SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 19, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3383 The People of the State of New York, Ind. 1277/07
Respondent,

-against-

Richard Rivera,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered June 22, 2009, as amended June 26, 2009, convicting defendant, after a jury trial, of robbery in the second and third degrees, grand larceny in the fourth degree (two counts) and criminal possession of stolen property in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 18 years to life, unanimously modified, on the law, to the extent of vacating the second-degree robbery conviction and dismissing the corresponding count of the indictment with leave to re-present any appropriate charges to the grand jury, and otherwise affirmed.

The court improperly denied defendant's request to submit

third-degree robbery to the jury as a lesser included offense of first-degree robbery with regard to the incident of June 7, 2006. Initially, we reject the People's argument that defendant failed to preserve this issue (*see* CPL 470.05[2]). Defendant specifically requested that charge and never abandoned that request. Moreover, the court expressly ruled on that request when it determined that it would charge second-degree robbery based on the affirmative defense that the allegedly displayed weapon was not actually a loaded firearm (*see* Penal Law § 160.15[4]), but would not charge third-degree robbery. In any event, to the extent defendant could be viewed as not adequately preserving this argument, we reach it in the interest of justice.

There is a reasonable view of the evidence, viewed most favorably to defendant, that he forcibly stole property by threatening the victim with harm while displaying an object that not only was not an actual loaded firearm, but which did not even appear to be a firearm. The victim's testimony that she believed that defendant had a firearm was impeached by her grand jury testimony that she believed defendant was pretending to have a firearm and that the object he was holding was "too small to be a gun." The victim's direct testimony was also cast in doubt by her testimony on cross-examination that she believed defendant had a weapon, but not necessarily a firearm.

Since the jury acquitted defendant of first-degree robbery, but convicted him of the lesser included offense of second-degree

robbery, there is presently no count of robbery in the second degree in the indictment on which to remand for a new trial (*see People v Mayo*, 48 NY2d 245, 253 [1979]).

In view of the foregoing, we need not reach defendant's other claims.

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

ENTERED: OCTOBER 19, 2010

CLERK

Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3385 In re Ja'Mes G.,

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

James G.
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Louise Feld of counsel), Law Guardian.

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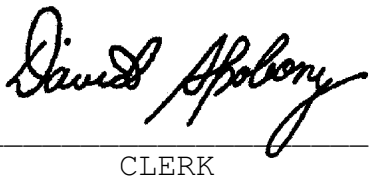
Amended order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about January 7, 2010, which, upon a finding that respondent father neglected the subject child, released the child to the custody of her mother under the supervision of petitioner, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence, including testimony that respondent engaged in acts of domestic violence against the mother in the child's presence (*see Matter of Elijah C.*, 49 AD3d 340 [2008]). There is no basis

for disturbing the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

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

ENTERED: OCTOBER 19, 2010



CLERK

Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3386 The People of the State of New York, Ind. 562/05
Respondent,

-against-

Rickey Bryant,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered November 26, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree (two counts) and criminal possession of a controlled substance in the third and fifth degrees, and sentencing him to an aggregate term of 9 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police properly stopped the car in which defendant was riding after the driver committed traffic violations. Defendant argues that the recovery of the contraband at issue was the fruit of an unnecessarily prolonged traffic stop. That argument is without merit, because the police lawfully arrested the driver for unauthorized use of a vehicle. The driver admitted "knowing that

he [did] not have the consent of the *owner*" (Penal Law § 165.05[1] [emphasis added]), which was a rental company. The driver stated that he borrowed the car from the lessee, and the rental agreement did not list the driver as an additional person authorized by the owner to drive the car.

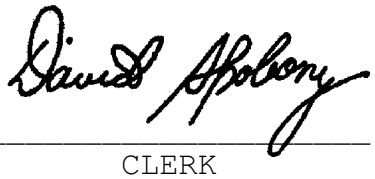
At trial, the People introduced a letter found on the person of the driver (a jointly tried codefendant) that contained instructions for completing a drug transaction. As we observed in addressing whether there was a legitimate nonhearsay purpose for this evidence in connection with a hearsay issue raised on the codefendant's appeal (*People v Overton,* 66 AD3d 604 [2009], *lv denied* 14 NY3d 772 [2010]), the letter was relevant to the codefendant's intent to sell the drugs he possessed. The court properly declined to exclude this evidence, or to grant defendant a mistrial and severance. A further limiting instruction would have sufficed to prevent any prejudice, but defendant declined that remedy (*see People v Young*, 48 NY2d 995 [1980]). In any event, while we conclude that the court should have charged the jury that the letter was received only for its bearing on the codefendant's intent and for no other purpose, any error was

harmless in view of the overwhelming evidence connecting defendant to the drugs and weapons in the car.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 19, 2010



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Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3388 In re Celenia M.,
Petitioner-Respondent,

-against-

Faustino M.,
Respondent-Appellant.

_____

Louise Belulovich, New York, for appellant.

Anne Reiniger, New York, for respondent.

Todd D. Kadish, Brooklyn, Law Guardian.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about August 14, 2008, which granted petitioner's application to modify the court's visitation order, entered on or about February 6, 2006, unanimously affirmed, without costs.

Although this Court's authority in custody matters is as broad as that of the trial court, the latter's findings and determination are accorded great deference on appeal *(Victor L. v Darlene L.*, 251 AD2d 178 [1998], *lv denied* 92 NY2d 816 [1998]), since that court had the opportunity to assess the witnesses' demeanor and credibility (*see Eschbach v Eschbach*, 56 NY2d 167, 173, [1982]). Here, there was a sound basis for the court's determination that the circumstances had changed sufficiently to modify the original visitation order. It was clear from the record that, while the daughter still desired a relationship with

the father, she did not want to have overnight visits with him due to his failure to maintain a sanitary home and to engage with her during their visits. Moreover, his comments about her developing body and his physical altercation with her over her use of a cell phone caused the child to be uncomfortable in his presence. This conduct by the father justified the court's modification of the visitation agreement to eliminate overnight visitation (*see Posporelis v Posporelis*, 41 AD3d 986 [2007]; *Matter of Filippelli v Chant*, 40 AD3d 1221 [2007]).

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

ENTERED: OCTOBER 19, 2010

CLERK

Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3389 The People of the State of New York, SCI. 1147N/05
Respondent,

-against-

Chris Williams,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered on or about January 30, 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 19, 2010

CLERK

Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3391 Dennys Hiraldo, Index 16485/05
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for appellant.

Robert G. Spevack, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about September 24, 2008, which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish its prima facie entitlement to judgment as a matter of law in this action where plaintiff sustained injuries when she fell while descending the external steps of defendant's premises in the dark. According to plaintiff, the external lights in the area were not illuminated because the light timers were improperly adjusted at the time of her fall.

Defendant's testimony that there were no notations in its logbook to indicate that there was either a lighting problem or a complaint about the subject lighting prior to the accident merely demonstrated that the lights worked when turned on. However,

defendant failed to submit evidence that the light timers were properly adjusted so as to turn on before dark. Indeed, the witnesses produced for deposition by defendant NYCHA had no personal knowledge of whether the light timers were actually adjusted. In light of defendant's failure to meet its prima facie burden, it is unnecessary to consider plaintiff's opposition to the motion *(see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Frees v Frank & Walter Eberhart L.P. No. 1*, 71 AD3d 491 [2010]).

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

ENTERED: OCTOBER 19, 2010

CLERK

Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3392 The People of the State of New York, Ind. 4705/08
Respondent,

-against-

Carlos Reyes,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams 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 (Daniel Conviser, J.), rendered on or about July 28, 2009,

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 19, 2010

CLERK

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

Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3393 The People of the State of New York, Docket 2871C/08
Respondent,

-against-

Lindon Grant,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (George Villegas, J.), rendered March 17, 2008, convicting defendant, upon his plea of guilty, of harassment in the second degree, and sentencing him to a conditional discharge for a period of 1 year, unanimously affirmed.

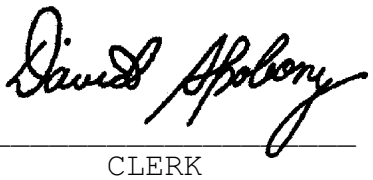
The misdemeanor complaint charging aggravated harassment was facially sufficient (*see* CPL 100.40[4][b]), as it set forth threatening language used by defendant that provided reasonable cause to believe that his communication was intended to harass, annoy, threaten or alarm the victim and that it was likely to cause the victim annoyance or alarm (Penal Law § 240.30[1]).

Defendant's First Amendment argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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 19, 2010



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Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3395 The People of the State of New York, Ind. 6411/04
Respondent,

-against-

Joeyvani Gonzalez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

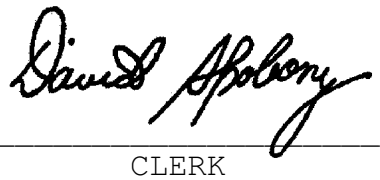
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, New York County (A. Kirke Bartley, J.), rendered on or about January 5, 2010,

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 19, 2010



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

Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3396 The People of the State of New York, Ind. 4076/08
Respondent,

-against-

Kip Mobley,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 20, 2009, convicting defendant, after a jury trial, of two counts of assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, unanimously affirmed.

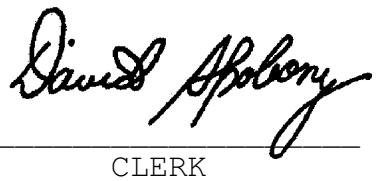
The court properly declined to give a missing witness charge regarding a witness who was clearly unavailable. Although the People had secreted him in a hotel for his own safety, he left the hotel, disobeyed a subpoena to appear, and could not be located despite diligent police efforts. Furthermore, although this witness was one of the victims of the assault, he had become hostile to the prosecution and could not be considered to be in the People's control for purposes of a missing witness charge (*see People v Gonzalez*, 68 NY2d 424, 428-428 [1986]). We reject

defendant's argument that, because of their actions, the People waived, or should be estopped from asserting, their claims of unavailability and lack of control. Even if the witness had initially been available to the People and within their control, that situation had changed by the time of trial as the result of the witness's behavior, and there was no basis for the jury to draw any adverse inference against the People from their inability to bring him to court. We have considered and rejected defendant's remaining arguments on this issue.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 19, 2010



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Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3397 The People of the State of New York, Docket 29743C/06
Respondent,

-against-

Edward Ramsey,
Defendant-Appellant.

_____

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

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

_____

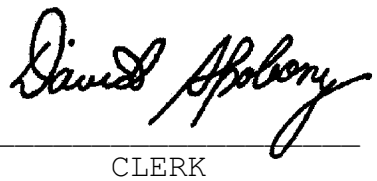
Judgment, Supreme Court, Bronx County (Analisa Torres, J.), rendered September 29, 2006, convicting defendant, after a nonjury trial, of attempted assault in the third degree and harassment in the second degree, and sentencing him to concurrent terms of 60 days and a conditional discharge, unanimously affirmed.

The verdict was based on legally sufficient evidence. Although the victim did not testify, there was ample circumstantial evidence, including, among other things, testimony

as to the victim's screams for help, to establish every element of the crimes at issue.

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

ENTERED: OCTOBER 19, 2010



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

2555 CDR Créances S.A.S., etc., Index 109565/03
Plaintiff-Respondent, 600448/06

-against-

Maurice Cohen, et al.,
Defendants-Appellants,

Summerson International Establishment, et al.,
Defendants.

- - - - -

CDR Creances S.A.S., etc.,
Plaintiff-Respondent,

-against-

Leon Cohen, etc., et al.,
Defendants-Appellants,

Iderval Holdings, Ltd., et al.,
Defendants.

_____

Dewey Pegno & Kramarsky LLP, New York (David S. Pegno of counsel), for appellants.

Kellner Herlihy Getty & Friedman, LLP, New York (Douglas A. Kellner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 27, 2009, which, to the extent appealed from, denied the motion of defendants Maurice Cohen, Leon Cohen and Sonia Cohen for leave to amend, denied the motion of the Cohens and defendants Joelle Habib, Robert Maraboeuf, Allegria Achour Aich, and Patricia Habib Petetin for summary judgment dismissing the complaints, and granted plaintiff's disclosure motion,

unanimously modified, on the law, to deny plaintiff's motion to compel the production of Maurice Cohen's personal income tax returns, without prejudice to renewal, and otherwise affirmed, without costs.

The motion court properly denied the Cohen defendants' motion to amend their answer to add various affirmative defenses after several years of litigation. Significant progress had been made in the cases and substantial discovery had been conducted, and the numerous proposed defenses would have necessitated no small measure of additional discovery (*compare Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207 [2006]). In addition, all the proposed defenses were set forth in conclusory fashion and unsupported by any evidentiary showing, such as an affidavit by a person with knowledge of the facts (*see Guzman v Mike's Pipe Yard*, 35 AD3d 266 [2006]). Several also lacked merit as a matter of law. The claimed defenses of lack of personal jurisdiction, the contractual selection of a forum in France and plaintiff's lack of standing were waived by defendants' general appearance and participation in this litigation over a period of several years, failure to assert the defenses in their original answers, and failure to seek amendment as of right (*see Frankel v Siravo*, 278 AD2d 66, 67 [2000]). The defenses of lack of standing and forum selection had been raised previously and rejected, and, since no appeal was taken from those determinations, are

precluded by the doctrine of law of the case (*cf. Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750 [1999] [second appeal presenting issue on which appeal had been noticed earlier and abandoned was correctly dismissed]). We note that, since forum clause and lack of standing defenses do not implicate subject matter jurisdiction (*see Lischinskaya v Carnival Corp.*, 56 AD3d 116, 122-123 [2008], *lv denied* 12 NY3d 716 [2009]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 280 [2006], *appeal dismissed* 8 NY3d 837 [2007]), they are subject to waiver and abandonment.

Since amendment to add the forum clause defense was properly denied, that defense cannot provide a basis for summary judgment.

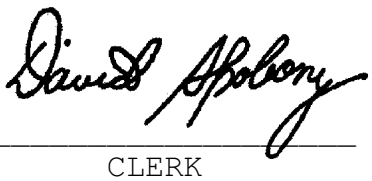
In all but one instance, the discovery rulings were proper exercises of the motion court's broad discretion in such matters (*see generally Arts4All, Ltd. v Hancock*, 54 AD3d 286 [2008], *affd* 12 NY3d 846 [2009], *cert denied* ___ US ___, 130 S Ct 1301 [2010]). We find that plaintiff failed to make the requisite "strong showing" of an overriding necessity for the information contained in Maurice Cohen's personal tax returns and of the unavailability of the information from other sources (*see Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [2005] [internal quotation marks and citation omitted]); the assertion that various entities allegedly controlled by this defendant or affiliated with his cohorts are domiciled in countries known for their bank secrecy laws is insufficient. In addition, it is

unclear that the type of fraud alleged here would be illuminated by tax returns (*see Sachs v Adeli*, 26 AD3d 52, 56-57 [2005]; *Four Aces Jewelry Corp. v Smith*, 256 AD2d 42 [1998]). However, upon plaintiff's showing that it is unable to obtain the information from other sources, the motion may be renewed (*see Williams*, 22 AD3d at 315-16).

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

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

ENTERED: OCTOBER 19, 2010



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

2960 Samantha Peluso, Index 108774/07
Plaintiff-Respondent,

-against-

Janice Taxi Co., Inc., et al.,
Defendants-Appellants,

Vault, et al.,
Defendants.

_____

The Sullivan Law Firm, New York (Timothy M. Sullivan of counsel), for appellants.

Craig L. Davidowitz, P.C., New York (Nolan Matz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered September 28, 2009, which denied defendants-appellants' motion for summary judgment dismissing the complaint for lack of a serious injury, affirmed, without costs.

On the issue of causation, plaintiff's expert's conclusion that plaintiff sustained injuries as a result of the accident is based on a physical examination of plaintiff just days after the accident and is sufficient to rebut defendants' evidence that the disc bulging revealed on an MRI taken some six weeks after the accident was the result of a preexisting degenerative condition (*see Linton v Nawaz*, 62 AD3d 434 [2009], *affd on other grounds* 14 NY3d 821[2010]). On the issue of seriousness, plaintiff's expert's conclusion that plaintiff has sustained permanent,

significant losses and limitations to her spine is supported by objective evidence, in particular, MRIs revealing injuries to her spine that he qualitatively relates to plaintiff's losses and limitations (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]). The motion court properly considered these unsworn MRI reports as they were incorporated into the expert's sworn report (*see Thompson v Abbasi*, 15 AD3d 95, 97 [2005]). Plaintiff adequately explains the gap in treatment by offering proof of the termination of her insurance benefits, and her own statement that she could not continue physical therapy out of pocket (*see Wadford v Gruz*, 35 AD3d 258, 258-259 [2006]). We have considered and rejected defendants' other arguments.

All concur except Friedman, J.P. and Nardelli, J. who dissent in a memorandum by Nardelli, J. as follows:

NARDELLI, J. (dissenting)

Since I believe that plaintiff failed to meet her burden of demonstrating the existence of factual issues as to whether her injuries were the result of a preexisting condition, and thus as to whether she incurred a serious injury, I would reverse and dismiss the complaint.

In moving for summary judgment, defendants Janice Taxi Co. and Nicholas Caamo, the owner and driver, respectively, of the taxicab which was involved in a collision with the vehicle in which plaintiff was driving, offered, inter alia, the affirmed report of Dr. David Milbauer, dated August 5, 2007. He, in turn, referenced an MRI taken of plaintiff's spine, dated March 15, 2005, approximately six weeks after her accident. Dr. Milbauer stated that the MRI showed "[d]iffuse degenerative disc bulging at LS-51 and minor disc bulging ... elsewhere, without significant compromise of the canal or neural foramina throughout." Dr. Milbauer further concluded, "The examination demonstrates no findings to indicate that a traumatic injury of the lumbar spine was sustained in the accident of February 5, 2005." The doctor then stated, without equivocation, "The disc bulging present is degenerative in etiology and preexists the accident of February 5, 2005."

Plaintiff admittedly had suffered injuries to her neck as a result of a prior automobile accident, and had instituted a

lawsuit in connection with that accident. She also testified at her deposition that she had previously received physical therapy and chiropractic adjustments for work-related back pain, and was a professional football player. In opposition to the motion, plaintiff offered various reports, including one from Dr. Gideon Hedrych dated July 25, 2008, approximately one year after Dr. Milbauer's report. Only this July 25 report postdates the report by Dr. Milbauer. Nowhere in his July 25 report does Dr. Hedrych, even obliquely, refer to or address the findings in Dr. Milbauer's report that the symptoms displayed in the MRI demonstrated only the existence of a preexisting degenerative condition. While Dr. Hedrych opined that plaintiff's symptoms were "causally related to the injuries sustained in the accident of 2/5/05," he did not even attempt to rebut the observation, provided by Dr. Milbauer as a medical conclusion, that plaintiff's symptoms did not result from trauma, but were purely degenerative and preexisted the accident. This failure to address Dr. Milbauer's findings is particularly perplexing in view of plaintiff's admitted prior medical history, as well as her occupation as a professional football player.

The Court of Appeals has made clear that when a showing is made that a "plaintiff's alleged pain and injuries were related to a preexisting condition, plaintiff [has] the burden to come forward with evidence addressing defendant's claimed lack of

causation" (*Pommel's v Perez*, 4 NY3d 566, 580 [2005]). Failure to specifically address a defendant's expert's informed opinion that the condition results from a degenerative condition warrants dismissal, as this Court has noted on many occasions (*see e.g.*, *Eichinger v Jone Cab Corp.*, 55 AD3d 364, 365 [2008]; *Chong Sim Kim v Amaya*, 51 AD3d 487, 488 [2008]).

Thus, since plaintiff, despite having been put on notice by a non-conclusory medical report of defendants' position that her condition was degenerative, and not the result of the accident, did not respond to the proffered evidence on the motion, where the laying bare of her evidence was required, summary judgment dismissing the complaint for want of serious injury should have been granted.

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

ENTERED: OCTOBER 19, 2010

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3364 The People of the State of New York, Ind. 1460/07
Respondent,

-against-

Dante Matthews,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Boris E. Ayala of counsel), for appellant.

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

_____

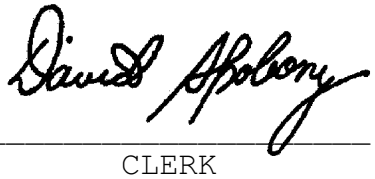
Order, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered October 25, 2007, convicting defendant, after a jury trial, of grand larceny in the fourth degree (four counts), criminal possession of stolen property in the fourth degree (four counts), petit larceny (two counts) and criminal possession of stolen property in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The officer's testimony and the reasonable inferences that may be drawn therefrom were sufficient to satisfy the People's minimal burden of producing some proof of the circumstances of the identification procedure (*see People v Ortiz*, 90 NY2d 533, 538 [1997]). In any event, any error in admitting identification

testimony by the witness at issue was harmless in light of the overwhelming evidence of defendant's guilt.

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

ENTERED: OCTOBER 19, 2010



CLERK

Mazzarelli, J.P., Sweeney, Acosta, Abdus-Salaam, JJ.

3365 Corlette O'Bryan, et al., Index 303293/09
Plaintiffs-Appellants,

-against-

Martha E. Stark, as Commissioner of the
New York City Department of Finance, et al.,
Defendants-Respondents.

_____

Daniel Padernacht, Bronx, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for municipal respondents.

Alex S. Avitabile, New York, for Neighborhood Restore Housing Development Fund Corporation, respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered March 12, 2010, which denied plaintiffs' motion to vacate a default foreclosure judgment and the deed transferring the property from respondent Commissioner of the New York City Department of Finance to the corporate respondent, to restore all parties to their status prior to entry of the foreclosure, and to permit them to defend the in rem tax foreclosure action, unanimously affirmed, without costs.

The party aggrieved by the foreclosure has four months thereafter in which to redeem the property by settling the delinquency in full with the Commissioner of Finance (New York City Administrative Code § 11-412.1[d]). After expiration of the redemption period, the Commissioner has an additional four-month

window in which to transfer the property (§ 11-412.1[c]), which period can be tolled by the City Council for review at any time within 45 days of its notification of such intended action by the Commissioner (§ 412.2). Here, the judgment was entered in the Office of the Bronx County Clerk on February 15, 2007, and the mandatory redemption period expired four months later, on June 15. A package for approval of transfer of the subject properties included in the judgment was submitted to the City Council on September 5, which was 6 months and 21 days after entry of the judgment. The 45-day toll for Council review lasted until October 20, at which point the transfer period resumed for the balance of the eight months, until November 30, 2007. Accordingly, the subject property was timely transferred by the Department of Finance to the corporate respondent on November 30 (*see e.g. Hall v Brennan*, 140 NY 409 [1893]; *Morris v Attia*, 2005 NY Misc LEXIS 555, *11-13, 2005 WL 709821, *4-5).

Contrary to plaintiffs' contentions, the record establishes that the judgment of foreclosure against the property was duly entered in the office of the County Clerk on February 15, 2007, thus creating a presumption of regularity of the proceedings in this action (*see* § 11-411) encompassing compliance by the City with all applicable notice, publication and filing requirements, including its mailing of a notice of foreclosure to plaintiffs, which could not be overcome by their mere denial of receipt of

such notice (*see In Rem Tax Foreclosure Action No. 47*, 29 AD3d 955 [2006]). In any event, this presumption of regularity became conclusive four months after entry of the judgment of foreclosure (*see* § 11-412.1[h]), and plaintiffs did not make the underlying motion or take any action to redeem the subject property within the four-month period under § 11-412.1(d) (*see Matter of Tax Foreclosure Action No. 44, Borough of the Bronx*, 2 AD3d 241 [2003]). Plaintiffs' application to vacate the judgment of foreclosure was thus time-barred under § 11-412.1(h).

We have considered plaintiffs' remaining claims and find them without merit.

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

ENTERED: OCTOBER 19, 2010

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3366 The People of the State of New York, Ind. 3293/08
Respondent,

-against-

Terrance Burton,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered on or about December 15, 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.

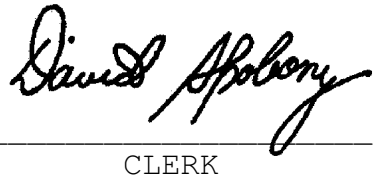
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: OCTOBER 19, 2010



CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3367 The People of the State of New York, Respondent, SCI 55794C/05

-against-

Darryl Ellis,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered October 16, 2006, convicting defendant, after a jury trial, of falsely reporting an incident in the third degree, and sentencing him to a conditional discharge, 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]). The evidence established that defendant's 911 call in which he reported an assault that did not occur was a gratuitous report within the meaning of Penal Law § 240.50(3). No one compelled defendant to place the call; defendant's supervisor, at most, suggested that he do so.

The court properly denied defendant's motion to suppress his statement, in which he admitted to the Department of

Investigation that he fabricated the assault. Defendant was never told explicitly or implicitly that his failure to answer questions would result in his termination from public employment (*compare Garrity v New Jersey*, 385 US 493 [1967]). Moreover, there was no evidence that defendant could be terminated for refusing to make a statement about an incident that did not relate to the performance of his official duties.

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 19, 2010

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3370 The People of the State of New York, Docket 57134C/06
Respondent,

-against-

Ronald Haley,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Maureen A. Lee of counsel), for respondent.

_____

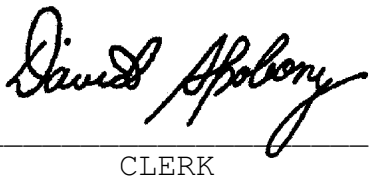
Judgment, Supreme Court, Bronx County (John Carter, J.), rendered March 21, 2007, convicting defendant, after a jury trial, of attempted assault in the third degree and harassment in the second degree, and sentencing him to a conditional discharge, unanimously affirmed.

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 court's credibility determinations, including its weighing of conflicting testimony in light of medical evidence.

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 19, 2010



CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3371 In re Lisa Joy J.,
Petitioner-Respondent,

-against-

Scott Hunter S.,
Respondent-Appellant.

_____

Michael S. Bromberg, Sag Harbor, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for respondent.

_____

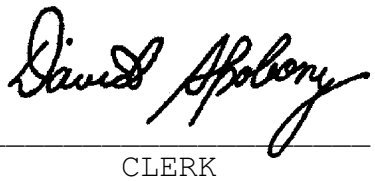
Appeal from order, Family Court, New York County (Susan R. Larabee, J.), entered on or about June 25, 2008, which denied respondent-appellant's objection to a decision and order entered by Support Magistrate Solange N. Grey on or about April 17, 2008 vacating a temporary reduction of the order of support and dismissing his petitions for downward modification of a New Jersey order of support registered in New York on September 28, 2007, unanimously dismissed, without costs.

Respondent's arguments on appeal may not be considered by this Court as they relate solely to an unappealed order which was rendered subsequent (on or about November 6, 2008) to the order appealed from (*see Hecht v City of New York*, 60 NY2d 57, 61 [1983]). Were we to consider them, we would find them without

merit, as the Family Court correctly determined that it had no jurisdiction over the mother.

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

ENTERED: OCTOBER 19, 2010



CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3372 The People of the State of New York, Respondent, Ind. 5059/07 2824/08

-against-

Vanessa Morales, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jaime Bachrach 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 (Edward J. McLaughlin, J.), rendered on or about September 9, 2008,

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

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

ENTERED: OCTOBER 19, 2010

CLERK

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

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3373 The People of the State of New York, Ind. 2236/06
Respondent,

-against-

Barry Norman,
Defendant-Appellant.

_____

Stanley Neustadter, New York (Peter Lushing of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at hearing; Charles J. Tejada, J. at jury trial and sentence), rendered February 14, 2007, convicting defendant of criminal sale of a controlled substance in the third degree and sentencing him, as a second felony drug offender, to a term of 5 years, unanimously affirmed.

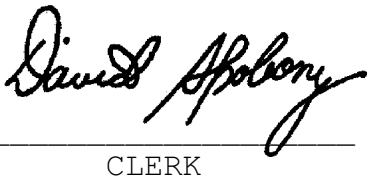
The court properly denied defendant's motion to suppress his statements to the police. Defendant persistently questioned the officer about the charges and evidence against him. The officer's very brief responses to some of defendant's questions did not constitute the functional equivalent of interrogation requiring *Miranda* warnings (*see People v Rivers*, 56 NY2d 476, 480 [1982]; *People v Lynes*, 49 NY2d 286, 294-295 [1980]), and defendant's statement, made immediately after these succinct

responses to his questions, was genuinely spontaneous.

The court properly exercised its discretion in denying defendant's mistrial motion based on certain portions of the People's summation, since the court's curative actions were sufficient to prevent the remarks in question from causing any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]). In any event, nothing in the prosecutor's summation was so egregious as to deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: OCTOBER 19, 2010



CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3374 Rachel Breitman, Index 105789/07
Plaintiff-Respondent,

-against-

Jay A. Dennett, M.D.,
Defendant-Appellant.

_____

Belair & Evans LLP, New York (James B. Reich of counsel), for appellant.

Gerald J. Mondora, Rye Brook, for respondent.

_____

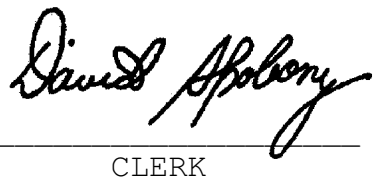
Order, Supreme Court, New York County (Alice Schlesinger, J.), entered December 21, 2009, which, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant dermatologist failed to establish his prima facie entitlement to judgment as a matter of law in this action alleging medical malpractice. Defendant submitted an affidavit which stated that during his treatment of plaintiff, he did not deviate from good and accepted medical practices. However, it failed to address plaintiff's essential factual allegations, namely, whether the keloid defendant treated was or was not the

same lesion that proved to be cancerous (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Kotler v Swersky*, 10 AD3d 350 [2004]).

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

ENTERED: OCTOBER 19, 2010



CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3375 The People of the State of New York, Ind. 1195/07
Respondent,

-against-

Jeris Powell,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey M. Kneipper 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 (Richard D. Carruthers, J.), rendered on or about July 22, 2009,

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 19, 2010

CLERK

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

Mazzarelli, J.P., Sweeny, Abdus-Salaam, Román, JJ.

3376 Uptown Realty Unlimited LLC, Index 110534/08
Plaintiff-Appellant,

-against-

Rafael Lovelace,
Defendant-Respondent.

_____

Kavulich & Associates, P.C., New Rochelle (Matthew N. Kaufman of counsel), for appellant.

Rafael Lovelace, respondent pro se.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered March 30, 2009, which denied plaintiff's motion for a default judgment and sua sponte dismissed the complaint without prejudice to the commencement of a new action, unanimously affirmed, without costs.

A stipulation between the parties in another action provided that defendant's counsel in that action must be served with a summons and complaint seeking rent arrears. The motion court properly found that the stipulation was not applicable to this action; it did not waive the requirement of service on defendant and plaintiff was unable to prove service of the instant summons and complaint on defendant. The pro se defendant's opposition to

the motion is construed as an application to dismiss the complaint.

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

ENTERED: OCTOBER 19, 2010

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3377 The People of the State of New York, Ind. 17076/06
Respondent,

-against-

Eric Hamilton Rhamo,
Defendant-Appellant.

_____

Samuel Braverman, Bronx, for appellant.

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

_____

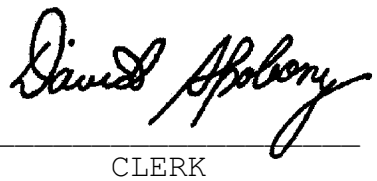
Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered April 7, 2008, convicting defendant, after a jury trial, of assault in the third degree, menacing in the third degree and harassment in the second degree, and sentencing him to an aggregate term of 3 years' probation, unanimously affirmed.

Defendant's ineffective assistance of counsel arguments are not reviewable on direct appeal since they involve matters outside the record concerning counsel's trial preparation and choice of trial tactics (*see People v Love*, 57 NY2d 998 [1982]). To the extent the existing record permits review, it establishes that defendant received effective assistance under both the state

and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: OCTOBER 19, 2010



CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3378 In re Terron B.,

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

_____

Steven N. Feinman, White Plains, for appellant.

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

_____

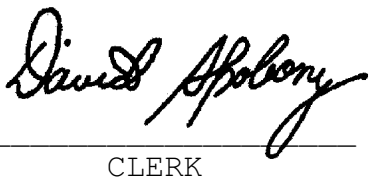
Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about July 13, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree and criminal possession of stolen property in the fifth degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. The showup occurred within close temporal and physical proximity to the crime, and it was not rendered unduly suggestive by the fact that the victim was told he would be viewing suspects, since any person of ordinary intelligence would have drawn that inference, or by the fact that appellant and his companion were visibly in police custody, which was justified as a security

measure (*see People v Sanchez*, 66 AD3d 420 [2009], *lv denied* 13 NY3d 862 [2009]). The identification was not the product of an unlawful seizure, because appellant and his companion were detained on the basis of a description that was sufficiently specific and accurate, given the temporal and spatial factors, to provide reasonable suspicion (*see e.g. People v Moore*, 288 AD2d 400 [2001], *lv denied* 97 NY2d 758 [2002]). We have considered and rejected appellant's remaining claims.

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

ENTERED: OCTOBER 19, 2010



CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3379 The People of the State of New York, Respondent, SCI 781/03 Ind. 2845/03

-against-

Steve Cuello, Defendant-Appellant.

_____

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

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

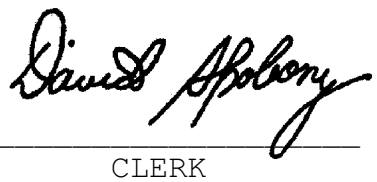
_____

Order, Supreme Court, Bronx County (Laura Safer-Espinoza, J.), entered January 14, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Defendant is not eligible to be resentenced under the 2009 Drug Law Reform Act (L 2009, ch 56), in that he was released on parole from custody on his drug conviction, but reincarcerated for a parole violation (*see People v Pratts*, 74 AD3d 536 [2010]).

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

ENTERED: OCTOBER 19, 2010



CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3380-
3380A Index 107144/09

Ralph W. Kern, et al.,
Petitioners-Respondents-Appellants,

-against-

Excelsior 57th Corp., LLC,
Respondent-Appellant-Respondent.

_____

Kaye Scholer LLP, New York (Richard C. Seltzer of counsel), for appellant-respondent.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Henry P. Wasserstein of counsel), for respondents-appellants.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 30, 2009, confirming an arbitration award, dated May 7, 2009, which determined the appraisal value of a certain parcel of land for the purpose of resetting rent, unanimously affirmed, with costs. Order, same court and Justice, entered January 8, 2010, which denied petitioners' motion to amend the judgment to include post-award interest, unanimously reversed, without costs, on the law, the motion granted and the matter remanded to Supreme Court for calculation of the interest.

Respondent argues that the arbitrators' determination that the property was to be valued as if unencumbered by the lease effectively re-wrote the parties' agreement and should be vacated

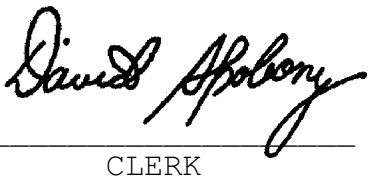
as exceeding the arbitrators' power pursuant to CPLR 7511(b)(1)(iii). However, in the course of their prior successive arbitrations, the parties litigated the issue whether the lease constituted an encumbrance on the property, the arbitrators repeatedly ruled that the land should be valued as if unencumbered, and the prior awards were confirmed. Respondent had a full and fair opportunity to litigate the issue, notwithstanding its present reliance on the authority of *936 Second Ave. L.P. v Second Corporate Dev. Co., Inc.* (10 NY3d 628 [2008]), which it concedes does not represent a recent change in the law. Contrary to respondent's contention, the doctrines of collateral estoppel and res judicata between the same parties apply as well to arbitration awards as to judicial adjudications (*Matter of American Ins. Co. [Messinger-Aetna Cas. & Sur. Co.]*, 43 NY2d 184, 189 [1977]; *Fajemirokun v Dresdner Kleinwort Wasserstein Ltd.*, 27 AD3d 320, 322 [2006], *lv denied* 7 NY3d 705 [2006]).

As a direct result of the arbitration award, respondent remitted to petitioners a lump-sum payment in the amount of $10,526,262.30. Since respondent had the benefit of not paying the rent that it owed to its landlord, petitioners are entitled

to interest on the money that was withheld from them (*see* *Mohassel v Fenwick*, 5 NY3d 44, 51-52 [2005]; *see* CPLR 5002).

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

ENTERED: OCTOBER 19, 2010



CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3381 The People of the State of New York, Docket 54877C/06
Respondent,

-against-

Harry Mercado,
Defendant-Appellant.

_____

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

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

_____

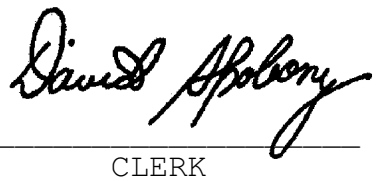
Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered March 16, 2007, convicting defendant, after a nonjury trial, of attempted violation of Tax Law §§ 1814(d) and 1817(d), and sentencing him to an aggregate term of 10 days, unanimously affirmed.

The accusatory instrument contained sufficient factual allegations. Although there was no allegation that defendant displayed the unstamped cigarettes he possessed, the allegation that he was calling out "Cigarettes, loosies" established an offer to sell those cigarettes, since the conduct alleged had no other reasonable interpretation (*cf. People v Lewis*, 50 AD3d 595 [2008], *lv denied* 11 NY3d 790 [2008] [in probable cause context, announcement to passersby "I got tickets, Billy Joel tickets," in front of Madison Square Garden had no rational explanation except offer to sell]).

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 19, 2010



CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3382N 1199 Housing Corporation, Index 601175/99
Plaintiff-Respondent,

-against-

Jimco Restoration Corp.,
Defendant-Appellant,

Four M Mechanical Corporation,
Defendant.

_____

Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for appellant.

Norris McLaughlin & Marcus, P.A., New York (Karen Bekker of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered August 29, 2008, awarding plaintiff $284,126.83 in attorneys' fees and costs, plus $150,766.26 in interest from October 7, 2002, for a total award of $434,893.09, unanimously affirmed, with costs.

Defendant Jimco Restoration Corp.'s (Jimco) challenge to the legality of the scope of the reference to a Special Referee was waived, as it failed to object to such reference and thereafter fully participated in the proceedings before the Special Referee

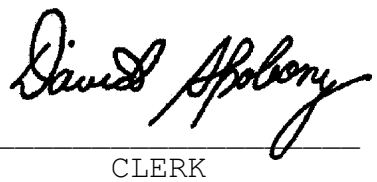
(*see e.g. Matter of Liquidation of Union Indem. Ins. Co. of N.Y. v Spira*, 67 AD3d 469 [2009]; *see also Abramowitz v American Gen. Contr. Co.*, 239 AD2d 303 [1997]). In any event, the argument is unavailing since the Judicial Hearing Officer, in ordering the reference only insofar as to determine the amount of attorneys' fees recoverable, implicitly found that the terms of the parties' licensing agreement had entitled plaintiff to recover reasonable attorneys' fees (*see generally* CPLR 4317[b]).

We further find that Jimco, due to lack of specific objection at either the hearing, or in its post-hearing memorandum, failed to preserve its claim that plaintiff presented insufficient proof at the hearing to establish the reasonableness of such fees (*see e.g. Adelaide Prods., Inc. v BKN Intl. AG*, 51 AD3d 598 [2008]). In any event, the managing partner in charge of billing and record maintenance at the law firm which represented plaintiff testified that the firm's billing records submitted into evidence identified the legal work performed, the billing rates of the firm's counsel, and the amount billed for the work described (*see 1050 Tenants Corp. v Lapidus*, 52 AD3d 248 [2008]; *Rothschild Inc. v Telergy, Inc.*, 270 AD2d 148 [2000]). Contrary to Jimco's contention, prejudgment interest on the

attorneys' fee claim was properly awarded from the date of the underlying judgment on plaintiff's breach of contract claim and not from the date of the instant judgment (*see Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226-227 [2005]).

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

ENTERED: OCTOBER 19, 2010



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Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3235-
3235A Index 600849/09

Alfred E. Mann Living Trust,
Plaintiff-Respondent,

-against-

ETIRC Aviation S.a.r.l.,
Defendant,

Roland ("ROEL") Pieper,
Defendant-Appellant.

_____

Carter Ledyard & Milburn LLP, New York (Jeffrey S. Boxer of counsel), for appellant.

McDermott Will & Emery LLP, New York (B. Ted Howes and Audrey Lu of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered June 29, 2009, affirmed, without costs. Appeal from order, same court and Justice, entered June 24, 2009, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Davis B. Saxe, J.P.
David Friedman
Karla Moskowitz
Helen E. Freedman
Nelson S. Román, JJ.

3235-3235A
Index 600849/09

_____x

Alfred E. Mann Living Trust,
Plaintiff-Respondent,

-against-

ETIRC Aviation S.a.r.l.,
Defendant,

Roland ("ROEL") Pieper,
Defendant-Appellant.
_____x

Defendant Roland Pieper appeals from a judgment of the Supreme Court, New York County (Eileen Bransten, J.), entered June 29, 2009, awarding plaintiff damages against him, and from an order, same court and Justice, entered June 24, 2009, which denied his cross motion to dismiss plaintiff's motion for summary judgment in lieu of complaint on the ground of improper service of process, and granted plaintiff's motion.

Carter Ledyard & Milburn LLP, New York (Jeffrey S. Boxer, Judith A. Lockhart and Theodore Y. McDonough of counsel), for appellant.

McDermott Will & Emery LLP, New York (B. Ted Howes and Audrey Lu of counsel), for respondent.

SAXE, J.P.

This appeal concerns the defense of improper service of process relied on by defendant guarantor Roland Pieper; specifically, he challenges the validity of service on him by e-mail while he was a resident of the Netherlands. The motion court rejected Pieper's defense because of the guaranty's provision waiving personal service of process and the provision in the related funding agreement, specifically referenced by the guaranty, authorizing service of notices, demands, requests or other communications by e-mail to Pieper at two specified e-mail addresses. For the reasons that follow, we affirm.

Plaintiff Alfred E. Mann Living Trust and defendant ETIRC Aviation S.a.r.l. entered into a funding agreement pursuant to which each agreed to provide $10 million in funding to a company known as Eclipse Aviation Corp. The parties further agreed that if the Trust provided ETIRC's $10 million share of the funding, ETIRC would be obligated to repay the Trust pursuant to the terms of a $10 million promissory note. The Trust subsequently provided the entire $20 million in financing and, pursuant to the funding agreement, the promissory note was executed by ETIRC, with Pieper signing as ETIRC's Managing Director. As the funding agreement required, Pieper also signed the separate unconditional, irrevocable and absolute personal guaranty

covering ETIRC's obligations, which guaranty is the subject of this appeal.

The note and the guaranty each explicitly provided that it was governed by the laws of New York and that any legal action to enforce it could be brought in New York courts, and expressly waived Pieper's right to service of process of any summons or complaint. Further, section 8 of the guaranty provides that "whenever any notice, demand, request or other communication shall or may be given to *or served upon* any party by any other party . . . each such notice, demand, request or other communication shall be delivered in accordance with the provisions of the Funding Agreement" (emphasis added). Section 8 of the funding agreement provides that such notice or service may be effected by e-mail to Pieper at two specified e-mail addresses.

It is undisputed that ETIRC defaulted on the promissory note and that the Trust served this CPLR 3213 motion on Pieper by e-mailing process to him at the addresses set forth in the funding agreement.

The comprehensive consent to jurisdiction, waiver of personal service, and waiver of any objection to lack of personal jurisdiction contained in the guaranty precludes a viable challenge to the court's jurisdiction over plaintiff's 3213

motion against Pieper. The provision reads:

> "GUARANTOR HEREBY CONSENTS AND AGREES THAT THE STATE OR FEDERAL COURTS LOCATED IN NEW YORK SHALL HAVE EXCLUSIVE JURISDICTION TO HEAR AND DETERMINE ANY CLAIMS OR DISPUTES BETWEEN GUARANTOR AND LENDER PERTAINING TO THIS GUARANTY OR TO ANY MATTER ARISING OUT OF OR RELATED TO THIS GUARANTY; PROVIDED, THAT NOTHING IN THIS AGREEMENT SHALL BE DEEMED OR OPERATE TO PRECLUDE LENDER FROM BRINGING SUIT OR TAKING OTHER LEGAL ACTION IN ANY OTHER JURISDICTION TO COLLECT THE GUARANTY OBLIGATIONS OR TO ENFORCE A JUDGMENT OR OTHER COURT ORDER IN FAVOR OF LENDER. GUARANTOR EXPRESSLY SUBMITS AND CONSENTS IN ADVANCE TO SUCH JURISDICTION IN ANY ACTION OR SUIT COMMENCED IN ANY SUCH COURT, AND GUARANTOR HEREBY WAIVES ANY OBJECTION THAT IT MAY HAVE BASED UPON LACK OF PERSONAL JURISDICTION, IMPROPER VENUE OR FORUM NON CONVENIENS. GUARANTOR HEREBY WAIVES PERSONAL SERVICE OF THE SUMMONS, COMPLAINT AND OTHER PROCESS ISSUED IN ANY SUCH ACTION OR SUIT."

Nevertheless, Pieper disputes the propriety of service on him by e-mail, protesting that the guaranty did not authorize service of process by e-mail, and citing *Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.* (2002 WL 31509881, 2002 US Dist LEXIS 21730 [SD NY Nov. 6, 2002]) for the proposition that absent clear authorization of service by e-mail, a waiver of personal service is not sufficient to authorize service by e-mail. However, *Maddaloni* is not helpful, because unlike Pieper, the individual in that case who was served by e-mail and ordinary mail had *not* waived his right to formal service of process; rather, the court found, he had merely agreed to accept service on behalf of all the defendants. Pieper, by contrast, expressly waived, in

writing, any right to formal service of process in an action under his guaranty.

Pieper cannot dispute that parties to a contract are free to contractually waive service of process (*see e.g. Comprehensive Merchandising Catalogs, Inc. v Madison Sales Corp.*, 521 F2d 1210, 1212 [7th Cir 1975]; *National Equip. Rental v DecWood Corp.*, 51 Misc 2d 999 [App Term 1966]; *see generally* 86 NY Jur 2d, Process and Papers § 7). By definition, such waivers render inapplicable the statutes that normally direct and limit the acceptable means of serving process on a defendant. Indeed, a stipulation waiving service confers jurisdiction, precluding the defendant from successfully challenging the court's jurisdiction over him: "Jurisdiction over the person of the defendant may be acquired by his consent" (*Gilbert v Burnstine*, 255 NY 348, 355 [1931] [internal quotation marks and citation omitted]), and jurisdiction is conferred by a stipulation waiving service (*id.*).

Yet Pieper suggests, albeit without support, that the dictates of the Hague Convention as to service of process in the international context (Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 UST 361, TIAS No. 6638 [1965]) may not similarly be avoided by a written waiver.

Although the Convention, including its service requirements,

must be treated as the law of the land (*see Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 390 [2008], citing US Const, art VI, cl 2; *see also Volkswagenwerk Akteingesellschaft v Schlunk*, 486 US 694 [1988]), we see no reason why the requirements of the Convention may not be waived by contract. Notably, in none of the cases Pieper relies on did the foreign defendants agree to waive service (*see Volkswagenwerk*, 486 US at 694; *Morgenthau*, 11 NY3d at 383; *Sardanis v Sumitomo Corp.*, 279 AD2d 225 [2001]; *Reynolds v Woosup Koh*, 109 AD2d 97 [1985]). We observe that precluding a contractual waiver of the service provisions of the Hague Convention would allow people to unilaterally negate their clear and unambiguous written waivers of service by the simple expedient of leaving the country.

We conclude that Pieper's waiver of personal service freed plaintiff from the requirements of law that would otherwise dictate the manner in which to serve Pieper with process -- both under CPLR 308 and, given his presence in the Netherlands, under the Hague Convention.

Of course, while Pieper's waiver of personal service and consent to jurisdiction prevents him from successfully interposing a jurisdictional defense, absent a waiver of his due process right to notice and an opportunity to be heard, he would still be entitled to notice of plaintiff's CPLR 3213 motion (*see*

Fiore v Oakwood Plaza Shopping Ctr., 78 NY2d 572, 581 [1991], *cert denied* 506 US 823 [1992]). Therefore, if there had been no contractual provision directing the manner in which plaintiff was to communicate with Pieper in the event that "notice[s], demand[s], request[s] or other communication[s]" were to be "given to *or served upon* any party by any other party" (emphasis added), Pieper's challenge to service on him by e-mail might have warranted further court proceedings to ensure that his due process rights were protected. But the guaranty specifically provided that such notices "shall be delivered in accordance with the provisions of the Funding Agreement," and the funding agreement, in turn, specified that such notices were to be sent to Pieper by e-mail at two specified e-mail addresses. The motion court therefore correctly concluded that the parties' contracts authorized and justified service by e-mail on Pieper.

We observe that while service of process by e-mail is not directly authorized by either the CPLR or the Hague Convention, it is not prohibited under either state or federal law, or the Hague Convention, given appropriate circumstances. Indeed, both New York courts and federal courts have, upon application by plaintiffs, authorized e-mail service of process as an appropriate alternative method when the statutory methods have proven ineffective (*see e.g. Snyder v Alternate Energy Inc.*, 19

Misc 3d 954 [2008] [permission to serve process by e-mail granted under CPLR 308(5)]; *Popular Enters., LLC v Webcom Media Group, Inc.*, 225 FRD 560 [ED Tenn 2004] [granting permission under Fed Rules Civ Pro rule 4(f)(3) to serve process by e-mail]). Service by e-mail on foreign defendants covered by the Hague Convention has also been approved upon a proper showing (*see e.g. MPS IP Servs. Corp. v Modis Communications, Inc.*, Case No. 3:06-cv-270-J-20HTS, 2006 US Dist LEXIS 34473 [MD Fla 2006]). Therefore, there is nothing necessarily improper about the use of e-mail service.

We reject Pieper's implicit contention that e-mail does not provide sufficient notice because an e-mail from a party with whom the recipient has not previously corresponded is likely to be flagged as "spam." Notably, federal courts have considered whether court-ordered service of process by e-mail and fax comports with due process requirements and have concluded that it is proper as long as there has been a showing that those methods are "reasonably calculated to apprise defendants of the pendency of the action" (*see Philip Morris USA Inc. v Veles Ltd.*, 2007 WL 725412, *3, 2007 US Dist LEXIS 19780, *9 [SD NY, Mar. 12, 2007]; *Rio Props. Inc. v Rio Intl. Interlink*, 284 F3d 1007, 1017 [9th Cir 2002]). While there are cases in which service by e-mail has been held improper in the absence of a showing that the defendant

would likely receive the transmitted information (*see Ehrenfeld v Bin Mafouz*, No. 04 Civ 9641 [RCC], 2005 US Dist LEXIS 4741, *8-9 [SD NY, Mar. 23, 2005]; *Pfizer Inc. v Domains by Proxy*, No. 3:04cv741 [SRU], 2004 US Dist LEXIS 13030, *3-4 [D Conn July 13, 2004]), the present matter is not such a case. The funding agreement specifically provides Pieper's e-mail address as the means to provide him with any notice, request, demand, or communication. Consequently, service of process at that address is, by definition, "reasonably calculated" to apprise Pieper of the action and thus comports with the requirements of due process.

Finally, we reject Pieper's contention that the motion court should have afforded him additional time to respond to the merits of the Trust's claims. Where an action is commenced by a motion for summary judgment in lieu of complaint (CPLR 3213), the defendant is obligated to set forth in his opposition papers any defenses he may have on the merits and to lay bare his evidentiary proof supporting any such defenses (*see Thompson v Olsen*, 177 AD2d 449 [1991]; *Bennell Hanover Assocs. v Neilson*, 215 AD2d 710 [1995]). "There is no automatic CPLR 3211(f)-type extension for a dismissal motion made against a CPLR 3213 motion" (*Thompson v Olsen* at 450, citing Siegel, 1986 Supp Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR C3213:15,

1991 Supp Pamph, at 572-573). Pieper was simply not entitled to additional time to respond to the merits of plaintiff's motion, and he made no showing of a particular reason why he should be awarded additional time in the court's discretion.

Accordingly, the judgment of the Supreme Court, New York County (Eileen Bransten, J.), entered June 29, 2009, awarding plaintiff, as against defendant Pieper, the amount of $10,206,027.39 plus interest in the amount of $2,796.17 per diem from February 28, 2009 through the date of final payment, should be affirmed, without costs. The appeal from the order, same court and Justice, entered June 24, 2009, which denied Pieper's cross motion to dismiss plaintiff's motion for summary judgment in lieu of complaint on the ground of improper service of process and granted plaintiff's motion should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: OCTOBER 19, 2010

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