SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 14, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2333 Tower Insurance Company of New York, Index 109554/07
Plaintiff-Respondent,

-against-

Red Rose Restaurant, Inc., et al.,
Defendants-Appellants.

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Longo & D'Apice, Brooklyn (Mark A. Longo of counsel), for Red Rose Restaurant, Inc., and Romano appellants.

Robert C. Fontanelli, P.C., Brooklyn (Robert C. Fontanelli of counsel), for Peluso appellants.

Law Office of Max W. Gershweir, New York (Joshua L. Seltzer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Doris Ling-Cohan, J.), entered February 13, 2009, inter alia, declaring that plaintiff insurer has no obligation to defend or indemnify defendants Red Rose Restaurant and the Romanos (the insureds) in an underlying personal injury action, unanimously affirmed, without costs.

The policy required the insureds to notify plaintiff of a possible claim as soon as practicable. The insureds became aware

of defendant Maryann Peluso's accident on the night it occurred, but failed to notify the insurer of the possibility of a claim until 14 months later. An insured's good-faith belief in its nonliability may excuse the failure to give timely notice (*see Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]). "However, where a reasonable person could envision liability, that person has a duty to make some inquiry" as to potential liability (*see White v City of New York*, 81 NY2d 955, 958 [1993]). Here, the insureds failed to describe any action they took to ascertain the possibility of their liability for the accident. Since they knew that Peluso fell on or near their premises, assisted her, watched as she was taken away in an ambulance, and knew that her mother-in-law lived nearby and frequented the restaurant, the insureds "had both the ability and the responsibility to investigate the outcome of the accident" and determine for certain the location and the cause of her fall (*SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 585 [1998]; *see also White*, 81 NY2d at 958). Their failure to do so belies any claim that they had a good-faith belief in their nonliability (*York Specialty Food, Inc. v Tower Ins. Co. of N.Y.*, 47 AD3d 589 [2008]). Thus the 14-month delay in notifying the insurer was inexcusable (*see e.g. id.*).

The insureds' purported belief that Peluso fell on the

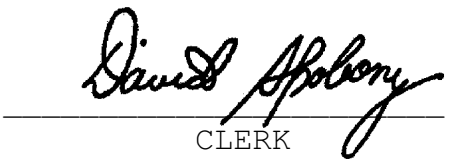
abutting public sidewalk, as opposed to the restaurant steps, would not have relieved them of their duty to notify the insurer. Administrative Code of the City of New York § 7-210, which was in effect when the accident occurred, requires an abutting property owner to maintain a public sidewalk in a reasonably safe condition. The insureds' ignorance of this provision would not have excused their noncompliance with the policy requirement to notify plaintiff of the occurrence as soon as practicable (*see e.g. Greyhound Corp. v Gen. Acc. Fire & Life Assur. Corp.*, 14 NY2d 380, 388 [1964, Fuld, J., concurring]).

The court properly exercised its discretion in denying the Peluso claimants' cross motion herein to strike the complaint. Plaintiff did not refuse to comply with the Pelusos' discovery demand; rather it produced the reports of its investigation, redacting only those portions that were privileged (*see Recant v Harwood*, 222 AD2d 372, 374 [1995]). As the Pelusos never sought to compel production of the redacted material, the court never determined that the material sought should have been disclosed, and no order was ever entered compelling plaintiff to produce material alleged to have been wilfully withheld, there is no basis for a sanction against plaintiff (*see Zletz v Wetanson*, 67 NY2d 711 [1986]).

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

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

ENTERED: OCTOBER 14, 2010



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

1265 Donaldo Nicosia, Index 104193/08
Plaintiff-Appellant,

-against-

The Board of Managers of the
Weber House Condominium, et al.,
Defendants-Respondents,

Axminster Carpets Ltd.,
Defendant.

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Tarter Krinsky & Drogin LLP, New York (César de Castro of counsel), for appellant.

Marin Goodman, LLP, New York (Margret M. McBurney of counsel), for The Board of Managers of the Weber House Condominium, respondent.

Loeb & Loeb LLP, New York (David M. Satnick of counsel), for KESY LLC and Kevin MacCarthy, respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 22, 2008, that granted the motions of defendants Board of Managers of the Weber House Condominium, KESY LLC and Kevin MacCarthy to dismiss the complaint and to cancel the notice of pendency plaintiff filed against the property, modified, on the law, to reinstate the second cause of action (in part) and fifth cause of action, and otherwise affirmed, without costs.

The court based its grant of defendants' motions to dismiss

on its finding that plaintiff had waived his right to bring any claims arising out of his contract with defendant Axminster to purchase the condominium unit. In doing so, the court improperly made a factual determination that defendant Board's exercise of its right of first refusal was valid (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Accordingly, we modify to reinstate those claims that we find to be viable, namely, that part of the second cause of action for tortious interference with contract and the fifth cause of action for breach of contract against Axminster.

Plaintiff states a cause of action for tortious interference with a contract against defendants Board of Managers, KESY and MacCarthy by alleging that he had a contractual relationship with Axminster, that KESY, the Board and MacCarthy had knowledge of the contract, and that MacCarthy, the Board and KESY intentionally interfered with that contract "by improperly purporting to exercise a right of first refusal," causing plaintiff financial damages (*see NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]; *cf. 85 Fifth Ave. 4th Floor, LLC v I.A. Selig, LLC*, 45 AD3d 349 [2007]).

The fifth cause of action, for breach of contract against Axminster only, should be reinstated because Axminster did not move to dismiss, but instead answered the complaint and asserted

affirmative defenses. For unstated reasons, the motion court dismissed the complaint in its entirety.

Plaintiff's remaining claims should be dismissed as either duplicative (*see Turk v Angel*, 293 AD2d 284 [2002], *lv denied* 100 NY2d 510 [2003]), unnecessary (*see Bartley v Walentas*, 78 AD2d 310, 312 [1980]) or insufficient to state a cause of action (*see MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1995]).

Plaintiff's fraud claim should be dismissed for the additional reason that it is not pleaded with particularity (CPLR 3016[b]). A cause of action for fraud requires plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages (*Eurycleia Partners, LP v Seward & Kissel*, LLP, 12 NY3d 553, 559 [2009]). Plaintiff's complaint is bare-bones. Among other deficiencies, plaintiff does not allege how he learned that the Board was purporting to exercise its right of first refusal. Plaintiff attaches an August 6, 2007 letter that the Board sent to Axminster's attorney stating that the Board was electing to exercise its right of first refusal. However, plaintiff does not articulate who communicated this information to him or when he received this information. Thus, we are left to guess that somehow Axminster's attorney communicated the Board's decision to plaintiff at some point.

Plaintiff also does not explain how he relied to his detriment on the Board's alleged exercise of its right of first refusal. While we can suppose that plaintiff's reliance somehow involved his refraining from taking steps to enforce the closing, it is not for us to interject our supposition into plaintiff's pleading. Nor is it our place to explain what damages might have flowed from the failure to close. The dissent points to allegations from the tortious interference cause of action where plaintiff alleges that because of defendants' wrongful conduct, "plaintiff's contract with Axminster to purchase the Unit was not consummated." However, this language does not appear in plaintiff's cause of action for fraud. And, even if it did, this language would hardly satisfy the CPLR 3016(b) requirement that the facts constituting the fraud "be stated in detail." Certainly, what plaintiff did or did not do after learning that the Board was exercising its right of first refusal, and what damages flowed from that action or inaction, are within plaintiff's purview.

While the dissent may be correct that plaintiff can prevail on his fraud claim "if Axminster reasonably relied on the misrepresentation in selling the unit to Kesy," plaintiff has not alleged this. Rather, plaintiff's allegations concerning Axminster are more nefarious -- that Axminster directly breached

its duties to plaintiff by failing to perform "its required due diligence to determine if the sale to KESY was in accordance with the By-laws."

Thus, the facts of this case could very well eventually support a fraud claim. However, plaintiff has not pleaded these facts sufficiently and, unlike the dissent, we decline to speculate and infer the facts for him, especially given our liberal rules regarding amendment of pleadings.

That part of plaintiff's second cause of action for tortious interference with prospective advantage was properly dismissed. Because plaintiff and Axminster had already entered into a contract, plaintiff failed to plead any prospective business relationship. We cannot see how plaintiff would have any relationship with Axminster, separate from the contract, upon which to recover. Moreover, because the fraud claim is not viable in its present form, plaintiff has failed to plead conduct "amount[ing] to a crime or an independent tort" or conduct the sole purpose of which was to inflict intentional harm on plaintiff, sufficient to support this cause of action (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]).

All concur except McGuire and Acosta, JJ. who dissent in a memorandum by McGuire, J. as follows:

McGUIRE, J. (dissenting)

I disagree with the majority's determination to uphold the dismissal of the fraud cause of action as against defendants KESY LLC and Kevin MacCarthy and the cause of action for tortious interference with prospective advantage.

We must assume the following to be true: Plaintiff entered into a contract with defendant Axminster to purchase a commercial condominium unit. The contract was subject to and conditioned upon the waiver of a right of first refusal to purchase the unit held by the condominium and exercisable by defendant Board of Managers. The condominium's bylaws provide that within 30 days of receipt of notice from a unit owner of a bona fide offer to purchase the unit, the Board "may elect, by notice to such unit owner, to purchaser [*sic*] such unit . . . (or to cause the same to be purchased by its designee, corporate or otherwise), on behalf of all other unit owners, on the same terms and conditions as contained in the Outside Offer and as stated in the notice from the offering unit owner." In a letter dated August 6, 2007, defendant MacCarthy, purporting to act in his capacity as the Board's president, falsely represented to Axminster's attorney that the Board properly had elected to exercise its right of first refusal and purchase the unit. In fact, according to the complaint, MacCarthy had "fraudulently

concocted a scheme whereby KESY, an entity he controlled, would purchase the Unit." Thereafter, the complaint alleges, "MacCarthy directed the sale of the Unit to KESY on or about September 14, 2007, in violation of the By-laws."

The majority writes that "[p]laintiff's complaint is bare-bones." Whether this characterization is accurate is irrelevant, because the question is whether the allegations regarding fraud pass muster with respect to KESY and MacCarthy. The majority identifies as a "deficienc[y]" that "plaintiff does not allege how he learned that the Board was purporting to exercise its right of first refusal." The majority goes on to note that the August 6, 2007 letter was "sent to Axminster's attorney," and that "plaintiff does not articulate who communicated this information to him or when he received this information," relying on plaintiff's failure to assert that this information was communicated to him as a basis for its affirmance of the dismissal of the claim.

The majority is unpersuasive to the extent it takes the position that the fraud claim is deficient because it fails to allege that KESY or MacCarthy made the false representation. Fairly read, plaintiff alleges that MacCarthy was the architect of a fraudulent scheme pursuant to which he used his position as president of the Board to arrogate to himself for his sole

benefit, through KESY, the right of first refusal that properly could be exercised only by the Board for the benefit of all the shareholders. Pursuant to this scheme, the complaint also alleges that MacCarthy wrote and sent to Axminster's attorney the August 6, 2007 letter falsely asserting that the right of first refusal had been exercised by the Board on behalf of all the shareholders. As the Court of Appeals stated in the course of holding that allegations of fraud were sufficiently pleaded, "[t]he very nature of the scheme, as alleged, gives rise to the reasonable inference . . . that the [defendant] officers, as individuals and in the key positions they held, knew of and/or were involved in the fraud" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 493 [2008]).

Although inartfully pleaded, plaintiff's complaint alleges a scheme to defraud him out of the property he contracted to purchase and it is clear from the complaint and the attached August 6 letter that the misrepresentation was conveyed to him. It would not matter at all if the misrepresentation was made by defendants to Axminster and not to plaintiff (*see Tindle v Birkett*, 171 NY 520, 524 [1902] [upholding fraud claim; "[d]isregarding mere forms and methods, it cannot be doubted that the defendant spoke false and deceitful words to the plaintiffs through [a third party] just as effectually as if they had met

face to face and the statements had been made directly and personally"]).

The majority writes that plaintiff "does not explain how he relied to his detriment on the Board's alleged exercise of its right of first refusal." But the want of such an explanation in his complaint hardly is fatal to plaintiff's fraud claim. Not surprisingly, the majority cites nothing in support of the notion that fraud complaints must contain explanations. The statutory requirement that "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]) "should not be confused with unassailable proof of fraud"; "section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*see also Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492).

The inference that plaintiff relied -- whether he did so reasonably is not in dispute -- on the fraudulent representation to his detriment is a reasonable one to which he is entitled. After all, the complaint alleges that because of the wrongful conduct of MacCarthy and KESY, "plaintiff's contract . . . to purchase the Unit was not consummated and as a result plaintiff has sustained financial harm . . . and damages." Of course, a fraud plaintiff can show that he or she acted or refrained from acting to his detriment (*Shea v Hambros, PLC*, 244 AD2d 39, 46-47

[1998]), and it is reasonable to infer from the complaint that plaintiff did not take steps to enforce his valuable contractual rights because he credited MacCarthy's representation that the Board properly had exercised its right of first refusal.

Moreover, it also is reasonable to infer from plaintiff's allegations against Axminster that Axminster sold the unit to KESY because it, too, credited that representation. Thus, plaintiff alleges that Axminster breached the contract in selling the unit to KESY "by failing to do its due diligence with respect to the purported exercise of the . . . right of first refusal." That inference also defeats the majority's position, because plaintiff can prevail on his fraud claim if Axminster reasonably relied on the misrepresentation in selling the unit to KESY (*see Rice v Manley*, 66 NY 82, 87 [1876] ["it matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced to produce the injury"]; *see also Ruffing v Union Carbide Corp.*, 308 AD2d 526, 528-529 [2003], *appeal dismissed* 1 NY3d 621 [2004]).

The majority also writes that "we are left to *guess* that *somehow* Axminster's attorney communicated the Board's decision to plaintiff at some point" (emphasis added). To be blunt, this is just silly. Even putting aside what, as noted below, transpired at oral argument, no reasonable person could fail to draw the

inference from the complaint's factual allegations that that is exactly what happened. Nor would any reasonable person think that communicating the decision -- ostensibly that of the Board -- might be at all difficult, even if it were necessary to allege how it was communicated. This statement by the majority is of a piece with the rest of its discussion of the fraud allegations. Rather than do what it must (if it seeks to persuade) and explain why the inferences I draw are not reasonable, the majority offers only conclusory characterizations ("guess," "supposition" and "speculate").

The majority argues that plaintiff's allegations that he was damaged are insufficient. It first stresses that I "point[] to allegations from the tortious interference cause of action where plaintiff alleges that because of defendants' wrongful conduct, 'plaintiff's contract with Axminster to purchase the Unit was not consummated.'" Permitting form to vanquish substance, the majority then objects that "this language does not appear in plaintiff's cause of action for fraud." Of course, however, on a CPLR 3211 motion, precisely where a factual allegation appears in a complaint is irrelevant (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["the sole criterion is whether the pleading states a cause of action, and if from its *four corners* factual allegations are discerned which taken together manifest any cause of action

. . . a motion for dismissal will fail"] [emphasis added]).

The majority next objects that even if this language did appear in the paragraphs of the complaint explicitly devoted to the fraud cause of action, it "would hardly satisfy the CPLR 3016(b) requirement that the facts constituting the fraud 'be stated in detail.'" This language, however, relates not to the fraudulent conduct but to plaintiff's damages and there is no requirement that the damages be pleaded with specificity. Rather, "[t]his provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of . . ." (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). In any event, the majority is content with this sweeping assertion and identifies no specific respect in which the language is deficient. Again, moreover, the majority wrongly requires what amounts to "unassailable proof of fraud" (*Pludeman, supra*, 10 NY3d at 492).

The majority is correct that "what plaintiff did or did not do after learning that the Board was exercising its right of first refusal, and what damages flowed from that action or inaction, are within plaintiff's purview." But if, as I contend, the factual allegations plaintiff does make and the reasonable inferences that can be drawn from them are sufficient to pass muster under CPLR 3016(b), the complaint is not defective because

plaintiff could have pleaded more.

The majority does not disagree with me that plaintiff can prevail on his fraud claim if Axminster reasonably relied on the misrepresentation in selling the unit to KESY. Instead, the majority protests that "plaintiff has not alleged this." Of course, however, I expressly acknowledged that. My point, with which the majority does not come to grips, is that it is reasonable to infer that reliance by Axminster from a specific allegation of the complaint. The majority's characterization of that allegation as "nefarious" is as colorful as it is irrelevant. In any event, if I am correct that reliance by plaintiff reasonably can be inferred from the allegations of the complaint, it does not matter whether I also am correct that reliance by Axminster can be inferred.[1]

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[1] Tellingly, at oral argument on the motion to dismiss, the defendants charged with fraud never so much as mentioned the subject of the adequacy of the complaint's allegations of reliance. The colloquy, however, makes clear that plaintiff's position is that he accepted the return of the down payment made to Axminster precisely because he believed the representation that the right of first refusal had been properly exercised. In addition, making clear that Axminster also relied on that representation, counsel for Axminster stated that plaintiff "accepted the $220,000 down-payment . . . *[e]verything seemed fine*, then we went to a closing, we transferred to KESY" (emphasis added). Accordingly, as plaintiff's ability to plead reliance cannot be doubted, it is not clear that the fraud cause of action should be dismissed even if the inference of reliance could not reasonably be drawn from the complaint (*cf. Nonnon v City of New York*, 9 NY3d 825, 827 [2007] [on a CPLR 3211 motion

One of the two reasons proffered by the majority for upholding the dismissal of the claim for tortious interference with prospective advantage is that "[b]ecause plaintiff and defendant Axminster had already entered into a contract, plaintiff failed to plead any prospective business relationship." The majority cites no authority in support of its position, and does not seek to reconcile it with the precept that causes of action can be pleaded in the alternative (*George Cohen Agency v Donald S. Perlman Agency*, 51 NY2d 358, 366 [1980]). Rather, it apparently assumes that the existence of a valid contract, something else the majority simply assumes, precludes a claim for tortious interference with prospective advantage. In other words, for some reason a plaintiff who pleads a breach of contract claim cannot also plead a claim for tortious interference with prospective advantage whenever the prospective advantage and the object of the contract are one and the same.

Why the majority singles out the latter rather than the former claim for dismissal is not clear. In any event, the fundamental problem with the majority's approach is that it implicitly and erroneously assumes that plaintiff can *prove* both the existence of a valid contract with Axminster and the breach

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to dismiss, affidavits may be used to remedy pleading defects]).

of that contract. As noted above, the theory advanced by plaintiff in his complaint is that Axminster breached the contract by selling the unit to KESY "by failing to do its due diligence with respect to the purported exercise of the . . . right of first refusal." We need not decide the point, but it is not obvious that Axminster breached the contract if it believed or reasonably believed that the right of first refusal had been properly exercised by the Board. If Axminster did not breach the contract, there is no reason -- the majority does not suggest one -- why plaintiff should be precluded from seeking to prove that MacCarthy and KESY tortiously interfered with a prospective business relationship pursuant to which Axminster would sell the unit to him. Finally, on this point, I note the quandary into which the majority would put a plaintiff who is unsure whether it can prove that a valid contract was breached. If the plaintiff can prove that a third party tortiously interfered with its prospective economic relationship with the contractual counterparty, the majority's approach forces the plaintiff to elect between suing the contractual counterparty and the tortfeasor. For no good reason, one of them must escape liability.

The majority has nothing at all to say in response to any of my arguments that it is wrong to uphold the dismissal of the

claim for tortious interference with prospective advantage on the ground that "plaintiff and Axminster had already entered into a contract." The majority's silence, I think, does not reflect timorous diffidence. In its failure to provide any explanation of, or even to cite a single precedent ostensibly supporting, its position, the majority's writing has more in common with a diktat than a judicial opinion.

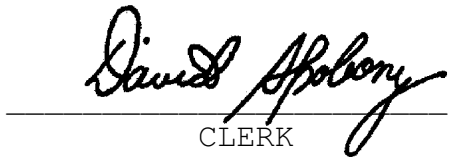
The second of the two reasons proffered by the majority is that "plaintiff has failed to plead conduct amount[ing] to a crime or an independent tort or conduct the sole purpose of which was to inflict intentional harm . . . to support this cause of action" (internal quotation marks omitted). The majority's premise, that plaintiff must plead and prove an independent tort (if it does not plead conduct that is criminal or intended solely to inflict harm), is incorrect *(see Carvel Corp v Noonan*, 3 NY3d 182, 190-191 [2004] [expressly leaving open the question of whether conduct, "though not a crime or tort in itself, [is] so 'culpable' . . . that it could be the basis for a claim of tortious interference with economic relations"]). In any event, for the reasons stated above, I think plaintiff has pleaded conduct amounting to the independent tort of fraud.

With regard to the cause of action for breach of contract asserted only against Axminster, a nonmoving defendant, it is not

clear that the court intended to dismiss this claim. The order appealed from does not mention Axminster nor does it state that it is dismissing the cause of action for breach of contract. To the extent that the complaint may have erroneously been dismissed in its entirety, this cause of action should be reinstated.

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

ENTERED: OCTOBER 14, 2010



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Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2393-
2393A B.B.C.F.D., S.A., etc., et al., Index 604084/03
Plaintiffs-Appellants,

-against-

Bank Julius Baer & Co. Ltd., et al.,
Defendants-Respondents,

Mina Persyko, et al.,
Defendants.

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Cooper, Brown & Behrle, P.C., New York (Martin S. Rothman and Richard B. Cooper of counsel), for appellants.

Wilmer Culter Pickering Hale and Dorr LLP, New York (Bruce E. Coolidge of counsel), for Bank Julius Baer & Co. Ltd., Julius Baer Americas, Inc., Julius Baer Holding Limited, Julius Baer Investment Manangement, LLC, Bernard Spilko, Wheeler Gemmer and Idania Vasquez-Leone, respondents.

Covington & Burling LLP, New York (Meghann E. Donahue of counsel), for Urs Schwytter, respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 7, 2008, which dismissed certain of plaintiffs' claims, unanimously affirmed, with costs, and the appeal from order of the same court and Justice, entered November 5, 2008, which denied plaintiffs' motion to "recall and modif[y]," unanimously dismissed, without costs.

This matter was previously before this Court (49 AD3d 378

[2008]). The principal question is the extent to which our prior decision delimited the issues to be addressed on remand. Plaintiffs contend that notwithstanding the grant of partial summary judgment, they may still challenge the applicability of the statute of repose (UCC 4-A-505) to their fraud claims. Our review of the prior decision, however, leads to the conclusion that any claims involving "fund transfers," as defined by the statute, are time-barred and were resolved on the prior appeal. An affirmance is thus dictated.

Plaintiff B.B.C.F.D., S.A. is a Panamanian corporation, and plaintiff Bijan Nassi is a principal of the corporation. In 1985 B.B.C.F.D. gave a power of attorney, including an authorization to withdraw funds, to non-party Yehuda Shiv with respect to its accounts. At B.B.C.F.D.'s direction, defendant Bank Julius Baer sent monthly statements directly to Shiv. In September 2001 the United States Securities and Exchange Commission sued Shiv and various companies which he controlled for defrauding a number of investment clients. Shiv was criminally prosecuted, and died in prison in 2004 while serving his sentence.

Plaintiffs commenced this action in 2003 to seek recovery from the Bank for 165 allegedly unauthorized withdrawals made by Shiv from the B.B.C.F.D. account of funds aggregating more than $20,000,000. The majority of the withdrawals occurred when Shiv

instructed the Bank to wire money from B.B.C.F.D.'s account to other accounts. The transfers were listed each month on the Bank's monthly statements, all of which were sent to Shiv pursuant to B.B.C.F.D.'s previous instructions. One hundred thirty-nine of these withdrawals were effected by instructing the Bank to wire money from B.B.C.F.D.'s account, without a check or negotiable instrument.

In October 2006 the Bank moved for partial summary judgment on the ground that the statute of repose required plaintiffs to have objected to any unauthorized funds transfers within one year of receiving notification from the Bank of the transfers. In opposition, plaintiffs acknowledged that Shiv had forwarded the Bank's statements to them, with copies of additional statements that Shiv had prepared in a more simplified form. Plaintiff Nassi stated that Shiv's simpler statements concealed Shiv's theft of funds, and that he had difficulty understanding the Bank's actual statements, which were too complex. He further claimed that he had met with some of the individual Bank employee defendants, who confirmed the accuracy of the Bank and Shiv statements when, in truth, these employees knew the statements were inaccurate but lied to Nassi to cover up the fraud.

In an order entered April 27, 2007, the trial court denied the motion for summary judgment. This Court reversed and granted

summary judgment to defendants (49 AD3d 378 [2008], *supra*). The decision noted that the evidence established that Nassi had reviewed the bank statements himself for a period of more than 12 years, and neither objected to the funds transfers nor consulted with his own accountants or financial advisors as to the accuracy of the statements. The Court stated, "Thus, Nassi's claim that the bank statements were unclear and did not reasonably put him on notice of the alleged fraud is unavailing" (*id.* at 379). The Court further stated, "His testimony that he was assured by bank personnel that the bank statements could be reconciled with the statements of his faithless agent is insufficient to support a claim of fraud against defendants so as to toll the statute of repose" (*id.* [internal citation omitted]).

The decision also took note of the defendants' concession that not all of the claims were barred by the statute of repose, since some of the transactions did not constitute "funds transfers (*id.* at 378)." Accordingly, the matter was remanded for a determination as to which claims constituted wire transfers, and thus were governed by the statute of repose.

On remand, defendants moved for dismissal of claims based on 139 withdrawals, totaling $20,087,868, on the grounds that they were "fund transfers" within the meaning of the statute of repose. Defendants conceded that 26 of the withdrawals were not

fund transfers, and they are not at issue on this appeal.

Plaintiffs opposed the motion by claiming, for the first time, that certain transfers were not funds transfers because they were made by check, cash, or letter of credit; certain other transfers completed before the effective date of the statute of repose were not governed by the statute and thus should not be dismissed; and other transfers totaling $340,000, which were made to cover "bank fees," did not constitute "fund transfers." Plaintiffs also argued that defendants were not entitled to judgment as they had not complied with discovery demands.

The motion court held that the 139 identified funds transfers were barred by UCC 4-A-505. The court further determined that claims concerning transfers made prior to the effective date of the statute of repose were barred by the statute of limitations; and the bank fees were not funds transfers within the meaning of the statute of repose. After the case was reassigned to Justice Kapnick, a settled order was entered on November 7, 2008.

On appeal plaintiffs do not pursue the arguments that some of the 139 transactions did not constitute "funds transfers," but argue that there are questions of fact concerning the existence of fraud on the part of bank employees such that the grant of partial summary judgment was premature, and argue that the record

contains evidence raising questions of fact as to whether the statute of repose is applicable.

The previous order made clear that any claims arising out of transactions which constituted "funds transfers" were to be dismissed (49 AD3d at 378). The decision allowed for plaintiffs' submission of evidence suggesting that some of the transactions may not constitute funds transfers, but plaintiffs' claims in that regard concerning the 139 transactions were rejected by the motion court, and are not pursued on appeal.

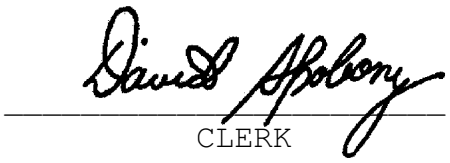
Plaintiffs now seek only to relitigate an issue which has been previously adjudicated. This Court will not revisit that prior determination (*Gropper v St. Luke's Hosp. Ctr.*, 255 AD2d 123 [1998]). In any event, as this Court previously noted, Nassi's testimony (even as amplified by the submissions on this motion) that he was reassured by bank personnel that the bank statements could be reconciled with the statement of his faithless agent are insufficient to support a claim of fraud which would toll the statute of repose. "'A depositor of a bank is under a duty to examine . . . statements of account, and to give notice of errors therein'" (*Thomson v New York Trust Co.*, 293 NY 58, 69 [1944], quoting *Potts & Co. v Lafayette Nat. Bank*, 269 NY 181, 187 [1935]). When a party chooses to delegate that duty to another, it may not charge the bank with the loss which

ensues, and which results from misplaced confidence in the agent (*Thomson*, 293 NY at 69). Nassi's purported inability to understand the statements issued by the bank, even if true, cannot impose liability on the bank.

Furthermore, there has been no demonstration that the statements themselves were fraudulent, but only claims, conclusory at best, that the bank employees fraudulently assured Nassi that the bank statements were reconcilable with the statements issued by Shiv. The duty to inspect the bank statements themselves could not be abrogated by requests to bank employees to compare the two sets of statements.

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

ENTERED: OCTOBER 14, 2010



CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3118 Robert Scott Petty, et al., Index 103088/06
Plaintiffs-Appellants,

-against-

Arnold Dumont, et al.,
Defendants-Respondents.

_____

John V. Decolator, Garden City, for appellants.

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

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for municipal respondents.

Richard W. Babinecz, New York (Helman R. Brook of counsel), for Consolidated Edison Company of New York, Inc., respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered December 21, 2009, which denied plaintiffs' motion for partial summary judgment on the issue of liability for personal injuries and on the threshold issue of "serious injury" under Insurance Law § 5102(d), modified, on the law, the motion granted on liability against all defendants, plaintiff Amaya is granted summary judgment against defendant Dumont on the issue of serious injury, and otherwise affirmed, without costs.

The motion court erred in finding that the existence of factual issues of comparative fault among the defendants

precluded it from awarding the blameless plaintiffs partial summary judgment on the issue of liability, as "the right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence" among defendants (*Johnson v Phillips*, 261 AD2d 269, 272 [1999]).

Here, defendant Dumont's cab collided with a line of at least five concrete barriers placed end to end in the middle of the left-most of West 66th Street's traffic lanes, partitioning off the left side parking lane into a private entry lane, controlled by Con Ed, leading into a Con Ed facility. The accident occurred at 7:20 P.M. on October 16, 2005; it was dark and drizzling. Although plaintiffs stated that Dumont was driving erratically and too fast, Dumont testified that he was traveling at no more than 15 mph at the time of the collision. Dumont stated that although he had a clear and unobstructed line of sight in the direction of the barrier, he never saw the barrier prior to impact. Under these circumstances, there is no excuse for the collision, and Dumont's negligence is established as a matter of law (*see DeAngelis v Kirschner*, 171 AD2d 593 [1991]).

As to the municipal defendants, it is undisputed that they had installed the concrete barrier, but they never put up warning signs or changed the traffic lanes to divert traffic around it.

Although orange barrels were initially placed in front of the barriers, they disappeared and the municipal defendants never replaced them. Indeed, their witness admitted that the barrier, as configured, was a "hazard." They contend nonetheless that Dumont's negligence in driving into the barrier constituted a "superseding cause of the accident."

This argument is unavailing. While issues of proximate cause are generally to be resolved by the fact finder (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]), a municipality's negligence in failing to provide adequate warning of a known roadway hazard has been held to be a concurrent cause, not superseded by the negligence of a careless driver (*see Humphrey v State of New York*, 60 NY2d 742, 744 [1983]). Indeed, it is readily foreseeable that a careless driver might crash into an unmarked concrete barrier placed in the middle of the street. Under these circumstances, the municipal defendants' negligence "increased the likelihood of an accident," and as such was a concurrent cause of this accident, not superseded by Dumont's carelessness (*Vasquez v Figueroa*, 262 AD2d 179, 182 [1999]).

As to Con Ed, although a private landowner generally owes no duty to maintain a public roadway adjacent to its land (*see Spangel v City of New York*, 285 AD2d 425 [2001]), an exception to this rule is found in the "special use" doctrine, which applies

when, among other things, a structure erected on public land has the effect of causing an adjoining private property to derive a special benefit from that land (*see Kaufman v Silver*, 90 NY2d 204 [1997]; *Weiskopf v City of New York*, 5 AD3d 202 [2004]). In such case, "the person obtaining the benefit (*id.*) is 'required to maintain' the used property in a reasonably safe condition to avoid injury to others" (*Kaufman*, 90 NY2d at 207). The private landowner thus bears a "duty to repair and maintain the special structure or instrumentality" creating the benefit, provided that the landowner has "express or implied access to, and control of" the instrumentality giving rise to the duty (*id.* at 208). This is so regardless of whether the private landowner installed the structure (*see Weiskopf*, 5 AD3d at 203).

Here, the municipal defendants installed the barriers as an antiterrorist measure after September 11, 2001, thus expanding the safety perimeter around the Con Ed facility. Con Ed argues, and the dissent agrees, that the barriers did not constitute a special use because they were placed there for the benefit of the public — to protect an important utility facility — rather than for the benefit of Con Ed per se. This argument lacks merit. What the dissent overlooks is that over the years, Con Ed did derive a "special benefit" from the barriers by effectively converting the previously public parking lane into a private

entry lane for the Con Ed facility, i.e., under Con Ed's control and its exclusive use. In *Infante v City of New York*, (258 AD2d 333, 334 [1999]), a gas station used a portion of a public sidewalk as an entrance to its premises and occasionally for parking, we held that "[t]he use of the public sidewalk as a driveway and parking lot for the gas station . . . was a special use, and there was sufficient evidence to establish that such special use caused the defect in the sidewalk that caused plaintiff to fall." Here, Con Ed not only had exclusive access and control over the area between the barriers and the curb, as evidenced by its addition of a swing gate permitting access only to Con Ed employees and others having business with Con Ed in that area, but also over the barriers themselves. Con Ed's own deposition witnesses testified that any party, including the City, who needed to move the barriers for any reason, including cleaning, paving, etc. had to first consult with Con Ed to determine what impact it would have on the facility's perimeter for security purposes. In fact, Con Ed's witness testified that the City's plan to perform paving work at one point "was not acceptable because the perimeter protection was not there," clearly indicating that Con Ed's approval for any movement of the barriers was required.

Kaufman v Silver (supra) relied on by the dissent is not to

the contrary. There, a handicapped ramp upon which plaintiff fell was located on adjoining private property. The Court of Appeals stated: "Inherent in the doctrine of special use is the principle that the duty to repair and maintain the special structure or instrumentality is imposed upon the adjoining landowner or occupier because the appurtenance was installed at their behest *or for their benefit."* (90 NY2d at 207 emphasis added). The dissent correctly points out that Con Ed did not request the barriers. But once those barriers were installed, Con Ed, by exercising complete control over them (or at least much greater control than the municipal defendants on whose property those barriers are located), certainly obtained a not insignificant benefit, including an additional layer of security (at no cost to it) as well as a private access way to its facility.

Kaufman recognized the requirement of the element of control by further holding that "[i]mposition of the duty to repair or maintain a use located on adjacent property is necessarily premised, however, upon the existence of the abutting land occupier's access to and ability to exercise control over the special use structure or installation" (*id.*) Notably, in order to be held liable under a special use theory, even partial control of the instrumentality by the special user is sufficient

to impose liability (*see Olivia v Gouze*, 285 App Div 762, 766 [1955], *affd* 1 NY2d 811 [1956]). There is no question here that Con Ed exercised sufficient control over those barriers to meet that requirement for a special use.

Significantly, the *Kaufman* court made the observation that "[i]n contrast to the matter before us, when the special use doctrine is invoked against owners or occupiers of land abutting *public* streets or sidewalks, the requirement of access and control, although significant, poses less of a liability hurdle simply by virtue of the adjoining landowner's or occupier's freedom of access, along with the general public, to that portion of the property so used" (90 NY2d at 208-209 emphasis in original).

As a result, Con Ed meets the "special use" doctrine exception and is liable along with the municipal defendants (*see D'Ambrosio v City of New York*, 55 NY2d 454, 463 [1982]; *Infante v City of New York*, 258 AD2d 333, *supra*).

Plaintiff Petty has not met his burden of submitting sufficient admissible evidence to warrant summary judgment on his claim that the accident caused the fracture of four teeth (*see generally Zecca v Riccardelli*, 293 AD2d 31 [2002]). Nor does the scar under his chin constitute a "significant disfigurement" and thus a "serious injury," as a matter of law. Such determination

must be made by a factfinder at trial. Amaya, on the other hand, has demonstrated that the accident caused his nasal fracture. As a matter of law, he meets the threshold burden of showing "serious injury" under § 5102(d).

All concur except Freedman and Abdus-Salaam, JJ. who dissent in a memorandum by Abdus-Salaam, J. as follows:

ABDUS-SALAAM, J. (dissenting)

I agree with the majority that plaintiff's motion for partial summary judgment on the issue of liability should have been granted against defendant Dumont and the City defendants. However, I do not believe the special use doctrine applies here to impose a duty on Con Edison to maintain the City street in a reasonably safe condition. As was explained by the Court of Appeals in *Kaufman v Silver* (90 NY2d 204, 207 [1997]), "Inherent in the doctrine of special use is the principle that the duty to repair and maintain the special structure or instrumentality is imposed upon the adjoining landowner or occupier because the appurtenance was installed at their behest or for their benefit." There is no evidence, or any claim by plaintiffs, that Con Edison requested placement of the barrier in front of its facility for its accommodation. Rather, the City made the decision, after the September 11th attack, to install the barrier to protect Con Edison's Control Center, which monitors the delivery of power and its operation in all five boroughs of the City. The barriers were for the benefit of the citizens of New York City, not for the exclusive benefit of Con Edison, and any incidental benefit that Con Edison may have gained from the barrier creating an

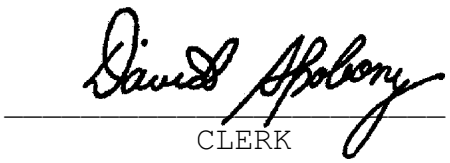
essentially private entry lane to the facility where there had previously been a public parking lane is not sufficient to constitute a special use (*see e.g. Guadagno v City of Niagara Falls*, 38 AD3d 1310 [2007] [defendant's conduct in driving across the portion of the sidewalk that crosses her driveway was not a special use of the sidewalk]; *Montalvo v Heege*, 301 AD2d 427 [2003] [existence of a single utility line to defendant's house from utility pole in front of house does not alone support a finding of a special use of sidewalk where pole was located]; *Roselli v City of New York*, 201 AD2d 417, 418 [1994] [metal sidewalk grate covering a transformer vault that provided electrical service to the street, including defendant's premises, did not create a special use of sidewalk where the vault and grate "were clearly not installed or maintained exclusively for the accommodation of the owner of the abutting premises"]).

This Court noted in *Balsam v Delman Eng'g Corp*. (139 AD2d 292, 300 [1988], *lv denied* 73 NY2d 783 [1988]) that "the question of imposition of a duty is one of policy and common sense, not technicalities." Under these circumstances, where there is no claim that the barrier was installed at the behest or for the benefit of Con Edison, and it is evident that the City made the decision to install it to protect the Energy Control Center from a terrorist attack, the special use doctrine is not applicable.

Accordingly, Con Edison had no duty to maintain the street in a reasonably safe condition.

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

ENTERED: OCTOBER 14, 2010



CLERK

Tom, J.P., Sweeny, Catterson, McGuire, Román, JJ.

3151 Melina Metalios, et al., Index 101735/07
Plaintiffs-Appellants,

-against-

Tower Insurance Company of
New York, et al.,
Defendants-Respondents.

_____

Bertram Herman, Mount Kisco, for appellants.

Law Office of Max W. Gershweir, New York (Joshua L. Seltzer of counsel), for Tower Insurance Company of New York, respondent.

Lazare Potter & Giacovas LLP, New York (Yale Glazer of counsel), for The Automobile Insurance Company of Hartford, Connecticut, respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered June 17, 2009, which granted defendants' motions for summary judgment declaring they had no duty to defend or indemnify plaintiffs in an underlying personal injury action, unanimously modified, on the law, to deny the motion of defendant The Automobile Insurance Company of Hartford, Connecticut (AIC), and otherwise affirmed, without costs.

Plaintiff Metalios hosted a party on February 12, 2005 for employees and friends at her Pluck U restaurant after closing hours. Early the next morning, Metalios witnessed a guest and former employee engaged in a verbal altercation with someone in

the restaurant's kitchen, and a fight ensued. Shortly thereafter, a Pluck U employee fatally stabbed the guest and injured another person outside the restaurant.

The court properly declined to find that defendant Tower had a duty to defend or indemnify, based on the "assault and battery" exclusion in the commercial lines policy issued to Pluck U (*see Marina Grand, Inc. v Tower Ins. Co. of N.Y.*, 63 AD3d 1012 [2009]; *New York Cas. Ins. Co. v Ward*, 139 AD2d 922 [1988]). Because the complaint's negligence allegations could not survive except for the assault, those claims are deemed to have arisen from the assault and are thus subject to the assault and battery exclusion (*see Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 353 [1996]). Nor is there merit to Pluck U's argument that the exclusion is inapplicable because the insured was not involved in the assault. That the endorsement containing the exclusion was unsigned is also irrelevant because it was part of the insuring agreement. Where, as here, "the policy has been duly countersigned, an endorsement or rider which was a part of the policy when it was issued is valid even though not signed or countersigned by the insurer or its authorized representative" (68A NY Jur 2d, Insurance § 752; *see also Ruiz v State Wide Insulation & Constr. Corp.*, 269 AD2d 518, 519 [2000]).

However, the court erred in finding that defendant AIC had

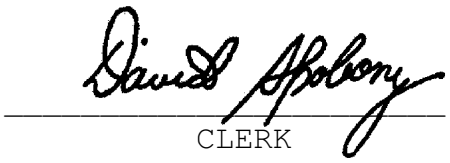
no duty to defend or indemnify, based on the "business pursuits" exclusion in the homeowners policy issued to Metalios (*see United Food Serv. v Fidelity & Cas. Co. of N.Y.*, 189 AD2d 74, 76-77 [1993]; *Stewart v Dryden Mut. Ins. Co.*, 156 AD2d 951 [1989]; *Home Ins. Co. v Aurigemma*, 45 Misc 2d 875, 879-880 [1965]). We recognize that a business purpose may render an otherwise social activity, such as the party at issue here, a business pursuit, even if the gathering was partially motivated by social interests (*see West Am. Ins. Co. v California Mut. Ins. Co.*, 195 Cal App 3d 314, 324, 240 Cal Rptr 540, 545 [1987]). However, it is beyond cavil that "an insurer seeking to exclude coverage 'must do so "in clear and unmistakable" language' and any exclusions are given a strict and narrow interpretation" (*Bragin v Allstate Ins. Co.*, 238 AD2d 773, 774 [1997], *quoting Seaboard Sur. Co. v Gillete Co.*, 64 NY2d 304, 311 [1984], *quoting Kratzenstein v Western Assur. Co. of City of Toronto*, 116 NY 54, 59 [1889]). Furthermore, we recognize that it is the insurer's burden to establish the applicability of the claimed exclusion, and any ambiguity perceived in its language "*must be strictly construed against the insurer*" (*Allstate Ins. Co. v Noorhassan*, 158 AD2d 638, 639 [1990] [emphasis added]).

The exception to the exclusion, that "[t]his exclusion does not apply to: (1) activities which are ordinarily incident to

non-business pursuits," dictates a result contrary to that reached by the motion court. The exception focuses on the objective nature of the activity itself rather than on the motivation of the policy holder. We find on this record that a social gathering is "ordinarily incident to a non-business pursuit." Thus, even if Metalios's motivation was in part that of employee morale, a party itself falls under the exception to the exclusion. Even were the exception somewhat ambiguous, it nevertheless must be strictly construed against AIC.

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

ENTERED: OCTOBER 14, 2010



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Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3345 In re Sergio G.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about December 3, 2009, 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, grand larceny in the fourth degree, criminal possession of a weapon in the fourth degree (two counts), criminal possession of stolen property in the fifth degree, and menacing in the second and third degrees, and also committed the act of unlawful possession of a weapon by a person under 16, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

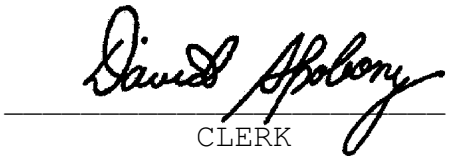
The court's finding was based on legally sufficient evidence

and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Even though the victim's identification of appellant was based on factors other than facial recognition, the circumstances, viewed as a whole, established beyond a reasonable doubt that appellant was one of the group of three boys who robbed the victim (*see Matter of William B.*, 74 AD3d 618 [2010]; *People v Welcome*, 181 AD2d 628 [1992], *lv denied* 79 NY2d 1005 [1992]; *Matter of Ryan W.*, 143 AD2d 435, 437 [1988], *lv denied* 73 NY2d 709 [1989]).

The prompt showup near the location of the crime was not unduly suggestive (*see People v Brisco*, 99 NY2d 596, 597 [2003]), and we have considered and rejected appellant's arguments to the contrary. Appellant's missing witness claim is unpreserved and we decline to review it in the interest of justice.

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

ENTERED: OCTOBER 14, 2010



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Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3346 The People of the State of New York, Ind. 1848/08
Respondent,

-against-

Michael Virdree,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered on or about March 19, 2009, 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: OCTOBER 14, 2010

CLERK

Friedman, J.P., DeGrasse, Freedman, Richter, JJ.

3348 Duration Municipal Fund, L.P., et al., Plaintiffs-Appellants, Index 603486/08

-against-

J.P. Morgan Securities Inc., Defendant-Respondent.

_____

Friedman Kaplan Seiler & Adelman LLP, New York (Eric Seiler of counsel), for appellants.

Levi Lubarsky & Feigenbaum LLP, New York (Howard B. Levi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered September 23, 2009, dismissing this action for breach of implied covenant of good faith and fair dealing, unanimously affirmed, with costs.

A cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties (*see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [2008]; *Triton Partners v Prudential Sec.*, 301 AD2d 411 [2003]). Here, plaintiffs cannot sustain their claim for breach of the convenant of good faith and fair dealing because the contractual relationships governing the relevant transactions were between plaintiffs and an entity other

than defendant, namely, a nonparty affiliate of defendant. Indeed, the contract in question specifically contemplates that the transactions complained of will be governed by other agreements, but none of the agreements referred to were between plaintiffs and defendant. Furthermore, the complaint does not allege facts that J.P. Morgan Securities Inc. acted in bad faith.

In light of our determination, we need not reach the parties' remaining arguments.

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

ENTERED: OCTOBER 14, 2010

CLERK

CORRECTED ORDER - NOVEMBER 17, 2010

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3349 The People of the State of New York, Docket 54441C/07
Respondent,

-against-

Vishwa Beharry,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Maureen L. Grosdidier of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Darcel Clark, J.), rendered February 21, 2008, convicting defendant, after a nonjury trial, of attempted criminal contempt in the second degree (two counts) and harassment in the second degree, and sentencing him to an aggregate term of 30 days, concurrent with 1 year of probation, unanimously affirmed.

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

Defendant's remaining contentions are unavailing (*see People v Correa*, 15 NY3d 213 [2010]).

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

ENTERED: OCTOBER 14, 2010

CLERK

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3351 In re Jon Goldin, Index 109751/08
Petitioner-Appellant,

-against-

Raymond W. Kelly, Commissioner of the
New York City Police Department,
Respondent-Respondent.

_____

Gordon, Gordon & Schnapp, P.C., New York (Kenneth E. Gordon of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 16, 2009, which denied the Article 78 petition to annul the determination of respondent, dated April 7, 2008, after a departmental hearing finding petitioner guilty of possession and ingestion of cocaine and dismissing him from the department, unanimously vacated, on the law, the determination unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

Supreme Court erred in not transferring the entire proceeding to this Court, as it raises a question of substantial evidence (CPLR 7804[g]); hence we vacate the order.

The hearing commissioner and, ultimately, respondent, properly considered the positive results of his random hair drug

test. The Court of Appeals has ruled definitively that the NYPD's change in its random drug testing procedures from urinalysis to hair testing was not a mandatory subject of collective bargaining (*see Matter of City of New York v Patrolmen's Benevolent Assn. of the City of N.Y., Inc.*, 14 NY3d 46, 57-60 [2009]), and thus, contrary to petitioner's contention, the fact that hair drug testing was deemed to be an improper practice by the New York City Office of Collective Bargaining ("OCB") at the time it was used against petitioner in his disciplinary action (as opposed to the time the testing occurred) does not render the use of such evidence unlawful (*see Matter of Chiofalo v Kelly*, 70 AD3d 423 [2010]). Thus petitioner's motion to suppress the results of his hair drug test was properly denied, and the hearing commissioner and respondent were justified in considering that evidence in finding him guilty of the charges and dismissing him from the force.

In light of the test results that petitioner had a level of cocaine in his system that was four times the level that might indicate inadvertent use, and petitioner having failed to persuade the hearing commissioner that the level of cocaine detected was the result of passive ingestion due to intimate sexual contact with his cocaine-using girlfriend and not due to intentional ingestion, a rational basis clearly existed for, and

substantial evidence clearly supported, the finding that petitioner was guilty of cocaine ingestion and possession and the determination that he should be dismissed (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-44 [1987]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-81 [1978]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-31 [1974]; *Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 277-78 [1972]; *Matter of Fanelli v New York City Conciliation and Appeals Bd.*, 90 AD2d 756, 757 [1982], *affd* 58 NY2d 952 [1983]).

Finally, there is no merit to petitioner's contention that respondent's use of the results of the hair drug test against him violated prior determinations of the OCB finding the use of such testing to be an improper practice (*see* OCB Decisions No. B-37-2006, at 23, No. B-38-2006, at 14), and/or this Court's order, entered in *Matter of City of New York v Patrolmen's Benevolent Assn.* (Sup Ct, NY County, Dec. 5, 2007, Wilkins, J., index No. 400007/07, *stay granted* 2008 NY Slip Op __ [U] [2008]), staying enforcement of Supreme Court's order annulling the OCB's determinations. The OCB's decisions did not expressly bar the continuance of any disciplinary proceedings that had already begun as a result of a positive hair drug test, only the

continued administration of hair drug testing itself. Nor did respondent violate this Court's March 13, 2008 order granting a stay "only to the extent of limiting radioimmunoassay of hair by petitioner-respondent NYPD to usage prior to August 1, 2005 pending hearing and determination of the appeal(s) taken by the respective appellants." This order prohibited the NYPD from conducting *further random* hair drug testing and limited such testing to the extent that it was permitted prior to August 1, 2005 (i.e., for end-of-probation employees, those under reasonable suspicion of drug use, and those who voluntarily submitted to hair drug testing (*see Matter of City of New York*, 14 NY3d at 49)), but did not bar the NYPD from making use of the *results* of any random hair drug tests that had been lawfully conducted after August 1, 2005 and before such testing was held by the OCB to be an improper practice on December 4, 2006. In any event, petitioner fails to demonstrate that the proper remedy for any violation by respondent of these orders is annulment of respondent's decision terminating him and his reinstatement to the police force.

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

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

ENTERED: OCTOBER 14, 2010

CLERK

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3352 The People of the State of New York, Ind. 3545/08
Respondent,

-against-

David Rivera,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James A. Yates, J.), rendered on or about December 8, 2008,

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

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

ENTERED: OCTOBER 14, 2010

CLERK

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

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3353 In re American Airlines, Inc., Index TAT(E)05-29(HO)
Petitioner,

-against-

The New York City Tax Appeals Tribunal, et al.,
Respondents.

_____

McDermott Will & Emery LLP, New York (Arthur R. Rosen of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Andrew G. Lipkin of counsel), for respondents.

_____

Decision of respondent New York City Tax Appeals Tribunal, dated June 29, 2009, sustaining the notice of disallowance of petitioner's claim for a refund of Hotel Room Occupancy Tax for the period from July 1, 2002 through June 30, 2003, unanimously confirmed, the petition denied and the proceeding pursuant to CPLR article 78, commenced in this Court pursuant to CPLR 506(b)(4), dismissed, without costs.

The Tribunal's decision that petitioner was not a permanent resident with respect to the hotel rooms it occupied for less than 180 consecutive days is based on a rational interpretation of the relevant statutory provisions (*see Matter of Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166, 173 [1988]). The Administrative Code of the City of New York

provides that, except "upon a permanent resident" (§ 11-2502[b][1]), a tax is to be imposed "for every occupancy of each room in a hotel" (§ 11-2502[a]). "Permanent resident" is defined thus: "Any occupant of any room or rooms in a hotel for at least [180] consecutive days shall be considered a permanent resident with regard to the period of such occupancy" (§ 11-2051[8]). Giving the statute "a sensible and practical over-all construction" and harmonizing these "interlocking" provisions (*see Matter of Long v Adirondack Park Agency*, 76 NY2d 416, 420 [1990]), the Tribunal reasonably determined that a person can be a permanent resident with respect to an occupancy of 180 consecutive days without being a permanent resident with respect to another occupancy of shorter duration.

Contrary to petitioner's argument, respondent Commissioner's rule that a permanent resident who rents "additional rooms" for less than 180 consecutive days is not considered a permanent resident with respect to those rooms (19 RCNY 12-01) is consistent with the enabling legislation (McKinney's Unconsolidated Laws of NY § 9441) and the relevant provisions of the Administrative Code. Petitioner's attempt to exempt itself from application of the rule on the ground that it used its long-

term rooms and its additional rooms for the same purpose finds no support in either the rule or the illustrations that accompany it.

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

ENTERED: OCTOBER 14, 2010

CLERK

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3355 In re New York State Development Corp., doing business as Empire State Development Corporation, Petitioner-Respondent, Index 401097/03

-against-

230 West 41st Street Associates LLC, etc., Claimant-Appellant.

_____

Goldstein, Rikon & Rikon, P.C., New York (Michael Rikon of counsel), for appellant.

Carter Ledyard & Milburn LLP, New York (John R. Casolaro of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered July 27, 2009, which, following a non-jury trial, awarded $1.315 million in direct damages and declined to award consequential damages, unanimously affirmed, without costs.

The award of compensation for the condemned property was based upon the appropriate factors, and Supreme Court's findings were within the range of expert testimony (*see Matter of City of New York [Reiss]*, 55 NY2d 885, 886 [1982]). Although Supreme Court's written decision does not set forth mathematical calculations, the record on appeal is sufficient to permit thorough and cogent review (*see Noco Energy Corp. v State of New York*, 67 AD3d 1354, 1355 [2009]). Having conducted such review,

we conclude that the court, after adopting claimant's valuation of the condemned property as per its highest and best use as a building "shell" suitable for development, did not abuse its discretion by deducting from such valuation those costs required to convert the building to such condition, and adjusting its award of direct damages accordingly.

Consequential damages were not warranted for a portion of the taking which was de minimis (*see Matter of Rockland County Sewer Dist. No. 1 v J. & J. Dodge,* 213 AD2d 409, 412 [1995]; *Matter of American Tel. & Tel. Co. v Salesian Socy.*, 77 AD2d 706, 707 [1980], *appeal dismissed* 51 NY2d 877 [1980]).

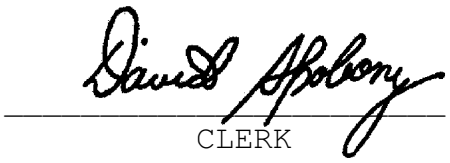
Supreme Court did not err by admitting into evidence a confidential written agreement which, by its terms, allowed for its use by the court in condemnation proceedings.

Petitioner's expert appraiser's opinion as to damages was not rendered inadmissable due to partial reliance upon outside material which was of the kind ordinarily accepted by experts in

the field (*see Matter of Jamie R. v Consilvio*, 17 AD3d 52, 60 [2005], *affd* 6 NY3d 138 [2006]; *Matter of Chrysler Realty Corp v Foley*, 74 AD2d 847, 848 [1980], *appeal dismissed* 50 NY2d 928 [1980]).

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

ENTERED: OCTOBER 14, 2010



CLERK

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3356 In re Nissim Y.,
Petitioner-Appellant,

-against-

Commissioner of Social Services,
on behalf of Violet Y.,
Respondents-Respondents.

_____

Nissim Y., appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Elina Druker of counsel), for respondents.

_____

Order, Family Court, New York County (Helen C. Sturm, J.), entered on or about May 14, 2009, which denied petitioner's objection to a Support Magistrate's order dismissing a supplemental petition to adjust arrears and refund alleged overpayments, unanimously affirmed, without costs.

Petitioner and Violet Y. were divorced in 1976. Since petitioner had not paid any of the ordered support payments, and his family was on public assistance, respondent Commissioner obtained money judgments against him in 1985 and 1986 for the respective sums of $51,452.05 and $10,200.

Family Court properly found that a 1992 support enforcement order had no effect on the prior money judgments, which were simply incorporated into a single "administrative amount." The

fact that the Support Collection Unit did not begin to charge petitioner with interest on the arrears until after November 1993 did not constitute a waiver of the right to recover such interest, as statutorily determined (*see* CPLR 5003; *see also Matter of Dox v Tynon*, 90 NY2d 166, 175-176 [1997]). Petitioner has made payments on the judgments through January 2008, and thus no applicable statute of limitations has elapsed (*see* CPLR 211[b]). Moreover, the statute of limitations is an affirmative defense (CPLR 3018[b]; *see Marine Midland Bank v Worldwide Indus. Corp.*, 307 AD2d 221, 222 [2003]) and cannot be used, as attempted herein, to reduce arrears (*see Matter of Vermont Dept. of Social Welfare v Louis T.*, 25 AD3d 515, 516 [2006]).

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

ENTERED: OCTOBER 14, 2010

CLERK

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3357 The People of the State of New York, Ind. 3251/03
Respondent,

-against-

Luis E. Pinales, etc.,
Defendant-Appellant.

_____

Pagan & Pagan, Bronx (Ramon A. Pagan of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

_____

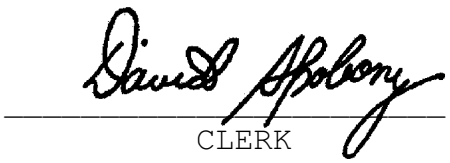
Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered May 25, 2006, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 15 years, unanimously affirmed.

Defendant's challenge to a remark made by the prosecutor in summation is similar to an argument this Court rejected on a jointly tried codefendant's appeal (*People v Quezada*, 66 AD3d 520 [2009], *lv denied* 14 NY3d 772 [2010]), and there is no reason to reach a different result. Defendant's remaining claims of prosecutorial misconduct are unpreserved, and we decline to review them in the interest of justice. As an alternative

holding, we find that none of the claimed improprieties deprived defendant of a fair trial.

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

ENTERED: OCTOBER 14, 2010



CLERK

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3358 George Barnes, et al.,, Index 114312/06
Plaintiffs-Appellants,

-against-

City of New York,
Defendant-Respondent.

_____

Law Offices of Lawrence Perry Biondi, Garden City (Lisa M. Comeau of counsel), for appellants.

Sullivan & Brill, LLP, New York (Joseph F. Sullivan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered May 11, 2009, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was proper since plaintiff's work, which consisted of disconnecting power cables from the third rail to allow a signal construction project to proceed safely, was a separate phase of work, distinct from any

construction and thus, not a covered activity under Labor Law § 241(6) (*see Nagel v D & R Realty Corp.*, 99 NY2d 98 [2002]; *Caban v Maria Estela Houses I Assoc., L.P.*, 63 AD3d 639 [2009]).

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

ENTERED: OCTOBER 14, 2010

CLERK

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3359 The People of the State of New York, Ind. 724/07
Respondent,

-against-

Edward Greeman,
Defendant-Appellant.

_____

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

Edward Greeman, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered February 7, 2008, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree and resisting arrest, and sentencing him, as a second felony offender, to an aggregate term of 2¼ to 4½ years, unanimously affirmed.

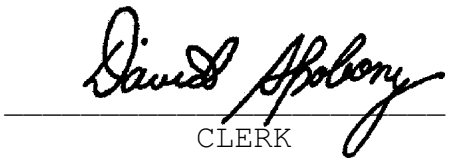
Since defendant's arguments on appeal are significantly different from those he made at trial, he has not preserved his present claims concerning the chain of custody for an altered MetroCard and the destruction of allegedly exculpatory evidence, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. There

was a proper chain of custody for the MetroCard at issue (*see People v Julian*, 41 NY2d 340, 343 [1977]), and the record refutes defendant's claim to the contrary. Defendant was not prejudiced when the arresting officer discarded a stack of MetroCards he also found in defendant's possession, since their exculpatory value was purely speculative (*see People v Scott*, 309 AD2d 573 [2003], *lv denied* 2 NY3d 806 [2004]).

We have considered and rejected defendant's pro se claims.

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

ENTERED: OCTOBER 14, 2010



CLERK

Friedman J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3360-3360A The People of the State of New York, Respondent, Docket 18821C/07 31891C/08

-against-

Isaac Morales,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Dewey & LeBoeuf, LLP, New York (Krista M. Ellis of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Maureen L. Grosdidier of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (David Stadtmauer, J.), rendered June 11, 2008, convicting defendant, upon his pleas of guilty, of assault in the third degree and attempted assault in the third degree, and sentencing him to an aggregate term of 45 days, unanimously affirmed.

Although the record does not establish that defendant made a valid waiver of his right to appeal, we find that the court properly denied defendant's suppression motion. The People met their burden to prove beyond a reasonable doubt the voluntariness of defendant's exculpatory statement to an officer at the scene of a street altercation, made in response to a simple request that defendant clarify the situation. The People were not required to produce the arresting officer's partner, who had a

brief initial conversation with defendant, since defendant did not present a "bona fide factual predicate" demonstrating that the nontestifying officer possessed "material evidence on the question of whether the statements were the product overtly or inherently of coercive methods" (*People v Witherspoon*, 66 NY2d 973, 974 [1985]). Given the fast-paced circumstances, defendant's assertion that the partner may have done or said something bearing on voluntariness is speculative.

We have considered and rejected defendant's remaining claims.

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

ENTERED: OCTOBER 14, 2010

CLERK

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3361 The People of the State of New York, Ind. 12125C/06
Respondent,

-against-

Anthony Pittman,
Defendant-Appellant.

_____

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

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

_____

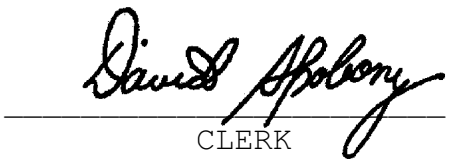
Judgment, Supreme Court, Bronx County (Darcel D. Clark, J.), rendered November 27, 2007, convicting defendant, after a nonjury trial, of harassment in the second degree, and sentencing him to a conditional discharge, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We further find that it was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the court's credibility determinations. The requisite intent for second-degree harassment may be inferred from defendant's actions.

Defendant's remaining contentions are unavailing (*see People v Correa*, 15 NY3d 213 [2010]).

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

ENTERED: OCTOBER 14, 2010



CLERK

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3363 In re King Justice A. El,
[M-4016] Petitioner,

-against-

Supreme Court of the State of New York,
Bronx County, Criminal Term,
Respondent.

_____

King Justice A. El, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Susan Anspach of counsel), for respondent.

_____

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

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

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

ENTERED: OCTOBER 14, 2010

CLERK