SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 27, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3849-3850 The People of the State of New York, Respondent,

-against-

George Oliveras,
Defendant-Appellant.

Ind. 6702/99

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), and Cravath, Swaine & Moore LLP, New York (K. Timothy Kline of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

Order, Supreme Court, Bronx County (David Stadtmauer, J.), entered June 4, 2009, which denied defendant's CPL 440.10 motion to vacate a judgment (same court and Justice), rendered February 13, 2002, convicting defendant of murder in the second degree, and sentencing him to a term of 25 years to life, reversed, on the law, the motion granted, and the matter remanded for a new trial. Appeal from the judgment dismissed, as academic, in light of the foregoing.

Defendant did not receive adequate assistance of counsel

under either the state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). The prosecution's case turned almost entirely on its ability to convince the jury that defendant's inculpatory statements, extracted after hours of interrogation, were reliable and voluntary. Defense counsel argued that defendant's will had been overcome by the police as a result of what he referred to as defendant's "mental history." Yet defense counsel failed to take any steps whatsoever to obtain defendant's relevant psychiatric and educational records, or to consult with an expert psychiatrist or psychologist in support of the defense because, counsel claimed, the defense "stood to gain nothing" by obtaining the records.

However, the defense had everything to gain by obtaining defendant's records and consulting with a psychiatric expert to support the claim that defendant lacked the mental capacity to voluntarily confess to the crime. Defendant's medical records showed, inter alia, that defendant, at the age of 15, was admitted to and spent six months in a psychiatric hospital for "express[ing] suicidal ideation at school." His presenting problems included depression, a "history of auditory and visual hallucinations," and "multiple suicidal attempts." His psychiatrist, in a 72-hour note, reported that "[defendant] often

hears a voice which he thinks is the voice of the devil . . . which tells him to kill himself." The doctor further reported that there was "a strong streak of paranoia running through [defendant's] ideation," and that he felt "people were against him at school." Defendant's educational records showed that he had been diagnosed as learning disabled and placed in special education classes, and that his IQ of 78 placed him in the "borderline" range of mental retardation. His psychiatrist described his intelligence as "normal at best but probably dull normal."

The psychiatrist retained by counsel in support of defendant's CPL 440 motion opined, upon a review of the relevant records, that defendant's psychotic symptoms, as well as his learning disabilities and probable mental retardation, could have substantially impaired defendant's ability to process, interpret and understand his *Miranda* rights and rendered him vulnerable to suggestion and coercion.

The only evidence linking defendant to the crime were his statements. The sole eyewitness produced by the prosecution did not identify defendant as the shooter at trial, even though the witness was defendant's neighbor and had known defendant since 1987. In his call to 911, the eyewitness described the shooter as a young black man wearing a blue hoodie. Defendant, however,

is a light-skinned Hispanic who was wearing a dress shirt, black jacket and blue jeans on the day of the shooting.

This was not the only inconsistency between defendant's statement and the underlying facts. Defendant stated that the victim started to reach into his coat pocket for what defendant thought was a gun; the detective, however, knew (and admitted as much during cross-examination) that this was not a true statement because the victim had not been wearing a coat. Defendant stated that the gun used to commit the crime was a revolver, whereas the detectives knew the gun used in the crime was a .25 caliber semi-automatic.

Defense counsel testified that by obtaining defendant's psychiatric records he "would have had to turn them over to the prosecution," even if they were never introduced at trial. However, the statute provides that such records need be disclosed only "if the defendant intends to introduce such report or document at trial, or if the defendant has filed a notice of intent to proffer psychiatric evidence" (CPL 240.30). Defense counsel's evident misapprehension of the law cannot be viewed as a strategic decision (*see Kimmelman v Morrison*, 477 US 365, 385 [1986] ["counsel's failure to request discovery, again, was not based on 'strategy,' but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its

inculpatory evidence to the defense"]).

Even if counsel intended to proffer the evidence at trial, defense counsel's concern that statements in the record could "bounce back" at defendant was unfounded since counsel could have obtained a ruling in limine to prevent prejudicial but irrelevant material coming into evidence. The only records that would be admissible would be those limited to the issue of defendant's mental state as it pertained to the voluntariness of defendant's confession.

Defense counsel's alleged reasons for failing to obtain the psychiatric records are not compelling. Defense counsel maintains that he thought there was enough in the record to make his case without resort to experts or to the medical records. However, defense counsel never consulted an expert or reviewed the medical records in arriving at this conclusion. His feeling that he was "better off" not doing so cannot be deemed a reasonable trial strategy.

In denying the defense's motion to suppress defendant's statements, the court expressly cited, as the basis for its ruling, the fact that no medical records documenting defendant's mental illness had been produced prior to or during the *Huntley* hearing. The trial court, in denying defendant's motion to serve late notice of a psychiatric defense, cited the defense's failure

to consult a psychological expert or to obtain the relevant medical records.

Defense counsel did not investigate the law or the facts, and in doing so deprived defendant of meaningful representation under both the New York and federal standards (*see e.g. People v Wilson*, 133 AD2d 179 [1987] [counsel ineffective where, inter alia, counsel failed to have client examined by a psychiatrist after he decided to rely only on an insanity defense]). The jurors never heard evidence concerning defendant's mental deficiencies or mental illness. Had they heard this evidence, there is a reasonable probability that the verdict would have been different.

Even absent the documentation of defendant's mental illness and low intelligence, it is clear that the jury struggled with the evidence. During the course of deliberations, the jurors sent numerous notes requesting clarification of the law and requesting evidence including defendant's statements, the 911 audiotape, the testimony of Mr. Clark, the eyewitness, and the written statement and testimony of defendant's mother. On the second day of deliberations, jurors sent a deadlock note, necessitating an *Allen* charge. The jury only rendered its verdict after three days of deliberations. The prosecution's case was not strong and relied almost entirely on defendant's

inculpatory statements. Defense counsel's failures, therefore, likely impacted the verdict.

In light of the above, it is unnecessary to address defendant's further contentions concerning the propriety of the court's charge to the jury, or whether the court erred in denying defendant's motion to file late CPL 250.10 notice.

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

CATTERSON, J. (dissenting)

Because I believe that the defense counsel's decision not to obtain psychiatric records in this case reflects a reasonable and legitimate trial strategy, the defendant has not met his burden of showing that his counsel's performance was deficient. Therefore, I must respectfully dissent.

The defendant in this case was convicted of murder in the second degree after a jury trial. On May 8, 2007, the defendant moved to vacate his conviction pursuant to CPL 440.10 on the grounds that his defense counsel (1) failed to obtain his psychiatric, Social Security, and/or educational records demonstrating that he had severe mental and educational deficits in order to challenge the voluntariness of his statements; (2) offered late CPL 250.10 notice; and (3) failed to distinguish the case cited by the People and thereby persuade the court that CPL 250.10 notice was not required to present lay testimony of defendant's mental and educational history.

At a January 8, 2009 evidentiary hearing on defendant's CPL 440.10 motion, defendant's trial counsel testified to the following: As of April 7, 2000, defense counsel's strategy was to "attack the voluntariness" of defendant's statements to the police by showing that defendant suffered from mental illnesses all his life. However, shortly after defense counsel indicated

his intention to the court and the prosecution that he would seek medical records, his client, the defendant, "shut [him] down" and flatly rejected that strategy.

Defense counsel testified that he agreed with the defendant partly because he was concerned at the time that the records would not be beneficial, but on the contrary might harm the defense by showing that defendant was violent. Defense counsel also asserted that, in his experience, it was often a more effective strategy to "giv[e] the jury a good gut feeling" rather than "getting bogged up in" a battle of expert witnesses. Counsel then developed a new strategy of adducing lay witness testimony from the defendant's mother "to build in the minds of the jury, in that [defendant] was somebody who had no work history, was on SSI, . . . had a grade school education at the most, and he was in special ed[ucation], I think, and had . . . some hospitalizations . . . that he's somebody whose mind could be played with."

Defense counsel further explained that although he knew that he was required to provide CPL 250.10 notice to present a psychiatric defense, he did not believe that notice was required to establish mental illness through a lay witness. However, not wanting to risk being precluded, he moved to provide late CPL 250.10 notice. Although the motion was denied, at trial, the

court permitted defense counsel to establish through the testimony of the defendant's mother, that defendant "only had an eighth grade education," that "he was in special education," that he "received treatment at Bronx Psychiatric clinic[ ]," that he had no work history, and that he "was on disability and received SSI payments." Defense counsel also pointed to indicia of coercion such as the defendant's inconsistent statements, and evidence that the police tricked the defendant's mother into permitting him to be interrogated without an attorney present and played "good cop/bad cop" during the interrogation. Defense counsel explained that if he could get the jury to see that the defendant was "not playing with a full deck" and that the "cops . . . took advantage of it," then he could secure an acquittal.

By order dated June 4, 2009, the motion court denied defendant's CPL 440.10 motion in its entirety. The motion court accepted defense counsel's testimony as "credible, reliable, truthful, and uncontroverted," and concluded that defendant was not denied effective assistance of counsel. The court further found that counsel "had a reputation as an able and experienced attorney who practiced criminal defense in Bronx County for over forty years."

I see no reason to disturb the motion court's credibility

determinations on appeal. In my view, the hearing court correctly found that the defense counsel's decision not to obtain the defendant's psychiatric records and his decision to rely on lay testimony to establish the defendant's mental deficiencies was a reasonable and legitimate defense strategy.

Defense counsel is deemed to have satisfied the constitutional mandate of effective assistance "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation." People v. Baldi, 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 898, 429 N.E.2d 400, 405 (1981). So long as counsel's performance reflects a "reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance." People v. Benevento, 91 N.Y.2d 708, 713, 674 N.Y.S.2d 629, 632, 697 N.E.2d 584, 587 (1998). Thus, it is the defendant's burden to "'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings." Benevento, 91 N.Y.2d at 712, 674 N.Y.S.2d at 632, quoting People v. Rivera, 71 NY2d 705, 709, 530 N.Y.S.2d 52, 54, 525 N.E.2d 698, 700 (1988).

Given the constraints placed on defense counsel by the defendant and the potentially adverse consequences that might

have resulted from pursuing a formal psychiatric defense, in my opinion the strategy that counsel adopted was reasonable under the circumstances. The jury heard testimony concerning the defendant's mental deficiencies, limited educational background, and psychiatric hospitalization. This evidence permitted counsel to advance a persuasive argument that the police exploited the defendant's deficiencies and that his confession and statements were not voluntary. Thus, in my opinion, neither the failure to request psychiatric records or to consult with a psychiatrist, nor the denial of the defendant's application to file a late CPL 250.10 notice, could have prejudiced the defendant to the extent that he did not receive a fair trial. See Benevento, 91 N.Y.2d at 713, 674 N.Y.S.2d at 633 ("[t]he question is whether the attorney's conduct constituted 'egregious and prejudicial' error such that defendant did not receive a fair trial")(citations omitted).

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

ENTERED: DECEMBER 27, 2011

CLERK

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

6067 Unitel Telecard Distribution Corp., et al., Plaintiffs-Appellants, Index 112627/09

-against-

Henry Nunez, Defendant-Respondent.

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Hodgson Russ LLP, New York (Jacquelyn R. Trussell and Daniel S. Steinberg of counsel), for appellants.

Allen M. Schwartz, New York, for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 13, 2010, which, insofar as appealed from, denied plaintiffs' motion to dismiss the counterclaim for an equitable accounting, unanimously affirmed, with costs.

The complaint alleges that the individual plaintiffs and defendant were equal shareholders, employees, officers, and directors of the corporate plaintiff, a closely held corporation. After defendant left the corporation, plaintiffs commenced an action seeking a declaration that he had relinquished all rights, authority, and interest of any type or kind in the corporation, and for damages arising from his alleged breach of fiduciary duty, unjust enrichment, and conversion. Defendant counterclaimed for an equitable accounting of his 25% share of a federal excise tax refund to the corporation.

While the corporation does not owe fiduciary duties to defendant (*see Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [2007]), defendant and the individual plaintiffs, as shareholders in a close corporation, owe fiduciary duties to one another (*see Brunetti v Musallam*, 11 AD3d 280 [2004]). That fiduciary relationship supports defendant's claim for an accounting (*see Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1997]).

To be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law (*Kastle v Steibel*, 120 AD2d 868, 869 [1986]). The unsigned and undated "Points of the Contract" memorandum that is the alleged basis for defendant's claim to 25% of the federal excise tax refund is insufficient to establish the existence of an enforceable agreement as to the distribution of the refund. Thus, defendant has established that he has no adequate remedy at law.

Finally, defendant has sufficiently set out that he demanded an accounting and that plaintiffs refused the demand (*see Kaufman v Cohen*, 307 AD2d 113, 123-124 [2003]; *McMahan & Co. v Bass*, 250 AD2d 460, 463 [1998], *lv dismissed in part, denied in part* 92 NY2d 1013 [1998]).

We have reviewed plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 27, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5420-
5421-
5422

Wilfredo Lopez,
Plaintiff-Appellant,

-against-

Richard A. Fenn,
Defendant-Respondent,

JPMorgan Chase & Co., et al.,
Defendants.

Index 603781/09

Brian M. DeLaurentis, P.C., New York (Brian M. DeLaurentis of counsel), for appellant.

Morrison Cohen LLP, New York (Edward P. Gilbert of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 15, 2010, which, to the extent appealed from as limited by the briefs, granted defendant Richard A. Fenn's motion to dismiss plaintiff's causes of action for conversion, prima facie tort, interference with the right of sepulcher, and intentional infliction of emotional distress, unanimously affirmed, without costs. Order, same court and Justice, entered December 14, 2010, to the extent it denied plaintiff's motion to renew, and order, same court and Justice, entered February 2, 2011, which granted Fenn's motion to quash subpoenas served on a nonparty, unanimously affirmed, without costs. Appeal from so much of the December 14, 2010 order as denied plaintiff's motion

to reargue, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiff claims that he is the long-time domestic partner of the decedent, Rev. Charles E. Whipple. Plaintiff alleges that in March 2007, defendant Fenn removed plaintiff's name from a Merrill Lynch bank account that plaintiff held in joint tenancy with Whipple. It is undisputed that the account was restored to a joint tenancy with plaintiff in August 2008. Plaintiff further alleges that a second conversion occurred on October 16, 2008, when Fenn "caused $725,000 to be wired out of the . . . account," which at that time had a balance of $1,399,413. Plaintiff's complaint alleges that the funds were transferred to an account that Fenn held jointly with Whipple.

Plaintiff brought this action claiming, inter alia, that Fenn's conversions of the Merrill Lynch account deprived plaintiff of his 50% interest (moiety) and survivorship rights. Fenn moved to dismiss pursuant to CPLR 3211(a)(1), (4), (5) and (7) and submitted documentary evidence showing that the funds were wired to the law firm of Morrison Cohen in order to settle a lawsuit against Whipple.

The documentary evidence includes a letter dated October 1, 2008 from Whipple to the law firm of Morrison Cohen LLP indicating that he intended to wire $670,749.05 to the escrow

account and directing Morrison Cohen to retain $70,749.05 in satisfaction of a September 11, 2008 invoice and release $600,000 to another law firm. The second document is a copy of Morrison Cohen's IOLA statement for Whipple's account indicating that on October 16, 2008 it received a wire transfer of $725,000, the same amount that plaintiff alleges went to a Fenn/Whipple joint account. The documents do not indicate whether it was Whipple or Fenn who executed the wire transfer.

In its decision and order of July 15, 2010, the motion court dismissed all but plaintiff's fifth cause of action for conversion of a Chase account, separate from the two conversion claims at issue in this appeal. The court found that to the extent that plaintiff claims that funds were improperly withdrawn in excess of Whipple's 50% share as a joint tenant, those claims may be asserted against Whipple's estate in the pending Surrogate's Court proceeding. The court also found that plaintiff's claim of conversion of the Merrill Lynch account is "flatly contradicted by documentary evidence."

Plaintiff appeals on the grounds that the documentary evidence does not "utterly refute" his claims of a 2007 conversion or that it was Fenn who executed the 2008 wire transfer. Fenn argues that it is irrelevant who executed the wire transfer because the documentation demonstrates that he did

not exercise any dominion or control over the funds. For the reasons set forth below, we find that no conversion occurred in 2007 and that the documentary evidence "utterly refutes" plaintiff's 2008 conversion claim.

Plaintiff's claim that the mere removal of his name from the account constitutes a conversion is without merit. The removal of a joint tenant's name destroys the joint tenancy as to the whole of the account and the right of survivorship, leaving each tenant with a sole interest in one half of the account (*Brown v Bowery Sav. Bank*, 51 NY2d 411 [1980]). A joint tenant whose name has been removed and substituted without authorization is entitled to a judgment declaring that he or she is the true joint tenant, and directing that his or her name be restored (*Gotte v Long Is. Trust Co.*, 133 AD2d 212, 214-215 [1987]). A cause of action for recovery of funds does not accrue unless the funds are actually removed by the unauthorized third party (*id*).

Here, plaintiff's name was removed from the account in March 2007 and restored in August 2008. However, plaintiff does not allege that Fenn or anyone else removed funds from the account during that time. Plaintiff's failure to allege that Fenn exercised any dominion or control over the funds in question

defeats his conversion claim (*see e.g. Industrial Bank of Latvia v Baltic Fin. Corp.*, 1994 Westlaw 286162, *4, 1994 U.S. Dist. LEXIS 8580, *12 [SD NY June 24, 1994]; *Old Republic Natl. Title Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680 [2005] [conversion claim should have been dismissed where "complaint fails to allege facts establishing that [defendant] had title, possession, or control over any money or property allegedly converted"]).

Brown v Bowery Sav. Bank (51 NY2d 411 [1980], *supra*), relied upon by plaintiff, does not mandate a different result. In *Brown*, the joint tenant removed the plaintiff's name from the account, and substituted a new joint tenant (51 NY2d at 413). Upon the death of the joint tenant, the new joint tenant withdrew all of the funds (*id.* at 414). The removal of plaintiff's name was a conversion because "the end result was . . . that plaintiff was deprived of her share of half of the funds in the account" (*id.* at 415). The *Brown* Court did not hold that the mere removal of the plaintiff's name from a bank account makes out a claim for conversion, and *Brown* has not been cited by any court for that proposition.

As to the alleged 2008 conversion, a joint tenant may terminate a joint tenancy and the right of survivorship without the other joint tenant's knowledge or permission by withdrawing

his moiety from the account (*Gotte*, 133 AD2d at 215, citing *Matter of Kleinberg v Heller*, 38 NY2d 836, 841 [1976, Fuchsberg, J., concurring]). When a joint tenant withdraws more than his moiety, the other joint tenant has a cause of action for recovery of the excess (*id.*). Thus, when $725,000, more than half of the account balance, was withdrawn from the joint account on October 16, 2008, plaintiff's joint tenancy in the account was severed, his survivorship interest was extinguished, and plaintiff had a right to recover the excess over the moiety that was withdrawn.

Typically, a joint tenant brings an action to recover excess over the moiety against the other joint tenant (*see e.g. Matter of Mullen v. Linnane*, 218 AD2d 50, 55, [1996]). Here, however, plaintiff seeks to hold Fenn "personally" liable for Fenn's "tortious conduct . . . in converting the plaintiff's property."

Conversion is an "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Peters Griffin Woodward, Inc., v WCSC, Inc.*, 88 AD2d 883, 883 [1982]). Defendant must engage in "[s]ome affirmative act -- asportation . . ., denial of access to the rightful owner or assertion to the owner of a claim on the goods, sale or other commercial exploitation of the goods" (*State of New York v Seventh Regiment Fund*, 98 NY2d 249, 260 [2002]).

Morrison Cohen's IOLA statement for Whipple's account

indicates that Morrison Cohen received the funds via wire transfer and disbursed them according to Whipple's instructions in his letter to Morrison Cohen. Pursuant to CPLR 3211(a)(1), a motion to dismiss on the basis of a defense founded on documentary evidence may be granted "where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Here, the documents "utterly refute" that the funds were transferred to a joint account held by Fenn and Whipple, and that Fenn at any time exercised the "right of ownership," possession, or control over the funds. Morrison Cohen's IOLA statement for Whipple's account shows that $725,000 was received via wire transfer on October 16, 2008 and credited to Whipple's account, giving him a balance of $725,000. $600,000 was wired out of the account the same day to the law firm of Smith Elliott Smith & Garney, P.A., leaving a balance of $125,000. Also on that same day, a check was issued in the amount of $70,749.05 to Morrison Cohen. These two amounts, disbursed as per Whipple's instructions in his letter 15 days prior, together with the balance of $54,250.95, total $725,000. The $54,250.95 balance was still in the account on January 13, 2010.

Plaintiff's attempt to overcome the documentary evidence

with vague references to "joint wrongdoing" in his briefs, is unavailing. Plaintiff does not allege that Fenn is liable as an agent for Whipple's wrongdoing. There is no conversion claim against Whipple (*see e.g. Old Republic Natl. Title Ins. Co.*, 14 AD3d at 680, *supra*). Plaintiff specifically argues that it was Fenn and not Whipple who converted the funds.

Supreme Court properly dismissed plaintiff's causes of action for intentional infliction of emotional distress. The conduct alleged, primarily that Fenn interfered with plaintiff's sepulcher and occupancy rights, is not sufficiently outrageous to state a claim (*see Simon v 160 W. End Ave. Corp.*, 7 AD3d 318, 320 [2004]*; Matter of Plaza v Estate of Wisser*, 211 AD2d 111, 120 [1995]; *see generally Melfi v Mount Sinai Hosp.*, 64 AD3d 26 [2009]). The prima facie tort claim was also properly dismissed, given that plaintiff did not specify damages, but listed only general categories (*see Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]).

Plaintiff's claim for interference with the right of sepulcher is barred by res judicata. Plaintiff litigated these same claims against Fenn in Surrogate's Court and did not prevail (*Ginezra Assoc. LLC v Ifantopoulos*, 70 AD3d 427, 429 [2010]).

Supreme Court properly granted the motion to quash. The 2005 power of attorney did not revoke the 2003 power. The 2003

power could only be cancelled expressly, and was a narrow power relating only to bank accounts at Chase. By contrast, the 2005 power was one for all of decedent's affairs, and only took effect once decedent was certified incompetent, which never occurred (*see Zaubler v Picone*, 100 AD2d 620, 621 [1984]).

Plaintiff does not raise any arguments with respect to his motion to renew and reargue. In any event, the motion, to the extent appealable, was properly denied. We have considered plaintiff's remaining arguments and find them unpersuasive.

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

ENTERED: DECEMBER 27, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5718 The People of the State of New York, Respondent,

-against-

Roy Bodden, Defendant-Appellant.

Ind. 311/09

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

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

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered March 4, 2010, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees, criminal possession of a controlled substance in the fifth degree and criminally using drug paraphernalia in the second degree, and sentencing him to an aggregate term of 9½ years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term for the second-degree weapon possession conviction to 5½ years and the prison term for the third-degree weapon possession conviction to 1½-4½ years, resulting in a new aggregate prison term of 5½ years, and otherwise affirmed.

Defendant did not preserve his claim that his weapon convictions were based on legally insufficient evidence, and we

decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We also reject defendant's claim that these convictions were 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 defense of temporary lawful possession was based entirely on his own testimony, which the jury was entitled to discredit.

We find the sentence excessive to the extent indicated.

Defendant's constitutional argument is unpreserved (*see People v Ianelli*, 69 NY2d 684 [1986], *cert denied* 482 US 914 [1987]), and we reject defendant's argument to the contrary (*see e.g. People v Rivera*, 33 AD3d 450, 451 [2006], *lv denied* 7 NY3d 928 [2006]). We decline to review this claim in the interest of

justice. As an alternative holding, we also reject it on the merits.

The Decision and Order of this Court entered herein on October 13, 2011 is hereby recalled and vacated (*see* M-5193 decided simultaneously herewith).

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

ENTERED: DECEMBER 27, 2011

CLERK

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

6103 Jang Hwan An, et al., Index 301551/08
Plaintiffs-Appellants,

-against-

Carlos A. Parra, et al.,
Defendants-Respondents.

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Sim & Park, LLP, New York (Sang J. Sim of counsel), for appellants.

Vincent P. Crisci, New York (David Weiser of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 21, 2010, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiffs did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to the extent of reinstating the claims for permanent loss of use of a body organ, member, function or systems, permanent consequential limitation of use of a body function or system, and significant limitation of use of a body function or system, and otherwise, affirmed, without costs.

Defendants failed to demonstrate their entitlement to judgment as a matter of law on plaintiffs' claim to recover for serious injury under Insurance Law § 5102. In opposition to defendant's motion, plaintiffs submitted, among other things, the

affidavits of their treating chiropractor, who averred that both plaintiffs had specified decreased ranges of motion in their cervical and lumbar spines, plaintiff Jang Hwan's right knee and plaintiff Jung Sook's right shoulder. The chiropractor averred that plaintiffs' injuries were sustained as result of the subject accident, and not the result of degenerative disease.

Jang Hwan submitted an affirmed report of the MRI results of his right knee, finding that he suffered multiple meniscal tears, joint effusion and a bone cyst or avascular neurosis. Jung Sook submitted an affirmed MRI report of her right shoulder, showing tears of the supraspinatus and subcapularis tendons. Such medical evidence, which contradicts defendants' medical evidence of a degenerative disease, raises an issue of fact as to the existence and causation of plaintiffs' injuries (*see Suazo v Brown*, _AD2d_, 2011 NY Slip Op. 07505 [2011]; *Chakrani v Beck Cab Corp.*, 82 AD3d 436 [2011]).

Plaintiffs, however, have failed to raise an issue of fact concerning their ability to perform substantially all of their daily activities for at least 90 of the first 180 days following the accident, inasmuch as both plaintiffs testified that they

were able to return to work within 90 days following the accident (*see Prestol v McKissock*, 50 AD3d 600 [2008]).

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

ENTERED: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6416 The People of the State of New York, Respondent, Ind. 1744/06

-against-

Thomas Brown, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

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Judgment, Supreme Court, New York County, (Arlene R. Silverman, J.), rendered January 24, 2008, as amended April 11, 2008, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the third degree, and sentencing him to an aggregate term of 28 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the jury's determinations regarding credibility and identification. The testimony of the identifying eyewitness was corroborated by other evidence, including testimony from a cooperating accomplice.

Defendant's arguments about the court interjecting itself into the proceedings are unpreserved and we decline to review

them in the interest of justice. As an alternative holding, we find that defendant was not deprived of a fair trial. While some of the court's comments may have been inadvisable, there was nothing in the court's conduct that requires reversal.

The challenged portion of the prosecutor's summation did not shift the burden of proof. Instead, the prosecutor was properly responding to defendant's summation arguments concerning the cooperating accomplice's alleged motives to falsify. The prosecutor was entitled to refute those claims by arguing that they were implausible and unsupported by the evidence (*see e.g. People v Sprinkle*, 221 AD2d 269 [1995], *lv denied* 87 NY2d 925 [1996). In any event, any prejudice was alleviated by the court's curative instructions.

The court properly imposed consecutive sentences. The murder and weapon possession were separate acts for sentencing purposes (*see* Penal Law § 70.25[2]; *People v Wright*, 87 AD3d 229 [2011], *lv granted* 2011 NY Slip Op 78815[U]).

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

ENTERED: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6417 In re Nathaniel S.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about November 9, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and placed him on probation. The underlying offense was an egregious assault on a school employee, causing injury. In addition, appellant's school record was generally poor, and the probation

report recommended probation. Accordingly, that disposition was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6418 The People of the State of New York, Respondent, Ind. 2654/09

-against-

Jeremy Gizze, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about June 2, 2010, 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: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6420 Naghib Sumar, Index 112984/09
Plaintiff-Respondent,

-against-

Barry Fox, et al.,
Defendants-Appellants.

_____

Steven L. Kessler, New York, for appellants.

Samuel & Stein, New York (Michael S. Samuel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered May 21, 2010, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint on the basis of res judicata, unanimously affirmed, with costs.

Plaintiff commenced a prior action involving identical parties and causes of action. Defendants moved to dismiss the prior action for lack of personal jurisdiction. Plaintiff did not oppose the motion, which was granted "on default," with no indication that dismissal was on the merits or with prejudice. Under the circumstances, the doctrine of res judicata does not

apply (*see Wynn v Security Mut. Ins. Co.*, 12 AD3d 1100, 1100 [2004]; *Espinoza v Concordia Intl. Forwarding Corp.*, 32 AD3d 326, 328 [2006]; *Boorman v Deutsch*, 152 AD2d 48, 52 [1989], *lv dismissed* 76 NY2d 889 [1990]), and plaintiff was free to commence this action without having to contest the dismissal of the prior action (*see Espinoza,* 32 AD3d at 327).

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: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6421 893 Bway LLC, Index 602292/08
Plaintiff-Appellant,

-against-

Warman Enterprises,
Defendant-Respondent.

_____

Claude Castro & Associates PLLC, New York (Claude Castro of counsel), for appellant.

Moses & Singer LLP, New York (Henry J. Bergman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 13, 2010, dismissing the complaint, and bringing up for review orders, same court and Justice, entered September 21, 2010, which denied plaintiff's motion for partial summary judgment and granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the judgment vacated, and the complaint reinstated.

In this action arising from a failed contract for the sale of real property, plaintiff purchaser alleges that it was entitled to cancel the contract based on a hazardous condition caused by defendant seller. Plaintiff claims that defendant removed underground oil tanks, after the execution of the contract, in violation of its contractual obligation to maintain

the premises "as is" and in "their present condition." On its motion, defendant submitted a contractor's report which found evidence of oil contamination and made remediation recommendations. Defendant's conclusory claim that it corrected the condition at a cost of approximately $5,000, is not supported by documentary evidence, lacks probative value, and is insufficient to establish entitlement to judgment as a matter of law. Similarly, plaintiff on the record failed to present a prima facie showing entitling it to summary judgment.

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

ENTERED: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6422 In re Dakim J.,

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

_____

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

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

_____

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about October 1, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree and sexual abuse in the first degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court properly permitted the seven-year-old victim to give sworn testimony. The victim's voir dire responses established that he sufficiently understood the difference between truth and falsity, the nature of a promise to tell the

truth, and the wrongfulness and consequences of lying (*see People v Nisoff*, 36 NY2d 560, 565-566 [1975]; *People v Cordero*, 257 AD2d 372 [1999], *lv denied* 93 NY2d 968 [1999]).

The court's finding was based on legally sufficient evidence and were 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. The evidence established the elements of each offense, and we have considered and rejected appellant's arguments to the contrary.

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

ENTERED: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6423 The People of the State of New York, Respondent, Ind. 1635/02

-against-

Pablo Almonte, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

Pablo Almonte, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered June 19, 2003, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment on the ground of prearrest delay (*see People v Taranovich*, 37 NY2d 442, 445 [1975]). The 10-year investigative delay was significant, but it was justified in this extremely serious case involving the murder of a police officer, where defendant fled the country after the incident.

At the original grand jury presentation in 1989, the People presented evidence against defendant and a codefendant. However, the People only asked the grand jury to consider charges against

the codefendant. The People reasonably concluded that, regardless of whether they could obtain an indictment against this defendant, they did not have sufficient evidence to obtain a conviction. The record reflects that the investigation did not continue because the People had exhausted all reasonable investigative steps.

Years later, a witness who had been interviewed shortly after the crime provided different, and much more valuable information than that which he had provided initially. The witness revealed that he had been a participant in the underlying robbery that led to the shooting death of the police officer. The witness also agreed to cooperate in return for leniency on this case as well as unrelated charges. The People reasonably concluded that their case against defendant had become strong enough for prosecution. Accordingly, the investigatory delay was satisfactorily explained, and was a permissible exercise of prosecutorial discretion (*see People v Decker*, 13 NY3d 12 [2009]).

We find defendant's claim that he was prejudiced by the delay unpersuasive. While defendant cites to some lost witnesses and physical evidence, there is no reason to believe that any of this proof would have been exculpatory.

The court dismissed the indictment (190 Misc 2d 783, 786-788 [Sup Ct, NY County 2002]) on the ground of a violation of CPL 190.75(3), but granted the People leave to resubmit the charge to another grand jury. The grant of leave was a proper exercise of discretion in light of the history of the case, as described above.

Defendant did not preserve his arguments, including his constitutional claims, regarding redacted statements by a nontestifying codefendant, photographic evidence, and a portion of the court's charge. We decline to review these claims in the interest of justice. As an alternative holding, we find no basis for reversal.

Defendant's ineffective assistance of counsel claims, including those presented in his pro se supplemental brief, assert that counsel was ineffective for failing to object to allegedly improper aspects of the trial evidence, the prosecutor's summation, and the court's charge. These claims are unreviewable on direct appeal because they involve matters outside the record concerning possible strategic explanations for omitting these objections (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal

standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). We conclude that counsel's failure to make these objections did not deprive defendant of a fair trial, affect the outcome of the case, or cause defendant any prejudice (*see Strickland*, 466 US at 694).

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

ENTERED: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6427-
6428

Jose Lala,
Plaintiff-Respondent,

Index 14880/05
85491/06

-against-

Fairfield Ronkonkoma, LLC, et al.,
Defendants-Appellants.

- - - - -

Fairfield Ronkonkoma, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

RJNJ Services, Inc., etc.,
Third-Party Defendant-Appellant.

Appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 21, 2010,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 7, 2011,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6430-
6431 American Home Assurance Company, et al.,
Plaintiffs,

National Union Fire Insurance Company of Pittsburgh, Pa.,
Plaintiff-Appellant,

-against-

Everest Reinsurance Company,
Defendant-Respondent,

American Re-Insurance Company,
Defendant.

Index 602485/06

_____

Cahill Gordon & Reindel LLP, New York (Edward P. Krugman of counsel), for appellant.

Pitchford Law Group LLC, New York (David L. Pitchford of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered June 23, 2010, dismissing the complaint seeking, inter alia, recovery of amounts due from defendant Everest Reinsurance Company with respect to losses paid by plaintiff National Union Fire Insurance Company of Pittsburg, Pa. pursuant to a settlement agreement with the underlying insured, unanimously reversed, on the law, with costs, the judgment vacated, and the complaint reinstated. Appeal from order, same court and Justice, entered on or about May 24, 2010, which, inter alia, granted Everest's motion for summary judgment dismissing

the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In 1993, National Union and its affiliates settled massive coverage litigation arising from the underlying insured's manufacture of the contaminant polychlorinated biphenyl (PCB) continuously from 1929 to 1971 at 80 sites around the country (the 1993 Settlement). The 1993 Settlement Agreement had two parts: a cash payment to resolve all existing and future governmental clean-up claims at the 80 sites, and an agreement as to how any future private bodily injury or property damage claims at those sites would be handled. Several years after the 1993 Settlement was consummated, the underlying insured became subject to claims for bodily injury and property damage arising from PCB contamination in and around Anniston, Alabama, where the insured had a manufacturing facility. In 2004, the insured settled the Anniston litigation for $600 million, and presented a claim for $150 million to National Union and its affiliates. The insurers paid the loss and turned to their reinsurers for reimbursement. When Everest Re (and three others that have now settled) refused to pay, the insurers commenced this action.

A reinsurer will be bound by a settlement agreed to by the ceding company if it is reasonably within the terms of the original policy, even if not technically covered by it (*see*

Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London, 96 NY2d 583, 596-97 [2001]; *Allstate Ins. Co. v American Home Assur. Co.*, 43 AD3d 113, 120-21 [2007], *lv denied* 10 NY3d 711 [2008]). This doctrine prevents the reinsurer from "second-guessing" the settlement decisions of the ceding company, and "imposes a contractual obligation upon the reinsurer to indemnify the ceding company for payments it makes pursuant to a loss settlement under its own policy, provided that such settlement is not fraudulent, collusive or otherwise made in bad faith, and provided further that the settlement is not an ex gratia payment, i.e., one made by a party that recognizes no legal obligation to pay, but makes payment to avoid greater expense, as in the case of a settlement by an insurance company to avoid the cost of a suit" (*Granite State Ins. Co. v ACE Am. Reins. Co.*, 46 AD3d 436, 439 [2007] [citation omitted]).

There is no evidence that, at the time of the 1993 Settlement, National Union acted other than in good faith, as during the years leading up to the settlement, the pollution exclusion, as well as other coverage terms and defenses were both litigated and negotiated. The settlement was also favorable to both parties. The limits of the reinsured policies applied on a "per occurrence" basis. The underlying insured settled the Anniston litigation in 2004 for $600 million. Thereafter, it

presented a claim to National Union and its affiliates for a capped amount of $150 million once the $80 million "deductible" had been satisfied by the insured.

However, on December 9, 1993, mere months after the 1993 Settlement was reached, the Delaware Superior Court ruled in a declaratory judgment action commenced by the underlying insured against National Union and others, that the sudden and accidental pollution exclusions of 38 moving insurers barred coverage in this matter (*see Monsanto Co. v Aetna Cas. & Sur. Co.*, 1993 WL 563253 [1993], *affd* 653 A2d 305 [Sup Ct Del 1994]). This circumstance presents issues of fact as to whether National Union settled in good faith. Moreover, the affidavit of Everest Re's claims representative, who attested that he had read the 1993 Settlement Agreement by 2003, raises issues of fact as to the applicability of waiver and estoppel.

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

ENTERED: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6433 The People of the State of New York, Ind. 6334N/09
Respondent,

-against-

Wilson Martinez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered on or about June 23, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: DECEMBER 27, 2011

CLERK

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

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6435 The People of the State of New York, Respondent, Ind. 6046/08

-against-

Salvador Lozado, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Denise Fabiano of counsel), and Mayer Brown LLP, New York (Natasha Goldvug of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Michael J. Obus, J. at plea and sentencing), rendered February 25, 2010, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of three and one-half years, unanimously affirmed.

The court properly denied defendant's motion to suppress the revolver recovered from his person. The police actions were lawful at each stage of the encounter.

Police officers conducting a nighttime vertical patrol of a Housing Authority building saw defendant coming up the stairs in a ninth floor stairwell. When defendant saw the police, he "paused" and "looked around," displaying "nervous" behavior.

These circumstances provided an officer with an "objective credible reason" to ask defendant where he was heading (*see People v Crawford*, 279 AD2d 267 [2001], *lv denied* 96 NY2d 799 [2001]; *People v Greene*, 271 AD2d 235 [2000], *lv denied* 95 NY2d 853 [2000]).

Defendant replied that he was returning a jacket to a friend on the 15th floor. The officer requested permission to accompany defendant, and defendant agreed. Defendant's claim that he was subjected to a level two inquiry is not supported by the record. The request to accompany defendant was not intimidating, and in any event it did not produce an incriminating response. Instead, it led only to an inquiry made to a third party.

When defendant and the officers arrived at the apartment, an occupant refused to open the door, denied that the person defendant was looking for was there, and denied knowing defendant. Nothing in this conversation confirmed that defendant was lawfully in the building. Even if the occupant's response could be viewed as implying that the person identified by defendant did live in the apartment, this did not establish that defendant had entered the building as that absent person's invitee. On the contrary, it tended to establish that no one had given defendant permission to enter. Simply having a friend

residing in a building barred to trespassers would not entitle a nonresident to invite himself or herself in.

The officers then asked defendant whether he lived in the building, to which he replied that he lived on the fourth floor, but did not know the apartment number. Defendant's inability to identify his own supposed apartment, along with all the surrounding circumstances, supported the reasonable inference that defendant was not "licensed or privileged" to be in the building (Penal Law § 140.00[5]), and provided probable cause to arrest defendant for criminal trespass (*see People v Williams*, 16 AD3d 151 [2005], *lv denied* 5 NY3d 771 [2005]; *People v Tinort*, 272 AD2d 206, 207 [2000], *lv denied* 95 NY2d 872 [2000]; *People v Magwood*, 260 AD2d 246 [1999], *lv denied* 93 NY2d 1004 [1999]).

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

ENTERED: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6437 Donata Mitchell, Index 22939/06
Plaintiff-Respondent,

-against-

Juan C. Calle, et al.,
Defendants-Appellants.

_____

White Fleischner & Fino, LLP, New York (Jennifer L. Coviello of counsel), for appellants.

Ephrem J. Wertenteil, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered January 25, 2011, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to dismiss the 90/180-day claim, and otherwise affirmed, without costs.

Defendants concede that plaintiff has a meniscal tear in her left knee, and their radiologist's report is too equivocal to make a prima facie showing that the tear was not caused by the accident (*see Glynn v Hopkins*, 55 AD3d 498, 498 [2008]), especially given plaintiff's relatively young age at the time of the accident (*see June v Akhtar*, 62 AD3d 427, 428 [2009]). However, defendants made a prima facie showing that plaintiff did not sustain a "permanent consequential limitation of use" of the knee within the meaning of Insurance Law § 5102(d) by submitting

the affirmed reports of medical experts who opined that she had normal range of motion in the knee and that any symptoms had fully resolved (*see Dembele v Cambisaca*, 59 AD3d 352, 352 [2009]; *Gibbs v Hee Hong*, 63 AD3d 559, 559 [2009]). The affirmed reports are competent evidence, notwithstanding that the experts relied on the uncertified emergency room records and other unsworn medical records (*see Pommells v Perez*, 4 NY3d 566, 577 n 5 [2005]).

In response, plaintiff submitted the affirmed reports of her treating physiatrist and the orthopedic surgeon who performed her knee surgery, who both found persisting limitations in range of motion of the left knee with discomfort, and described the qualitative nature of plaintiff's limitations based on the normal function, purpose, and use of the knee. In addition, plaintiff submitted an unsworn MRI report of the left knee stating that there was a small effusion suggesting a meniscal tear. Plaintiff's evidence raised an issue of fact as to whether she sustained a permanent consequential limitation of use of the knee (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Salman v Rosario*, 87 AD3d 482 [2011]). Although the MRI report is unsworn, plaintiff could rely on it since defendants submitted it in support of their motion (*Lazarus v Perez*, 73 AD3d 528, 528 [2010]). Plaintiff also adequately explained the gap in

treatment by testifying that she stopped treatment because her no-fault benefits terminated (*see Wadford v Gruz*, 35 AD3d 258, 259 [2006]).

The court, however, should have dismissed the 90/180-day claim. Defendants made a prima facie showing that plaintiff did not suffer a 90/180-day injury, and plaintiff failed to raise a triable issue of fact. Indeed, plaintiff testified that, after the accident, she was confined to bed for only three days and to home for a only week (*see Salman*, 87 AD3d at 484). Further, the claimed restrictions in her usual and customary activities are unsupported by objective medical evidence (*see Nelson v Distant*, 308 AD2d 338, 340 [2003]).

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: DECEMBER 27, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6438N Justinian Capital SPC, for and on behalf of Blue Heron Segregated Portfolio, Plaintiff-Appellant, 600975/10

-against-

WestLB AG, New York Branch, et al., Defendants-Respondents.

Reed Smith LLP, New York (Mark L. Weyman of counsel), for appellant.

Hughes Hubbard & Reed LLP, New York (Christopher M. Paparella of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 18, 2011, which granted defendants' motion to disqualify Reed Smith LLP as counsel for plaintiff, unanimously affirmed, with costs.

The motion court providently exercised its discretion in granting the motion (*see Decana Inc. v Contogouris*, 27 AD3d 207 [2006]). In *Bank Hapoalim B.M. v WestLB AG* (82 AD3d 433 [2011]), we affirmed the disqualification of Reed Smith as counsel for the plaintiffs, including the plaintiff in this action, in a suit claiming that defendants had engaged in negligent and fraudulent conduct in mismanaging the plaintiffs' investments. Although the particular investment vehicles and legal claims at issue in this case are not identical to those in *Bank Hapoalim*, the cases are

substantially related. The motion court correctly found that the meeting between defendants and the attorneys that later joined Reed Smith, which required disqualification in *Bank Hapoalim*, mandates disqualification in this case. Although there is no evidence that the investment vehicle at issue in this case was specifically discussed at the meeting, "doubts as to the existence of a conflict of interest must be resolved in favor of disqualification" (*Rose Ocko Found. v Liebovitz*, 155 AD2d 426, 428 [1989]).

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

ENTERED: DECEMBER 27, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, JJ.

5907 In re Nilda Macri, etc., Index 115286/09
Petitioner-Respondent,

-against-

Raymond W. Kelly, as Police Commissioner
of the City of New York, etc., et al.,
Respondents-Appellants.

_____

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for appellants.

Michael T. Murray, New York (Christopher J. McGrath of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered May 10, 2010, affirmed, without costs.

Opinion by Sweeny, J. All concur.

Order filed.

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

ENTERED: DECEMBER 27, 2011

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
John W. Sweeny, Jr.
Dianne T. Renwick, JJ.

5907
Index 115286/09

_____x

In re Nilda Macri, etc.,
Petitioner-Respondent,

-against-

Raymond W. Kelly, as Police Commissioner
of the City of New York, etc., et al.,
Respondents-Appellants.

_____x

Respondents appeal from an order and judgment (one paper) of the Supreme Court, New York County (Jane S. Solomon, J.), entered May 10, 2010, which granted this article 78 petition seeking, inter alia, to annul their decision to disapprove the designation of the death of petitioner's husband as a line-of-duty World Trade Center death, and to compel such designation.

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow, Paul Rephen and Inga Van Eysden of counsel), for appellants.

Michael T. Murray, New York (Christopher J. McGrath of counsel), for respondent.

SWEENY, J.

The issue before us is whether respondents produced credible evidence to rebut the World Trade Center presumption (Administrative Code of the City of New York, § 13-252.1 [1][a]) accorded to petitioner's claim for accidental line-of-duty death benefits. We hold that, in this case, they did not.

Petitioner's decedent Frank Macri was appointed as a New York City police officer on February 1, 1995. He was a first responder during the terrorist attacks on September 11, 2001. When the first tower collapsed, building debris struck Macri, knocking him to the ground and causing lacerations to his left arm, right leg, and both corneas. He inhaled significant quantities of dust and smoke caused by the collapsing building. Macri received treatment for his injuries that day at New York University Medical Center. As part of that treatment, he underwent a chest X-ray that revealed no evidence of cancer in his lungs.

Subsequent to September 11, Macri performed approximately 350 hours of duty in the rescue, recovery and cleanup operations after the attack. He worked at Ground Zero until October 1, 2001, and at Fresh Kills Land Fill from November 1, 2001 to early January 2002.

On July 25, 2002, Macri visited orthopedic surgeon Herbert

Jalens complaining of a "sudden onset of aching pain in his left thigh, starting about two or three weeks earlier." Jalen's examination report listed Macri as a 46-year-old nonsmoker who was "muscled and pumps iron." Jalen reported that Macri advised him of a similar episode in the spring "when he woke up one day with pain in the buttock and thigh." Jalens referred Macri for an MRI of his lumbrosacral spine.

Within days, Macri underwent a series of diagnostic tests, including an MRI and CT scan of his lumbar spine, a whole body bone scan, a biopsy of his sacrum and a whole body PET scan. In August 2002, Macri was diagnosed with a malignant lytic sacral lesion and lung carcinoma.

Macri underwent treatment for this condition but an MRI conducted on December 23, 2003 revealed at least three metastases to his brain. By January 2005, Macri's "non-small cell lung cancer" had metastasized to his brain, liver, lungs and bones, finally taking his life on September 2, 2007.

On August 22, 2002, an application for ordinary disability retirement (ODR) was submitted on Macri's behalf. On March 8, 2006, Macri filed a form known as a Notice of Participation in the World Trade Center Rescue, Recovery, or Clean-up Operations. On October 11, 2007, petitioner, Macri's widow, applied for World Trade Center (WTC) accidental line-of-duty combat death benefits,

citing cancer as the qualifying physical condition.

On October 31, 2007, the Medical Board Police Pension Fund Article II (Medical Board) recommended approval of Macri's application for ODR and disapproval of petitioner's WTC line-of-duty application. The Medical Board found "that the findings of metastatic lung cancer in July 2002 precludes the World Trade Center exposure as the cause of the officer's disease." This decision was based, inter alia, on Dr. Jalen's July 2002 report, as well the radiologist reports from Macri's MRI and CT scans, also taken in July 2002, which contained findings of "abnormal bone density" and a "likely . . . malignant lesion" in Macri's left sacral vertebral body. The Medical Board also considered Marci's medical records, pathology and radiation reports, the 2004 report of Macri's brain surgeon as well as the March 2004 brain MRI and CT scans indicating four metastatic lesions in his brain.

On April 9, 2008, the Police Pension Fund Board of Trustees (PPF Board) held its first session and denied petitioner's application for WTC line-of-duty benefits. In its decision, the Board stated: "We do believe that the Medical Board's report rebuts the [WTC] presumption," pointing to the Medical Board's finding that metastatic lung cancer in July 2002 indicated a cancer existing prior to 9/11, which rebutted the presumption

that exposure at the WTC was the cause of the cancer.

Petitioner's counsel asked for a Medical Board reconsideration, arguing that the Medical Board's finding of no causal connection between the disability and WTC exposure was not sufficient to rebut the WTC presumption. The PPF Board granted counsel's request and remanded the matter to the Medical Board to consider "New Evidence and as per Verbatim minutes."

On May 14, 2008, the Medical Board issued a memorandum adhering to its prior determination. The Medical Board noted that "there is substantial literature which quantitates the doubling times of primary pulmonary lung cancers," and that based upon this literature, and Macri's etiology of presenting with lung cancer some 9 to 10 months after September 11, 2001, the cancer was preexisting and therefore was not the result of WTC exposure. The Medical Board held that "this [i.e., the aforesaid unidentified literature] is competent evidence to rebut the premise of the World Trade Center Bill."

On November 12, 2008, the PPF Board held its second session. Petitioner submitted a letter from Macri's treating oncologist, stating that lung cancer was rare among young nonsmokers and that, while it impossible to state with absolute certainty Macri's lung cancer was related to his work at Ground Zero, the "documented presence of high levels of carcinogenic substances in

air/dust from the Ground Zero site, and increasing reports of malignancies in the group of first-responders all suggest a very plausible association" between Macri's work and the development of his lung cancer. Indeed, this oncologist opined that it was more reasonable then not that Macri's exposure at WTC was the cause of his lung cancer. Petitioner also submitted an e-mail from Macri's radiation oncologist which stated Macri's diagnosis with stage 4 cancer at "a young age could be ascribed to 9/11 type exposure." The PPF Board again remanded this case to the Medical Board to consider this additional evidence.

On March 18, 2009, the Medical Board issued a memorandum, which once again adhered to its prior recommendations. The Medical Board stated that it was "not aware of literature in the responder population" relative to the incidence of cancer but did not "find that the only rebuttable evidence that can be presented would be based on data from the responder population." The Medical Board discounted, without specifically addressing, the letters from Macri's oncologists, stating those letters were merely an "attempt to raise a 'specter of doubt' as to the etiology being caused by the World Trade Center exposure, but f[ound] that the known clinical course of deceased Officer Macri's disease in its advanced stage of metastatic disease found in July 2002 is adequate evidence for rebuttal."

On July 8, 2009, the PPF Board cast six votes in favor of designating Macri's death as a WTC line-of-duty death and six votes against, thus denying the application for line-of-duty benefits.

Petitioner brought an article 78 proceeding seeking to annul the PPF Board's determination and compel respondents to designate Macri's death as a WTC line-of-duty combat death. Noting that "no definition has been standardized for what constitutes proof by competent evidence for purposes of rebutting the WTC presumption," the court determined that competent evidence was essentially the same as credible evidence. Applying that standard, Supreme Court found that respondents had not met their burden of showing that Marci's medical condition was not caused by the performance of his duties after the 9/11 terrorist attacks. The court particularly faulted the Medical Board's reference to "unidentified 'doubling time' literature," which was admittedly based on a non-responder population, and which was never provided to petitioner, who had requested it. The court faulted the Medical Board's "attempt, without any credible medical evidence, to compare these unidentified studies to Macri's situation, despite his different set of facts and letters written on his behalf from his treating doctors, who are current experts in the field." Since the PPF Board relied unquestionably

on the Medical Board's findings in arriving at its determination, the court granted the petition.

Although the burden of proof with respect to demonstrating entitlement to benefits usually rests with the claimant at the administrative level, the Legislature has provided a presumption in favor of accidental line-of-duty causation involving first responders, including personnel of the NYPD, who performed recovery or other duties at the World Trade Center site, Fresh Kills Land Fill, temporary morgues and other specified locations after the 9/11 attacks. This WTC presumption places on the respondents the initial burden of demonstrating that a petitioner with a qualifying condition is not entitled to benefits, and is codified in Administrative Code § 13-252.1(1)(a) as follows:

> "Notwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, if any condition or impairment of health is caused by a qualifying World Trade Center condition as defined in section two of the retirement and social security law, it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence."

Administrative Code § 13-252.1(4) further provides that if a member who meets the criteria set forth above dies in active service from a "qualifying World Trade Center condition . . .

caused by such member's participation in the World Trade Center rescue, recovery or cleanup operations . . . then unless the contrary be proven by competent evidence, such member shall be deemed to have died as a natural and proximate result of an accident sustained in the performance of duty."

Retirement & Social Security Law § 2(36) provides the time frames the claimant must have performed duties at the specified locations and the qualifying physical and psychological conditions which resulted from those duties that give rise to his or her claim. Section 2(36)(c)(v) specifically defines cancer as a "qualifying physical condition."

Generally, the standard of review by which a reviewing court assesses the PPF Board's administrative determination is either the arbitrary and capricious standard (CPLR 7803[3]) or the substantial evidence standard (CPLR 7803[4]; *see Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 351 [1983]). Where, as here, however, the Board's decision is reached as a result of a tie vote, the standard of judicial review is necessarily different. In such circumstances, "the reviewing court may not set aside the Board of Trustees' denial of accidental disability retirement resulting from such a tie vote unless 'it can be determined as matter of law on the record that the disability was

the natural and proximate result of a service-related accident'" (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997] quoting *Canfora*, 60 NY2d at 352; *see also Matter of Polak v Board of Trustees of N.Y. City Police Dept. Art. II Pension Fund*, 188 AD2d 341 [1992], *lv denied* 81 NY2d 706 [1993]). In cases where there has been a tie vote, "the reviewing court may only disturb the final award by finding causation established as a matter of law, [and] as long as there was any credible evidence of lack of causation before the Board of Trustees, its determination must stand" (*Meyer* at 145; *see Canfora* at 351).

This case therefore turns on the question of whether there was "credible evidence" supporting the PPF Board's determination with respect to lack of causation between the claimant's disability and his performance of duty at Ground Zero or other specified 9/11 related sites.

While there is no precise definition of what constitutes "credible evidence" sufficient to rebut the WTC presumption, there are certain essential parameters that must be met. Credible evidence "must proceed from a credible source and reasonably tends to support the proposition for which it is offered" and "must be evidentiary in nature and not merely a

conclusion of law, nor mere conjecture or unsupported suspicion . . .” (*Matter of Meyer,* 90 NY2d at 147). For a reviewing court to uphold a determination of no causation, the decision must be based “on objective medical evidence or a rational, fact-based medical explanation” (*id.*). The facts of each case must therefore play a significant role in this determination.

Here, in addition to Macri’s identifed medical records, the Medical Board relied on unidentified “doubling time” literature which was not based on the responder population to support its conclusion that his cancer was a preexisting condition and not WTC related. However, that conclusion is not supported by credible evidence.

There is no question that Macri’s temporal duration at Ground Zero and Fresh Kills far exceeded the minimum 40 hours required by Retirement and Social Security Law § 2(36)(g) to invoke the WTC presumption. Moreover, there is nothing in the medical records, other than the unidentified “doubling time” literature, to indicate that his cancer preexisted 9/11. Indeed, the chest X-ray taken on 9/11 showed no indication of any pulmonary cancer. While it is true that Macri’s cancer was a highly aggressive form of cancer, that fact, standing alone, does not rebut the WTC presumption. Indeed, Macri’s oncologists

stated that his diagnosis of stage 4 cancer "at such a young age could be ascribed to 9/11 type exposure," and that the rapid growth and spread of the cancer made it more reasonable than not, given his nonsmoker status and health prior to 9/11, that the cancer was contracted because of his exposure to the high levels of carcinogens known to be present at Ground Zero. The Medical Board dismissed without addressing this evidence and did not examine the basis for the conclusion that exposure to the known toxins at the WTC site was the proximate cause of Macri's admittedly unusually aggressive cancer, a significant omission which undermines its conclusion (*see Matter of Fernandez v Board of Trustees of N.Y. Fire Dept. Pension Fund, Subchapter 2*, 81 AD3d 950, 952 [2011]).

Respondents' reliance on our decision in *Matter of Maldonado v Kelly* (86 AD3d 516 [2011]) is misplaced. There, the petitioner evidenced symptoms prior to 9/11 which later turned out to be a sarcoma, clearly evidence of a preexisting condition. The petitioner admitted his cancer preexisted 9/11. However, having worked the minimum statutory 40 hours at ground zero, he applied for WTC line-of-duty benefits, arguing that this work exacerbated his condition. Significantly, the petitioner's own medical providers essentially acknowledged that his time at the WTC site "suggests" that, although the exposure was not the etiology of

the petitioner's cancer, it "does not rule out the possibility" that such exposure aggravated his cancer. The petitioner's doctor did not "even state that, in his medical opinion, it was more likely than not that the rapid growth of the tumor was related to petitioner's work at the World Trade Center site" (*id.* at 520). The PPF Board, based on the Medical Board's determination that there was no causal connection between the petitioner's cancer and his work at the WTC site denied his claim, finding that the WTC presumption was rebutted on the basis of the medical evidence submitted.

In affirming Supreme Court's dismissal of the petitioner's article 78 proceeding, we specifically cautioned: "This decision should not be viewed as a diluting of the World Trade Center presumption, which was enacted in recognition of the enormous sacrifice made by those public employees who assisted in the recovery from the World Trade Center attacks. Rather, *it reflects the unique facts of this case*, where not even petitioner's own physician could offer more than a wholly equivocal, speculative opinion on causation" (*id.*) (emphasis added).

In the case before us, we have the opposite situation. There is no evidence to support the Medical Board's conclusion, adopted by the PPF Board, that Macri's cancer was preexisting.

Indeed, there is evidence that just the opposite was the case. Unlike *Maldonado*, Macri's time at various WTC sites was extensive. His oncologists provided a strong, clearly articulated, experience-based medical opinion, finding that the etiology of his cancer led to the conclusion that it was more reasonable than not that his cancer was the result of his duty at WTC sites. This opinion was not addressed by the Medical Board, and, as in *Matter of Fernandez,* undermined their conclusions.

This case is closer to our decision in *Bitchatchi v Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II* (86 AD3d 427 [2011]). There, the petitioner, who had worked in excess of 65 hours at various WTC sites, was diagnosed with rectal cancer in October 2002. She applied for line-of-duty benefits, claiming her cancer was a result of her WTC duties. The Medical Board concluded that, based on her prior history of ulcerative colitis and surgery to correct this condition almost 20 years prior to her diagnosis, and the size of the petitioner's cancer mass on an October 2002 CT scan, the cancer was a condition that preexisted 9/11. The PPF Board agreed and denied her application.

The petitioner brought an article 78 proceeding to overturn that determination. In finding that the PPF Board failed to adduce credible evidence sufficient to overcome the WTC

presumption, Supreme Court specifically cited the Medical Board's conclusory statement that "clinical data," not otherwise specified, supported the Medical Board's conclusion that the size of petitioner's cancerous mass indicated a pre-9/11 origin. Since this "clinical data" was not part of the administrative record, the court found the conclusions of the PPF and Medical Boards did not meet the credible evidence standard (*see* 2010 NY Slip Op. 30700[u] [2010]).

We affirmed, finding that there was "no credible evidence to support the Medical Board's assertion that the size of tumor meant it began growing before September 11, 2001, and thus could not have been the result of or exacerbated by exposure. Nor [was] there credible evidence to support the Medical Board's conclusion that petitioner's cancer was caused by her episode of ulcerative colitis and the corrective surgery, which occurred nearly 20 years prior to the onset of the cancer" (86 AD3d at 427-428).

Here, we find the same conclusory reliance on undisclosed literature that we determined did not constitute credible evidence in *Bitchatchi*. We see no reason to not find similarly in this case.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Jane S. Solomon, J.), entered May

10, 2010, which granted this article 78 petition seeking, inter alia, to annul respondents' decision to disapprove the designation of the death of petitioner's husband as a line-of-duty World Trade Center death, and to compel such designation, should be affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 27, 2011

CLERK