Court, New York County (Walter B. Tolub, J.), entered August 1, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants in this legal malpractice action demonstrated plaintiff could not prove that but for their alleged negligence, she would have prevailed on the merits in the underlying litigation (*see e.g. Davis v Klein*, 88 NY2d 1008 [1996]). Plaintiff alleged that Celebrity Cruise Lines had an open seam in its carpet, which created a tripping hazard when pressure was applied from pedestrian traffic. She failed, however, by either her witnesses or her expert, to show that defendants had notice of this allegedly defective condition. Witnesses for both sides

testified that this open seam was not visibly noticeable (*see Cooper v Kelner & Kelner*, 45 AD3d 323 [2007]). Plaintiff's expert's attestation that the carpet's adhesive had lost its holding strength over time, causing the seam to open, was insufficient to establish notice, since it failed to show that the alleged defect was visible and apparent for a sufficient period of time to permit the ship operators to discover and remedy it (*see Peffers v Hilton Hotels Corp.*, 279 AD2d 386 [2001]).

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

ENTERED: MARCH 24, 2009



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

137N David Smith, Index 301452/07
Plaintiff-Appellant,

-against-

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

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

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 9, 2008, which, in an action against the City and a police officer for false arrest and imprisonment, malicious prosecution, assault and battery and violation of civil rights, granted defendants' motion to change venue from Bronx County to Queens County, unanimously affirmed, without costs.

The action was properly transferred to Queens County, where plaintiff was arrested, initially incarcerated and prosecuted. CPLR 504(3), which provides that the place of trial in an action against the City shall be in the county within the City where the cause of action arose, "implements the public policy of giving all due consideration to the convenience of public officials, and should be complied with absent compelling countervailing circumstances" (*Rose v Grow-Perini*, 271 AD2d 210 [2000]). That defendants made their motion to change venue approximately two

months after serving their demand for a change of venue with their answer, in noncompliance with the statutory 15-day time limit in CPLR 511(b), is not so compelling a circumstance as to override CPLR 504(3). We also reject plaintiff's argument that Bronx County is a proper venue by reason of his detention for slightly more than a day at Rikers Island, in the Bronx, after his arrest and booking.

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

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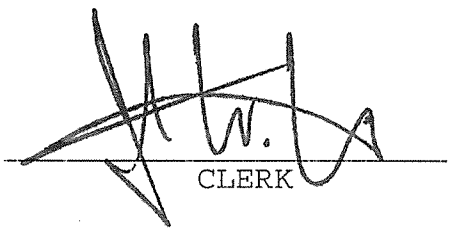

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 24, 2009.

Present - Hon. David B. Saxe, Justice Presiding
David Friedman
John W. Sweeny, Jr.
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 2762/07
Respondent,

-against- 138

Jose Orta,
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 (Rena K. Uviller, J.), rendered on or about December 5, 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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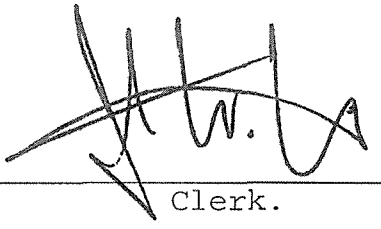


Clerk.

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

Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

139 In re Kenneth Friedman, Index 114769/07
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Respondents.

Santo Golino, New York, for appellant.

Gary R. Connor, New York (Aida P. Reyes of counsel), for DHCR, respondent.

Caraballo & Mandell, New York (Dolly Caraballo of counsel), for Larry Yakata, respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered March 31, 2008, which dismissed the petition brought pursuant to CPLR article 78 seeking to annul the determination of respondent Division of Housing and Community Renewal (DHCR), dated October 25, 2007, denying petitioner landlord's petition for administrative review of a Rent Administrator's order which determined that petitioner failed to timely offer respondent tenant a renewal lease, directed that petitioner offer an amended renewal lease commencing July 1, 2006 and based the rent on the 2006 rent guidelines (Rent Guidelines Board Order # 37), unanimously affirmed, without costs.

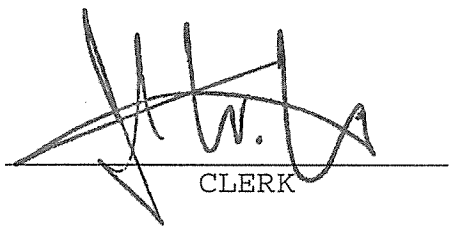
There exists no basis to disturb DHCR's credibility-based finding that petitioner failed to establish that his predecessor timely tendered a renewal lease to the tenant in 2005, or that

the tenant had not made a conscious decision about the commencement date of the untimely renewal offered (*see e.g. Matter of 201 E. 81st St. Assoc. v New York State Div. of Hous. & Community Renewal*, 288 AD2d 89 [2001]). Accordingly, since the lease was not renewed until April 1, 2006, the determination to direct petitioner to issue an amended renewal commencing July 1, 2006 and to apply the 2006 guideline rent increases to that lease was rationally based (*see* Rent Stabilization Code [9 NYCRR] § 2523.5[c][1]; § 2522.7).

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

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

ENTERED: MARCH 24, 2009



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Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

141 In re Norman Christian K., etc.,

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

Derrick B.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

Robin S. Steinberg, The Bronx Defenders, Bronx (M. Chris Fabricant of counsel), for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia S. Colella of counsel), Law Guardian.

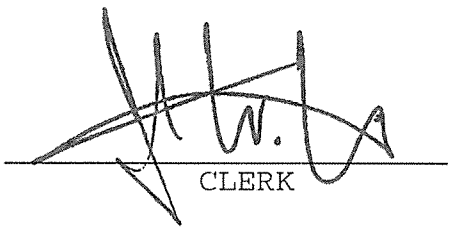
Resettled order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about September 21, 2007, which, to the extent appealed from, determined, after a hearing, that respondent father was not a person whose consent to his child's adoption was required, unanimously affirmed, without costs.

Respondent's consent to the adoption of his child was not required since he did not maintain "substantial and continuous or repeated contact with the child" (Domestic Relations Law § 111[d][1]). The record shows that respondent failed to provide financial support according to his means while the child was in foster care (*see Matter of Margaret Jeanette P.*, 30 AD3d 359 [2006]; *Matter of Christopher Robert T.*, 303 AD2d 759, 760 [2003]

[respondent father's argument that he failed to contribute financial support to his children because he was never ordered to do so by the court was rejected]), and he did not visit his son at least monthly or, as here, when visitation was not possible, communicate regularly with him or his custodian (*see Matter of Pedro Jason William M.*, 45 AD3d 431 ([2007], *lv dismissed and lv denied* 10 NY3d 804 [2008]). Accordingly, respondent never acquired a constitutionally protected interest (*see Lehr v Robertson*, 463 US 248, 262 [1983]). Contrary to respondent's contention, the statute does not require the agency to encourage an unwed father to perform the acts specified therein (*see* Domestic Relations Law § 111[1][d]).

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

ENTERED: MARCH 24, 2009



Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

143 The People of the State of New York, Ind. 1348/06
Respondent,

-against-

Ramon Pequero,
Defendant-Appellant.

John R. Lewis, Sleepy Hollow, for appellant.

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 1, 2007, as amended February 20, 2007, convicting defendant, after a jury trial, of conspiracy in the second degree, murder in the second degree (two counts), attempted murder in the second degree, burglary in the first degree, criminal possession of a weapon in the second degree (three counts), and criminal possession of a weapon in the third degree (three counts), and sentencing him to an aggregate term of 50 years to life, unanimously affirmed.

The burglary conviction was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). The evidence that defendant and two other drug dealers went to a building to resolve a "problem" over territory, and that defendant and one of his companions had firearms in their hands as they unlawfully entered the building, permitted the jury to find that defendant

entered the building with at least the intent to commit a crime such as menacing therein (*see People v Lewis*, 5 NY3d 546, 552 [2005]; *People v Ortiz*, 173 AD2d 189 [1991], *lv denied* 78 NY2d 1129 [1991]).

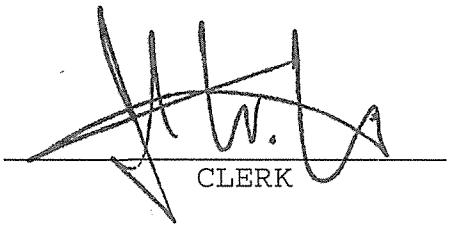
The court properly denied defendant's request for a justification charge with respect to the murder committed on August 6, 2001, since there was no reasonable view of the evidence, when viewed most favorably to defendant, to support that defense (*see People v Watts*, 57 NY2d 299, 301-302 [1982]). In the first place, defendant was clearly the initial aggressor (*see* Penal Law § 35.15[1][b]). Moreover, although the victim was armed, "there was still no evidence that defendant believed he was in imminent danger of the deceased's use of deadly force, or that such belief was reasonable" (*People v Hubrecht*, 2 AD3d 289, 290 [2003], *lv denied* 2 NY3d 741 [2004]; *see also People v Jones*, 3 NY3d 491, 496 [2004]). Instead, the victim only revealed his own weapon when he complied with defendant's gunpoint command to remove his hands from his pockets. The victim then held his weapon at his side, as defendant paused long enough to announce to his companions that the victim had a handgun, and then commenced firing.

The record does not support defendant's speculative claim, raised for the first time on appeal, that two witnesses to whom he made inculpatory statements while in prison were acting as

agents of the prosecution, thereby violating his right to counsel (*see People v Kinchen*, 60 NY2d 772 [1983]; *see also People v Bent*, 160 AD2d 1176, 1177 [1990], *lv denied* 76 NY2d 937 [1990]). Since the existing record does not reveal a factual basis for such a claim, defendant's argument that his trial counsel rendered ineffective assistance by not raising this issue is unreviewable on direct appeal (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]).

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

ENTERED: MARCH 24, 2009



Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

144 In re Shou-Mei Kerney, Index 400487/08
Petitioner-Appellant,

-against-

Tino Hernandez, as Chair of the
New York City Housing Authority, et al.,
Respondents-Respondents.

Thomas Torto, New York, for appellant.

Sonya M. Kaloyanides, New York (Joseph P. Fusco of counsel), for respondents.

Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered on or about August 19, 2008, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78, which sought to annul the determination of respondent New York City Housing Authority, dated November 28, 2007, to terminate petitioner's tenancy on the grounds of, inter alia, nondesirability, unanimously affirmed, without costs.

As the subject petition only sought review of the penalty imposed, and did not raise issues of substantial evidence, Supreme Court properly addressed the issues, rather than transferring the matter to this Court (*see Matter of Charles v Commissioner, N.Y. State Dept. Of Social Servs.*, 240 AD2d 490 [1997]). Were we to conduct a de novo review, we would find that the determination was supported by substantial evidence that petitioner knowingly permitted the possession and sale of drugs

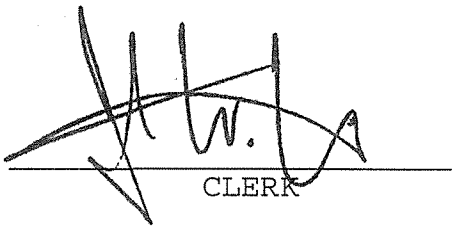
on the premises (*see Matter of Satterwhite v Hernandez*, 16 AD3d 131 [2005]).

The penalty imposed does not shock the conscience (*id.*).

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

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

ENTERED: MARCH 24, 2009



CLERK

Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

145-
145A Chaudry Construction Corp., Index 108933/02
Plaintiff-Respondent,

-against-

James G. Kalpakis & Associates,
Defendant-Appellant.

John V. Decolator, Garden City, for appellant.

Andrew Lavoott Bluestone, New York, for respondent.

Order, Supreme Court, New York County (John E.H. Stackhouse, J.), entered September 15, 2008, which denied defendant's motion to vacate a default judgment, unanimously reversed, on the law, without costs, the motion granted, and the answer reinstated. Appeal from earlier interim order, same court and Justice, later entered September 26, 2008, which granted defendant's motion to vacate the default to the extent of setting the matter down for a traverse hearing, unanimously dismissed, without costs, as academic.

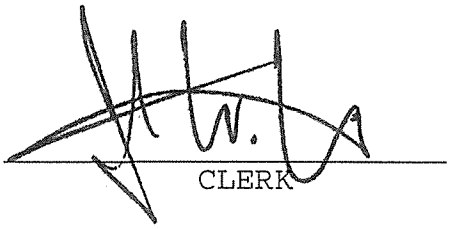
Even assuming the affirmations of service by plaintiff's counsel sufficiently raised a presumption of proper mailing, defendant rebutted that presumption by showing they were mailed to an incorrect address (*see Matter of Holland v New York City*, 271 AD2d 609, 610 [2000]), necessitating a traverse hearing (*see Northern v Hernandez*, 17 AD3d 285 [2005]). Furthermore, defendant's submissions offered factual support for a meritorious

defense (*see Mandell v Stein*, 183 AD2d 488 [1992]).

At the traverse hearing, plaintiff failed to carry its burden of establishing proper service. Under such circumstances, the court erred in shifting that burden to defendant to disprove service.

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

ENTERED: MARCH 24, 2009



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Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

146 R.C. Dolner, Inc., Index 602672/01
Plaintiff-Respondent,

-against-

My-Way Contracting Corp., et al.,
Defendants,

Crum & Forster Insurance Co., et al.,
Defendants-Appellants.

Carroll, McNulty & Kull L.L.C., New York (Ann Odelson of counsel), for appellants.

Wasserman Grubin & Rogers LLP, New York (Vashali Maria Aggarwal of counsel), for respondent.

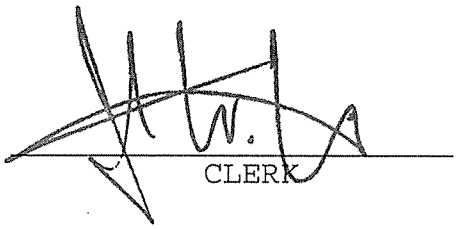
Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 28, 2008, which granted plaintiff's motion for summary judgment against defendants Crum & Forster and U.S. Fire in the amount of $178,205.16, and denied those defendants' cross motion for summary judgment dismissing plaintiff's claim for damages, unanimously affirmed, with costs.

This Court previously affirmed the ruling that Crum & Forster and its subsidiary, U.S. Fire, were obligated, under plaintiff's insurance policy, to provide coverage for damages incurred in connection with the renovation of a hotel (41 AD3d 185). The amount of such damages is irrefutably established by evidence in the record. The award of pre-judgment interest and

the determination of the date from which computed were appropriate exercises of the court's discretion (CPLR 5001[a]).

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

ENTERED: MARCH 24, 2009



Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

147 CS Plumbing, Inc., et al., Index 17361/06
Plaintiffs-Respondents,

-against-

Action Nissan, Inc., et al.,
Defendants,

White Plains Nissan, Inc., etc.,
Defendant-Appellant.

Richard Weiss, New Rochelle, for appellant.

Mitchell Silberberg & Knupp, New York (Lauren J. Wachtler of counsel), for respondents.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered September 13, 2007, which, inter alia, granted plaintiffs' motion to be released from further obligations to make payments on a leased vehicle, unanimously affirmed, with costs.

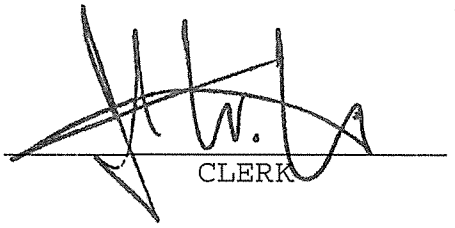
At the hearing on the subject application, all defendants were represented and their counsels were present and were served with the papers upon which plaintiffs sought relief. The transcript of proceedings shows that neither appellant, nor any of the other defendants, at any time requested leave to file opposing papers, objected to the entry of the relief granted by the motion court or preserved any objections. Thus, appellants' objections to the court's order are improperly raised for the first time on this appeal and unpreserved for our review (*see*

Prendergast v City of New York, 44 AD3d 414, 415 [2007], *lv denied* 9 NY3d 818 [2008], *cert denied* 128 S Ct 2516 [2008]).

Were we to consider appellants' contentions, we would find them unavailing.

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

ENTERED: MARCH 24, 2009



Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

148 The People of the State of New York, Respondent, Ind. 514/05

-against-

Luis Morales, Defendant-Appellant.

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

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

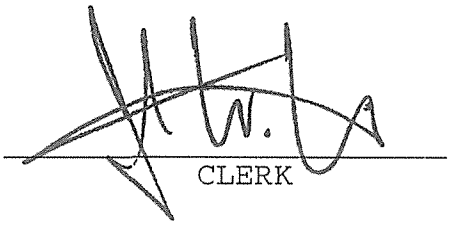
Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 5, 2006, convicting defendant, upon his plea of guilty, of criminal sexual act in the first degree and burglary in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 25 years to life and 16 years to life, respectively, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea (*see People v Alexander*, 97 NY2d 482 [2002]; *People v Frederick*, 45 NY2d 520 [1978]). The record establishes that the plea was entered knowingly, intelligently and voluntarily (*see People v Harris*, 61 NY2d 9, 19 [1983]). At a proceeding the day before the plea, it was made clear to defendant that he was a persistent violent felony offender who could not receive anything less than a life sentence. During the colloquies leading up to

the plea, it was made equally clear to defendant that the offer was an aggregate term of 25 years to life to cover all the charges. Defendant, who was exposed to a much greater aggregate term if convicted of multiple charges after trial, accepted this offer. It was only after defendant agreed to accept this sentence that the court misspoke in referring to a 25-year determinate sentence. Neither this misstatement, nor the court's failure to specify the minimum term of the concurrent sentence defendant would receive on the burglary conviction, could have influenced defendant's decision to plead guilty.

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

ENTERED: MARCH 24, 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 24, 2009.

Present - Hon. David B. Saxe, Justice Presiding
David Friedman
John W. Sweeny, Jr.
Helen E. Freedman, Justices.

The People of the State of New York,
Respondent,

-against-

Jason Rivera,
Defendant-Appellant.

SCI 4035/04
30330C/05
55180C/05
149-
149A-
149B

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Peter J. Benitez, J.), rendered on or about October 4, 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 judgments so appealed from be and the same are hereby affirmed.

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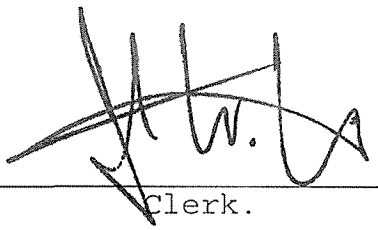


Clerk.

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

Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

150 Diana McDonald, Index 14944/01
Plaintiff-Appellant,

-against-

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

Alexander J. Wulwick, New York, for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for respondents.

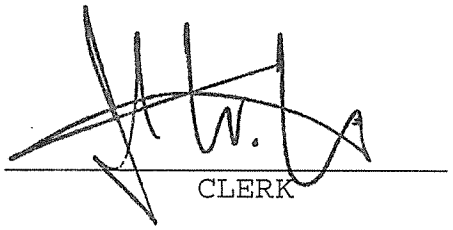
Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 26, 2007, which granted defendants' motions to dismiss the complaint for failure to prosecute, and denied plaintiff's cross motion to vacate or extend the CPLR 3216 notice served by the court, unanimously affirmed, without costs.

The subject notice (in which the court crossed out the number 90 and inserted the number 120) was issued after the fifth pre-note of issue conference and sixth pre-note of issue order pertaining to disclosure. While plaintiff's attorney offered some compelling personal reasons for the general pre-notice delay, the only specific excuse he gave, in an affirmation submitted after the 120-day period had already run, for not being able to meet the 120-day deadline was his office's relocation during the 120-day period. Such excuse did not demonstrate good cause for the requested extension of the already extended notice. While plaintiff contends that defendants were themselves

noncompliant with the prior disclosure orders, and that such noncompliance was preventing her from filing a note of issue, she had her remedies during the lengthy period of general delay (CPLR 3124, 3126), and no basis exists to disturb the motion court's finding that plaintiff's laxity and delay were "wanton."

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

ENTERED: MARCH 24, 2009



CLERK

Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

151 Asa Nathanson, et al., Index 60207/06
Plaintiffs-Appellants,

-against-

Tri-State Construction LLC, et al.,
Defendants-Respondents.

Lawrence A. Omansky, New York, for appellants.

John P. DeMaio, New York, for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 19, 2008, insofar as it granted defendants' motion for summary judgment to the extent of dismissing the second, third, fourth and fifth causes of action asserted in the amended complaint, and denied plaintiffs' cross motion for summary judgment, unanimously affirmed, without costs. Appeal from that part of the aforesaid order incorporating prior rulings, unanimously dismissed, without costs.

The court properly granted defendants' motion to the extent of dismissing the fraud causes of action asserted in the amended complaint. Section 4.01 of the contract provided that "unless otherwise provided, Seller is the sole owner of the premises." As found by the court, the Seller did "otherwise provide" - by handwritten amendment to the form contract which stated that "if at closing Seller does not have or cannot convey title the contract is rescinded," a reference to the fact that the property

was being "flipped." Language expressly granting DeMaio, the escrow agent, permission to transfer all or part of the down payment held in escrow to a separate escrow account to be held as an additional deposit under the purchase contract also could only refer to the underlying contract between the owner, Vaij Realty, and Tri-State. Given the express terms of the contract, plaintiffs cannot claim to have been misled regarding the nature of the transaction.

Plaintiffs assert that other "issues of fact" warranted denial of defendants' motion. However, the issues to which plaintiffs point, i.e., the legality of the purported assignment from plaintiffs to Omansky, whether defendants acknowledged same, and whether or not there was a financing contingency, go to which party breached the contract, and have no bearing on dismissal of the fraud claims.

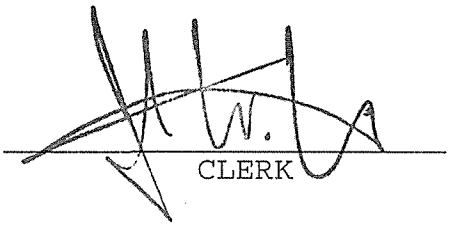
Finally, plaintiffs assert that they are entitled to rescission of the contract since it is undisputed that defendants never had title to the property and were never in a position to convey title to the property. The contract does provide that "[i]f at closing seller does not have or cannot convey title, the contract is rescinded." However, as the court found, there are factual issues concerning which party first breached the contract, precluding judgment as a matter of law on this issue.

To the extent plaintiffs seek appellate review of prior

rulings on the cross motion with respect to amending the complaint, striking the answer, disqualifying defendants' counsel and for a default judgment, which were set forth in transcripts not included in the record before us, the appeal is dismissed for failure to comply with the rules of this Court (*see* CPLR 5528[a][5]; Rules of App Div, 1st Dept [22 NYCRR] § 600.5[a]).

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

ENTERED: MARCH 24, 2009



Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

152 Marsha Zimbler, etc., et al., Index 150016/06
Plaintiffs-Respondents,

-against-

Resnick 72nd Street Associates, etc., et al.,
Defendants,

The Board Managers of the Oxford on
Seventy Second, et al.,
Defendants-Appellants.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellants.

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

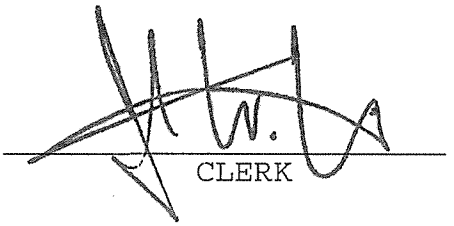
Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 9, 2008, which denied the motion of defendants The Board Managers of the Oxford on Seventy Second and Brown Harris Stevens Residential Management, LLC, to preclude the presence of a stenographer or other recorder at the court-ordered psychological evaluation of the minor plaintiff to the extent of directing plaintiffs to arrange for the stenographer not to be present in the examination room, unanimously modified, on the facts, to direct that, if it is not feasible to station the stenographer outside the examination room so as not to be visible to anyone in the room and not to interfere with the proper conduct of the examination, then the stenographer's audio recording device may be placed, concealed, in the examining room

during the evaluation and the recording transcribed later, and otherwise affirmed, without costs.

On the record presented, the motion court properly permitted plaintiffs to record the psychological examination of the infant plaintiff, provided that the stenographer is not present in the examination room (*see Barraza v 55 W. 47th St. Co.*, 156 AD2d 271 [1989]; *Milam v Mitchell*, 51 Misc 2d 948, 950 [1966]). Defendants have not shown that the presence of a stenographer outside the room will unduly interfere with the examination.

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

ENTERED: MARCH 24, 2009



Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

153 The People of the State of New York, Ind. 1953/07
Respondent,

-against-

Jose Fernandez,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Division, New York (Carol A. Zeldin of counsel) and Milbank, Tweed, Hadley & McCloy LLP, New York (William J. McNamara of counsel), for appellant.

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

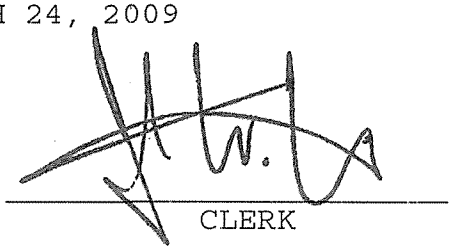
Judgment, Supreme Court, New York County (A. Kirke Bartley, J. at suppression hearing; Gregory Carro, J. at plea and sentence), rendered February 27, 2008, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. We perceive no basis to overturn the hearing court's findings crediting the officer's testimony (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The officer, who had extensive experience involving gravity knives, observed the top of a shiny metal knife sticking out of defendant's pants pocket, attached with a clip. According to the officer's testimony, an object bearing this combination of characteristics is at least likely to be a gravity knife, even if the knife's illegal status cannot be determined

without testing it. Therefore, we conclude the officer had, at least, reasonable suspicion to believe that defendant possessed an illegal weapon (*see People v Snovitch*, 56 AD3d 328 [2008]; *People v Carter*, 49 AD3d 377 [2008], *lv denied* 10 NY3d 860 [2008]). Being reasonably concerned for his safety, he properly secured the knife by removing it from defendant's pocket (*see People v Batista*, 88 NY2d 650, 654 [1996]; *People v Benjamin*, 51 NY2d 267, 271 [1980]). Patting down defendant's pocket would have served no useful purpose, since the knife was visible and a patdown would have revealed what the officer already knew.

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

ENTERED: MARCH 24, 2009



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Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

154 Thomas DeKenipp, Index 102802/02
Plaintiff-Respondent,

-against-

Rockefeller Center, Inc., et al.,
Defendants-Appellants.

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

Oshman & Mirisola, LLP, New York (David L. Kremen of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 16, 2008, which, insofar as appealed from, granted plaintiff's motion for renewal and reargument of an order dated November 14, 2007 granting defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim, and, upon reargument, vacated said dismissal and granted plaintiff's motion for summary judgment on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

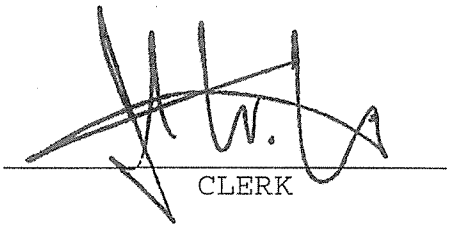
Plaintiff, a window washer employed by a private contractor that defendants hired, was instructed by his supervisor to clean the interior windows of defendants' building. Plaintiff had previously cleaned these windows, and requested that his supervisor provide a pole extension that allowed him to reach their upper portions. This request was denied and thus, plaintiff had to stand atop 3 to 4 foot high, wall-mounted,

heating convector covers to reach the windows' upper areas. While plaintiff worked on one window, the convector cover he stood on suddenly came loose from the wall and he fell, injuring himself.

We find that the window-washing task here involved an elevation-related risk of the type contemplated by the safety devices listed in Labor Law § 240(1) (*see e.g. Swiderska v New York University*, 10 NY3d 792, 792-793 [2008]). Plaintiff was effectively instructed to stand on the convector covers to get the job done, a practice established by record evidence as being routinely used by workers to access the building's windows and ceilings.

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

ENTERED: MARCH 24, 2009



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Friedman, J.P., Sweeny, Renwick, Freedman, JJ.

155 Mark Bruce International, Inc., Index 603388/06
Plaintiff-Appellant,

-against-

Blank Rome, LLP,
Defendant-Respondent.

Gibbons, P.C., New York (Jeffrey A. Mitchell of counsel), for appellant.

Blank Rome, LLP, New York (Harris N. Cogan of counsel), for respondent.

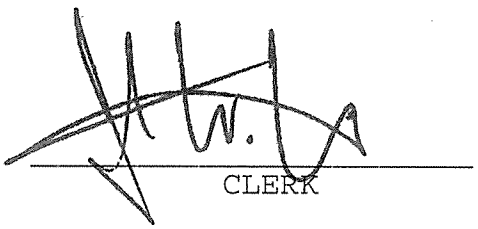
Order, Supreme Court, New York County (Herman Cahn, J.), entered May 30, 2008, which, in an action for breach of contract and unjust enrichment, granted defendant's cross motion for summary judgment dismissing the complaint and denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

The exchange of e-mails, which did not set forth the fee for plaintiff's services or an objective standard to determine it, was too indefinite to be enforceable (*see generally Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482-484 [1989], *cert denied* 498 US 816 [1990]). The standard of reasonableness, left for future determination by the parties themselves, rather than by a third party, was not made objective by the implied duty to determine the amount of the fee in good faith. Furthermore, the unjust enrichment claim was properly dismissed as it is

duplicative of the breach of contract claim (*see Andrews v Cerberus Partners*, 271 AD2d 348 [2000]).

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

ENTERED: MARCH 24, 2009



CLERK

Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

156N Moyses Garces, Index 6183/07
Plaintiff-Appellant,

-against-

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

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

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

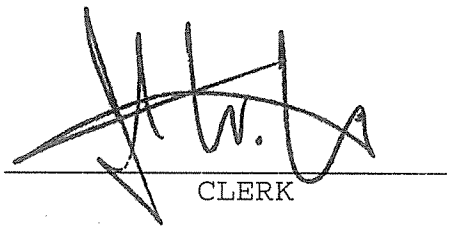
Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered January 10, 2008, which, in an action against the City and two police officers for, inter alia, false arrest and imprisonment, malicious prosecution, assault and battery and violation of civil rights, granted defendants' motion to change venue from Bronx County to Queens County, unanimously affirmed, without costs.

The action was properly transferred to Queens County where plaintiff was arrested, initially incarcerated and prosecuted. CPLR 504(3), which provides that the place of trial in an action against the City shall be in the county within the City where the cause of action arose, "should be complied with absent compelling countervailing circumstances" (*Rose v Grow-Perini*, 271 AD2d 210, 210 [2000]). We also reject plaintiff's contention that Bronx County is a proper venue by reason of his one-day detention at

its Rikers Island facility. Alternatively, transfer was proper as a matter of discretion pursuant to CPLR 510.

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

ENTERED: MARCH 24, 2009



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

234 Mark S. Brantley, Index 104616/08
Petitioner-Respondent,

-against-

Municipal Credit Union,
Respondent-Appellant.

Epstein Becker & Green, P.C., New York (Barry A. Cozier of counsel), for appellant.

Mark S. Brantley, respondent pro se.

Order and judgment (one paper), Supreme Court, New York County (Marylin G. Diamond, J.), entered October 10, 2008, which, inter alia, ordered respondent's Board of Directors to reinstate the 2008 Nominating Committee and the nominees selected by that committee and enjoined the Board from taking any action against the reinstated nominations or amending respondent's by-laws in a manner inconsistent with the New York State Banking Law, unanimously affirmed, without costs. Respondent is directed to hold its 2008 election within 60 days of the date of entry of this order.

Respondent never argued before the motion court that petitioner lacked standing to assert his own claims; it argued only that he lacked standing to make claims with regard to certain persons who were not named parties in this proceeding. Having failed to argue in either an answer or a pre-answer motion to dismiss that petitioner lacked standing to assert his own

claims, respondent waived that defense (*see e.g. Dougherty v City of Rye*, 63 NY2d 989, 991-992 [1984]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278 [2006], *appeal dismissed* 8 NY3d 837 [2007]).

Similarly, respondent failed to argue that mandamus did not lie in this proceeding. As respondent itself contends with respect to some of petitioner's claims, an argument raised for the first time on appeal should not be considered.

Under the circumstances of this case, the court correctly determined that respondent's actions were not authorized. As currently written, respondent's by-laws make no provision for mid-year reconstitution of the Nominating Committee or for the Board's rejection of the Committee's list of candidates; indeed, Article IV, Section 9, supports the inference that the Board may not interfere with the Committee's choice of candidates. The business judgment doctrine does not help respondent in this case; "it constitutes no grant of general or inherent power in the directors to enforce against a shareholder an edict of the directors beyond their authority to make under ... the bylaws of the corporation" (*Fe Bland v Two Trees Mgt. Co.*, 66 NY2d 556, 565 [1985]).

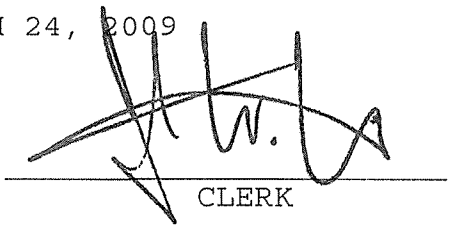
Petitioner made a showing of irreparable harm if an injunction were not granted. Before March 28, 2008, he was a candidate for the 2008 election and had secured the number two spot on the ballot; on March 28, the chairman of respondent's

Board notified petitioner that the Board had vacated his nomination. Given the animosity between the parties, it is highly unlikely that petitioner would be renominated by a reconstituted Nominating Committee.

Petitioner also showed that a balancing of the equities favored the injunction. Respondent will not be irreparably harmed if the election goes forward. First, the candidates selected by the Nominating Committee might not be elected; respondent's by-laws permits incumbents who are not selected by the Nominating Committee to run for the Board and the Supervisory Committee. Second, even if one or more candidates selected by the Nominating Committee are elected, the report of respondent's Supervisory Committee admits that they appear to be well qualified. Third, if respondent is aggrieved by the election results, it can find a shareholder to bring a petition pursuant to Banking Law § 466(3).

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

ENTERED: MARCH 24, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
John W. Sweeny, Jr.
James M. McGuire
Leland G. DeGrasse, JJ.

5304
Ind. 1853/03

The People of the State of New York,
Respondent,

-against-

Anthony Coston,
Defendant-Appellant.

Defendant appeals from a judgment of resentence, Supreme Court, Bronx County (Troy K. Webber, J.), rendered July 27, 2006, resentencing him upon his conviction of reckless endangerment in the first degree and other crimes to a term of four months' intermittent imprisonment to be served on weekends, five years' probation and a fine, and from an order, same court and Justice, entered on or about March 17, 2008, which denied his CPL 440.20 motion to set aside the resentence.

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

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

McGUIRE, J.

The principal issue on this appeal may be a novel one -- the parties cite no precedent squarely on point -- concerning the scope of the right secured by the double jeopardy provisions of the federal and state constitutions (US Const 5th Amend; NY Const, art I, § 6) not to be punished twice for the same offense. We need not, however, survey double jeopardy precedents to resolve this issue. The parties each rely on two decisions of the United States Supreme Court, *Ex parte Lange* (18 Wall [85 US] 163 [1873]) and *In re Bradley* (318 US 50 [1943]), that are pillars of the third protection afforded by the double jeopardy clause of the federal and state constitution, "the protection against multiple punishments for the same offense" (*Jones v Thomas*, 491 US 376, 381 [1989] [internal quotation marks omitted]; *see also People v Biggs*, 1 NY3d 225, 228-229 [2003]). Both cases held that the right not to be punished twice for the same offense was violated by sentences that are similar to both the original and revised sentences imposed in this case. The sentences imposed in *Ex parte Lange* and *In re Bradley*, however, differ in a critical respect from the original and revised sentences. That difference requires the conclusion that defendant's double jeopardy claim is without merit.

Defendant was convicted upon his plea of guilty to every

count remaining in the indictment at the time of the guilty plea, a misdemeanor drug possession charge previously having been dismissed. As is clear from the prosecutor's statements, the People insisted that defendant plead guilty to the entire indictment in light of their opposition to the promised sentence. Specifically, defendant pleaded guilty to reckless endangerment in the first degree, criminally negligent homicide, criminal mischief in the fourth degree, operating a motor vehicle while under the influence of alcohol and two counts of leaving the scene of an incident without reporting.

In the plea colloquy defendant admitted under oath that on March 29, 2003, after consuming alcohol, he drove a motor vehicle at a speed in excess of the posted limit on a street in the Bronx before striking and causing more than $250 in damages to a parked car. He admitted that he thereafter drove his vehicle in reverse, striking his passenger, Ida Benitez, with the back door of the vehicle as she exited, inflicting fatal injuries. Defendant also admitted that although he knew he had struck Ms. Benitez, he fled the scene without reporting to the police either that he had caused damage to the parked car or injured Ms. Benitez. Finally, defendant did not dispute the results of a breathalyzer test indicating that he had a blood alcohol level of .08.

At the outset of the plea proceedings, defendant's attorney stated that defendant was offering to plead guilty on the understanding that he would be sentenced to a "six month split," by which, as is clear from the subsequent discussion, counsel meant a period of six months' intermittent incarceration (to be served on weekends) and a period of five years' probation. Counsel further stated that although he had discussed with defendant the option of pleading guilty and receiving a sentence of intermittent prison of one year to be served on weekends, defendant had "opted to take the six months and the probation offer rather than one year." The court promised defendant that he would be sentenced to a term of six months' intermittent imprisonment, which would be served on weekends, and five years' probation. Following the allocution, the prosecutor expressed satisfaction with the allocution itself but stated the People's position that the appropriate sentence was a prison sentence of one to three years' incarceration.

At the sentencing proceeding on October 5, 2005, defense counsel stated that defendant was relying on the promised sentence. The court noted that defendant had pleaded guilty to a violation of subdivision 1 of Vehicle and Traffic Law § 1192, operating a motor vehicle while under the influence of alcohol, and that the court did not recall whether it had stated at the

plea proceeding that a fine of $500 was "mandatory" upon a conviction for that crime. When defense counsel stated he was not sure if such a fine was required, the court asserted that it and a 90-day suspension of defendant's driver's license were required.[1] The court asked defense counsel if he had anything else to say, and counsel responded, "I think that's it." When the court asked defendant if he had anything to say before sentence was imposed, defendant stated, "No."

The court then pronounced the sentence. Specifically, the court stated that "the sentence of the Court ... on defendant's plea of guilty to reckless endangerment in the first degree, criminally negligent homicide, operating a motor vehicle while under the influence of alcohol, leaving the scene of an incident without reporting two counts, is a term of incarceration of six months plus a term of probation of five years." In addition, the court stated that "there's a fine imposed in the amount of five hundred dollars" and directed both a 90-day suspension of defendant's driver's license and the imposition of surcharges that are not relevant to the issues presented on appeal. The court went on to state that defendant's weekend incarceration

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[1]The court erred. As discussed below, the maximum authorized fine is $500; a fine of at least $300 is mandated (Vehicle and Traffic Law § 1193[1]).

would commence on November 11, 2005, with the final weekend commencing on May 12, 2006 and ending on May 14, 2006. Finally, the court set December 30, 2005 as the date by which defendant was required to pay the $500 fine, but made clear that if defendant did not have the money by that date he would be given additional time to pay it. Defendant voiced no objection to any aspect of the sentence.

The court's comments prior to pronouncing sentence make clear that the $500 fine was imposed on the conviction for operating a motor vehicle while under the influence of alcohol (Vehicle and Traffic Law § 1192), which is a traffic infraction under the particular facts of this case (Vehicle and Traffic Law § 1193[1][a]) as defendant was convicted under subdivision 1 of Vehicle and Traffic Law § 1192 for driving while his ability to operate a motor vehicle was impaired by the consumption of alcohol. The court otherwise failed to specify the sentence for each offense and also failed to mention the conviction for the class A misdemeanor of criminal mischief in the fourth degree (Penal Law § 145.00). Although the parties do not discuss either failure, or mention the latter, we briefly discuss both below, as well as another problem with the sentence that the parties do not mention.

Thereafter, the court modified the sentence on several occasions by changing the dates on which defendant would serve the remaining period of intermittent imprisonment and by resentencing defendant on one of those occasions, December 13, 2005, to an intermittent prison term of 5 months. The legality of neither the modifications nor the resentencing to an intermittent prison term of 5 months is in dispute on this appeal.

Defendant's double jeopardy claim arises from another resentencing proceeding, conducted on July 26, 2006.[2] Penal Law § 60.01(2)(d) provides as follows:

> "In any case where the court imposes a sentence of imprisonment not in excess of sixty days[] for a misdemeanor or not in excess of six months for a felony *or in the case of a sentence of intermittent imprisonment not in excess of four months*, it may also impose a sentence of probation or conditional discharge provided that the term of probation or conditional discharge together with the term of imprisonment shall not exceed the term of probation or conditional discharge authorized by article sixty-five of this chapter. The sentence of imprisonment shall be a condition of and run concurrently with the sentence of probation or conditional discharge" (emphasis added).

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[2]The transcript of this proceeding is dated July 26, 2006, but the sentencing order is dated July 27, 2006. The discrepancy is immaterial.

Thus, the intermittent imprisonment component of both the original (six months) and revised (five months) sentences was illegal.

At the July 26, 2006 resentencing the court stated that it had erred and that defendant should have been sentenced to a term of 4 months' intermittent imprisonment. The court stated that "the sentence is vacated" and "the defendant is now sentenced" to a term of four months' intermittent imprisonment to be served on weekends and five years' probation. Although not pronounced orally by the court, the sentencing order signed by the court expressly states that the sentence included a fine of $500 to be paid "on or before 12/30/05," the same date for payment specified in the original and the revised sentences. Defendant voiced no objection to this revised sentence.

Before addressing defendant's appellate claims -- his double jeopardy challenge to the probation component of the sentence and his claim relating to the fine component -- we first discuss the two failures noted above. A threshold issue, however, also must be addressed and it can be disposed of summarily. At the plea proceeding, defendant answered "yes" when the court asked if he understood that he was "waiving [his] right to appeal this plea and sentence." We need not pause to consider the People's dubious argument that defendant validly waived his right to

appeal. As defendant correctly argues, even assuming the validity of the waiver generally, "a defendant may not waive the right to challenge the legality of a sentence" (*People v Seaberg*, 74 NY2d 1, 9 [1989]). Moreover, the two illegal sentence claims defendant raises arise out of events that occurred after the plea and the imposition of the original sentence. A valid waiver of the right to appeal cannot plausibly be thought to preclude review of all claims of error arising out of judicial or prosecutorial actions that occur after sentencing, regardless both of whether the actions were unlawful and of whether they were or reasonably could have been foreseen at the time of sentencing.

A

As pronounced, but putting aside the effect of Penal Law § 60.01(2)(d), the sentence is lawful with respect to the convictions for the two felony offenses, the class D felony of reckless endangerment in the first degree (Penal Law § 120.25) and the class E felony of criminally negligent homicide (Penal Law § 125.10). A five-year period of probation is specified whenever the court determines to impose a period of probation (Penal Law § 65.00[3][a][i]) for class D and E felonies for which a definite sentence of one year or less is authorized (Penal Law § 70.00[4]), and the five-month term of the intermittent

imprisonment satisfies the requirement of Penal Law § 85.00(3) that the term not exceed the term of the definite sentence that could have been imposed.

On the other hand, if the probation and intermittent prison components of the sentence as pronounced were to be viewed as having been imposed as well on the other offenses for which the court stated it was imposing sentence, the sentence would be illegal to that extent. With respect to the two convictions for leaving the scene of an incident without reporting (Vehicle and Traffic Law § 600), one of them (Vehicle and Traffic Law § 600[2][a]) is a class B misdeameanor (Vehicle and Traffic Law § 600[2][c]) and the other (Vehicle and Traffic Law § 600[1][a]) -- like the conviction under Vehicle and Traffic Law § 1192(1)-- is a traffic infraction (Vehicle and Traffic Law § 600[1]). For a class B misdemeanor, when the court determines to impose a period of probation, a one-year period is specified (Penal Law § 65.00[3]), and the term of imprisonment may not exceed three months (Penal Law § 70.15). Because a traffic infraction is not a "crime" (Penal Law § 10.00[6]), the sentence may not include a period of probation (Penal Law § 65.00[1]), and the term of imprisonment may not exceed 15 days (Vehicle and Traffic Law § 600[1]). Although a sentence of intermittent imprisonment is authorized for a class B misdemeanor and a traffic violation

(Penal Law § 85.00[2][a]; *see also* Penal Law § 60.20[1][d]), the term of the intermittent imprisonment component of the original and revised sentences exceeds the maximum definite sentences of imprisonment authorized for these three offenses.

If the probation and intermittent prison components of the sentence as pronounced were to be viewed as having been imposed only on the two felonies, it would follow that the court failed to impose any sentence on the two Vehicle and Traffic Law § 600 offenses, i.e., the B misdemeanor and the traffic infraction. That would raise an additional issue, one which arises in any event on account of the court's failure to pronounce any sentence on the conviction for criminal mischief in the fourth degree. Penal Law § 60.01(1) states that "[e]xcept as otherwise specified in this article, when the court imposes sentence upon a person convicted of an offense, the court *must* impose a sentence prescribed by this section" (emphasis added). It appears that no provision of article 60 would apply here so as to negate this mandate, but the parties do not address the issue and we need not decide it. Although lawful concurrent terms of intermittent imprisonment presumably could have been imposed for the Vehicle and Traffic Law § 600 offenses,[3] the court did not pronounce such

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[3]Penal Law § 85.00(2)(b) precludes a sentence of intermittent imprisonment when "the court is . . . imposing any

sentences and for that reason alone they cannot be viewed as having been legally imposed (*People v Sparber*, 10 NY3d 457 [2008]). For the same reason, it is of no legal moment that the sentencing order signed by the court on the date of the original sentence states that the criminal mischief crime was one of the offenses for which sentence was imposed. Even if the sentence as pronounced lawfully could be viewed as having been imposed on the criminal mischief conviction, the period of probation exceeds the three-year period specified for such a class A misdemeanor (Penal Law § 65.00[3][b][i]).

A final problem with the sentencing pronouncement, which also makes it difficult to view the sentence as having been imposed on the misdemeanor violation of Vehicle and Traffic Law § 600, is an ironic one, given defendant's appellate claim that he is entitled to get back the $500 fine he paid for the Vehicle and Traffic Law § 1192(1) conviction. The problem is that upon conviction for that misdemeanor, the Legislature has mandated a fine of not less than $250 nor more than $500 (Vehicle and Traffic Law § 600[2][c]). The court, however, did not impose any

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other sentence of imprisonment upon the defendant at the same time." Although we need not decide the point, it seems reasonable to construe the phrase "any other sentence of imprisonment" to mean any sentence of imprisonment other than a sentence of intermittent imprisonment.

fine for this offense.

Defendant is not aggrieved by any of these failures and omissions. Although the People are aggrieved, the one-year period in which they may move to set aside a sentence as invalid as a matter of law has elapsed (CPL 440.40[1]). Whether a partial failure of the sentencing court to comply with the mandate of Penal Law § 60.01(1) is subject to that time limitation is a matter we need not address. Similarly, whether we or the sentencing court have the authority under the circumstances of this case to correct the sentence sua sponte also is an issue we need not address. Nor would it be prudent to determine what if any corrective action we might take on account of these failures and omissions given that the parties do not address them in their briefs. For the reasons stated below, we affirm the judgment. Our affirmance, however, should not be construed to preclude the People or the court from taking whatever actions they may believe to be authorized and appropriate.

B

In *People v Sparber* (10 NY3d 457), the Court of Appeals held that the failure of the sentencing courts in each of the five cases before it to pronounce orally a term of postrelease supervision at the sentencing proceeding was contrary to

statutory mandates (*id.* at 469-471). As the sentences would be unlawful without a period of postrelease supervision (*id.* at 469, 471), the Court held that the "sole remedy" for the "procedural error" was "to vacate the sentence and remit for a resentencing hearing so that the trial judge can make the required pronouncement" (*id.* at 471). According to defendant, the sentence was vacated entirely at the July 26, 2006 resentencing proceeding. Because the court did not then pronounce that the sentence included a fine of $500, defendant argues that under *Sparber* the sentence imposed on July 26, 2006 does not include that fine. He further contends not only that the omission of the fine was lawful and that *Sparber* therefore does not require a remand for the purpose of reimposing the fine, but that this Court lacks authority under CPL 470.15(1) and (2)(c) to direct such a remand. For these reasons, defendant claims he is entitled to have the $500 he paid in satisfaction of the fine component of the original sentence returned to him.

This claim is without merit. At the July 26, 2006 resentencing proceeding, the court stated that "[i]t should be four months with probation so the sentence is vacated." As the immediately preceding statement of the court makes clear, the "[i]t" to which the court referred was the imprisonment component of the sentence. At no point during the proceeding did the court

state that it was vacating the sentence in its entirety. The linchpin in defendant's claim -- that the fine component of the sentence was vacated -- thus disintegrates. Because the fine component was pronounced orally by the court at the original sentencing proceeding and was not vacated thereafter, it did not have to be repronounced. Moreover, our conclusion that the fine component was not vacated is buttressed by the written sentencing order signed by the court stating that the fine was to be paid "on or before 12/30/05," the same date specified in the original sentencing order and in each of the two prior sentencing orders that modified the intermittent prison component of the sentence.

Even assuming that defendant had met his burden as appellant (*see Appleby v Erie County Sav. Bank*, 62 NY 12, 18 [1875]) to establish the illegality of the fine component of the sentence by showing that it was vacated at the July 26, 2006 proceeding, we would be unwilling to extend the holding of *Sparber* to a case in which a component of a sentence was not *repronounced* in the defendant's presence at a subsequent resentencing proceeding. The original sentence imposed a fine of $500 that was pronounced by the court. When a defendant has not been convicted within the preceding five years of a violation of the Vehicle and Traffic Law § 1192(1), the subdivision of the offense of "Operating a motor vehicle while under the influence of alcohol or drugs"

under which defendant was convicted, a fine of at least $300, but not more than $500, is mandated by statute (Vehicle and Traffic Law § 1193[1]). As noted, each of the sentencing orders signed by the court expressly states that the sentence includes a $500 fine. Under these circumstances, we would be loathe to require a proceeding that would be pointless precisely because its outcome would be inevitable (*see* CPL 470.05[1] ["An appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties"]). Even if a remand were required, defendant's claim that it would be unauthorized because the ostensible "omission of the fine from the resentencing was lawful," is erroneous. A fine of at least $300 is mandated by statute.

Finally, defendant is entitled to no relief on account of his separate argument premised on the court having made no mention of a fine during the plea proceeding and its erroneous statement at the original sentencing proceeding that a fine of $500 for the Vehicle and Traffic Law § 1192(1) offense was "mandatory." After all, defendant does not seek the "proper remedy [of] vacatur of the plea" (*Sparber*, 10 NY3d at 469) and seeks only relief, return of the entire fine, that would render

the sentence illegal.[4]

C

Turning to the double jeopardy claim, defendant does not and cannot make the broad assertion that the court lacked all authority to correct the illegal original sentence. Unquestionably, the court "had the inherent power to correct an illegal sentence" (*People v DeValle*, 94 NY2d 870, 871-872 [2000] [internal quotation marks omitted]). Accordingly, at least prior to defendant's completion of 4 months of intermittent imprisonment, the illegal original and revised sentences could have been corrected at any time (*Matter of Lionel F.*, 76 NY2d 747, 749 [1990] ["There is no constitutional impediment to a court's power to modify its decisions, provided such a modification does not subject an individual to double jeopardy"]).

Defendant's double jeopardy claim is based on the fact that as of July 26, 2006, the date the illegal revised sentence containing a five-month intermittent imprisonment component was corrected, he had already completed 4 months of intermittent

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[4]Defendant's present failure to seek vacatur of the plea, like his failure to object to the fine at sentencing, is far from puzzling. If he now sought vacatur of the plea or if he had objected at sentencing, the "proper remedy [of] vacatur of the plea" would expose him to the sentence the People recommended, a state prison term.

imprisonment.[5] By a motion under CPL 440.20 dated October 18, 2007, defendant asserted that the imposition of the corrected sentence violated his double jeopardy rights, arguing that because he had already completed an "authorized, alternative sentence, the court could not impose any further sentence." Accordingly, he maintained that the term of the corrected sentencing imposing a period of five years' probation had to be vacated. Although he now argues that no fine was imposed on July 26, 2006, he maintained as well that Supreme Court should not have "reimposed" the $500 fine on that date. Supreme Court denied the motion in a written decision dated March 13, 2008. Thereafter, defendant was granted leave to appeal from the order denying his CPL 440.20 motion and that appeal was consolidated with defendant's appeal from the underlying judgment.

Defendant's double jeopardy claim is without merit.[6] If

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[5]As discussed below, defendant's claim also depends on one other fact.

[6]We are not persuaded by the People's contention that defendant's double jeopardy claim is not preserved for review because defendant did not object at all to the imposition of the revised sentence at the resentencing proceeding on July 26, 2006. To be sure, a double jeopardy claim premised on the third protection afforded by the double jeopardy clause is subject to preservation requirements (*People v Gonzalez*, 99 NY2d 76, 82 [2002]). However, defendant raised precisely this double jeopardy argument in his motion under CPL 440.20 to set aside the probation component of the sentence, and that is sufficient to preserve the claim for review (*cf. People v Moon*, 225 AD2d 826,

defendant were correct, we would agree that it would not matter even if he knew that the intermittent imprisonment component of the original and revised sentences were illegal and chose to wait until after he served the 4 months' before asserting such illegality and raising the bar of double jeopardy. Defendant's double jeopardy rights, however, were not violated when the court corrected the illegal revised sentence of five months' intermittent imprisonment and five years' probation, and resentenced defendant to the lawful sentence of 4 months' intermittent imprisonment and five years' probation.

In re Bradley does not support defendant's position. In *Bradley*, the petitioner was sentenced to a fine and a term of 6 months' imprisonment even though the statute specified that the court was authorized to impose either a fine or imprisonment but not both. After the petitioner had been committed to prison his attorney paid the fine. Later that same day, the court

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827 [1996] [holding that challenge to sentence on direct appeal was not preserved for review where defendant had failed, inter alia, to move to set aside the sentence on this ground in a motion under CPL 440.20], *lv denied* 88 NY2d 939 [1996]). Relatedly, we need not address separately defendant's reliance on the double jeopardy clause of the New York constitution (*see Matter of Suarez v Byrne*, 10 NY3d 523, 534 [2008] ["The Double Jeopardy Clauses in the State and Federal Constitutions are nearly identically worded, and we have never suggested that state constitutional double jeopardy protection differs from its federal counterpart"]).

"realizing that the sentence was erroneous, delivered to the clerk an order amending it by omitting any fine and retaining only the six months' imprisonment. The court instructed the clerk, who still had the money, to return it to the petitioner's attorney" (318 US at 51-52). The lawyer refused to accept the money (the practice of law being quite different then), the petitioner sought a writ of certiorari and the Supreme Court directed that the petitioner be discharged from custody. The Court reasoned as follows:

> "When . . . the fine was paid to the clerk and receipted for by him, the petitioner had complied with a portion of the sentence which could lawfully have been imposed. As the judgment of the court was thus executed so as to be a full satisfaction of one of the *alternative penalties* of the law, the power of the court was at an end. It is unimportant that the fine had not been covered into the treasury; it had been paid to the clerk, the officer of the United States authorized to receive it, and petitioner's rights did not depend on what that officer subsequently did with the money.
>
> "It follows that the subsequent amendment of the sentence could not avoid the satisfaction of the judgment, and the attempt to accomplish that end was a nullity. Since one valid *alternative* provision of the original sentence had been satisfied, the petitioner is entitled to be freed of further restraint" (*id.* at 52 [footnotes omitted;

emphasis added]).[7]

Here, by contrast, the statute authorized the court to impose a sentence of intermittent imprisonment *and* a sentence of a period of probation (Penal Law § 60.01[2][d]). The sentence of intermittent imprisonment and the sentence of probation are not alternative sentences. Both are authorized. Indeed, although our analysis does not depend on it, they are interconnected components of *the* sentence.[8] To be sure, the statute does not authorize a sentence of a period of probation when a sentence of intermittent imprisonment in excess of four months is imposed. The invalidity of one of the two components of the original sentence, however, cannot negate the statutory authority to sentence a defendant both to a fine and a period of intermittent imprisonment.

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[7]The Court did not mention the double jeopardy clause in its opinion, but it twice cited *Ex parte Lange* in footnotes to the first paragraph quoted above. The facts of *Ex parte Lange* are indistinguishable from those in *In re Bradley* and the holding in *Ex parte Lange* is predicated on the double jeopardy clause (85 US at 175).

[8]The last sentence of Penal Law § 60.01(2)(d) states that "[t]he sentence of imprisonment shall be a condition of and run concurrently with the sentence of probation or conditional discharge." As the Court of Appeals has observed, however, "the meaning of the additional directive that '[t]he sentence of imprisonment shall be a condition of ... probation' remains obscure" (*Matter of Pirro v Angiolillo*, 89 NY2d 351, 358 [1996], quoting Penal Law § 60.01[2][d] [first brackets added]).

The holding in *Ex parte Lange* is based on reasoning that is identical to the reasoning in *In re Bradley*. There, too, the Court emphasized "[t]he error of the court in imposing the two punishments mentioned in the statute, when it had only the *alternative* of one of them" (85 US at 174 [emphasis added]; *id.* at 175 ["The court, through inadvertence, imposed both punishments, when it could rightfully impose but one"]). The reference in *Ex parte Lange* to a "valid judgment" is of no moment. The Court rhetorically asked, after stressing that the petitioner had paid the fine and served a portion of the prison sentence, "all under a *valid* judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, [and] impose another punishment on the prisoner on that same verdict?" (*id.* at 175 [emphasis added]). The Court appears to have concluded that the judgment was "valid," as opposed to "void," because "[i]t was rendered by a court which had jurisdiction of the party and of the offence, on a valid verdict" (*id.* at 174).

In any event, it makes no sense to suppose that if the fines imposed and paid in *Ex parte Lange* and *In re Bradley* had exceeded the statutory limits -- if, in other words, the sentences were doubly flawed -- the Court would have concluded that the petitioners' double jeopardy rights had not been violated. The

ratio decidendi of both cases is that the petitioners would be "put to actual punishment twice" (*id.* at 175) if, after suffering in full one of the alternative punishments authorized by law, they were made to suffer as well the other alternative.

Acceptance of defendant's position would entail startling consequences. Consider a criminal statute authorizing a sentence of, for example, a fine of up to $1500, a prison term of up to 15 years, or both such a prison term and fine. If a sentencing court mistakenly sentenced the defendant, perhaps for a violent felony offense, to 15 years in prison and a fine of $1600, under defendant's view of double jeopardy the defendant would not have to serve a day in jail if he paid the $1600 fine immediately after sentence was imposed. Alternatively, the statute might authorize a sentence of up to 14 days in jail and a fine of up to $1500. If a sentencing court mistakenly sentenced the defendant to 15 days in jail and a fine of $1500, the defendant would not have to pay a penny of the fine if he first served the jail sentence.

Ex parte Lange and *In re Bradley* implicitly foreclose any argument that a defendant's subjective awareness of the illegal nature of the sentence is relevant to the constitutional analysis. Accordingly, it would not matter in either case if the defendant knew the sentence was illegal and waited until after

the illegal component of the sentence was satisfied before raising the bar of double jeopardy to the remaining, perfectly legal component of the sentence. The prospect of such quixotic consequences flowing from defendant's position brings to mind the memorable words of the estimable Mr. Bumble. The views of neither Mr. Bumble nor Dickens do not of course shed any light on the original understanding of the double jeopardy provisions of the federal and state constitutions. Mr. Bumble's familiar words merit quotation just the same: "If the law supposes that, the law is a ass -- a idiot." Another, far from questionable authority has made much the same point, albeit in less colorful terms: "neither the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls" (*Jones v Thomas*, 491 US at 387).

That defendant's double jeopardy claim lacks merit also can be seen when it is recognized that it depends on the fortuitous fact that the illegal revised sentence was corrected after the court realized its error.[9] Had the error not been corrected at the resentencing proceeding on July 26, 2006, defendant could not

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[9]Regardless of whether a court must exercise its "inherent power to correct [an] error made at sentencing" (*People v Wright*, 56 NY2d 613, 614 [1982]) when it becomes aware that the sentence is illegal, the point is that defendant's illegal sentence was corrected only because the court realized it had erred and sua sponte corrected the error.

claim that because he had already served four months of intermittent imprisonment the court punished him twice for the same offense when it resentenced him on that date to four months of intermittent imprisonment and five years' probation. Defendant's position thus entails the equally startling proposition that although the *illegal* original and revised sentences (with intermittent terms of imprisonment of 6 and 5 months, respectively) did not violate his double jeopardy rights, the *legal* revised sentence did violate those rights. By contrast, the double jeopardy violations in *Ex parte Lange* and *In re Bradley* inhered in the illegal sentences originally imposed, developing into actual violations when one component of the sentences was satisfied, and were unaffected by the revised sentences imposing punishments authorized by the statutes.

Regardless of whether defendant knew the intermittent imprisonment component of the sentence could not exceed 4 months and waited until after serving more than four months before pressing his double jeopardy claim, one of the two punishments imposed on him by the sentence was more severe than the statute authorized. That is certainly most unfortunate and would be all the more so if defendant did not know until after serving more than four months of intermittent imprisonment that no more than 4 months of intermittent imprisonment is authorized when a sentence

of probation also is imposed. Some sentencing mistakes, like mistakes generally, cannot be undone at all, let alone consistently with double jeopardy protections. But not all uncorrectable sentencing mistakes violate these protections. The Legislature authorized both punishments and defendant was sentenced to both. Excessive punishment is not necessarily double punishment; defendant was punished excessively but not "*twice* for the same offence" (*Ex parte Lange*, 85 US at 175 [emphasis in original]).

Accordingly, the judgment of resentence, Supreme Court, Bronx County (Troy K. Webber, J.), rendered July 27, 2006, resentencing defendant upon his conviction of reckless endangerment in the first degree and other crimes to a term of four months' intermittent imprisonment to be served on weekends, five years' probation and a $500 fine, should be affirmed. The appeal from the order, same court and Justice, entered on or about March 17, 2008, which denied defendant's CPL 440.20 motion to set aside the resentence, should be dismissed as academic.

All concur.

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

ENTERED: MARCH 24, 2009

CLERK