SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 29, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

332 The People of the State of New York, Respondent, Ind. 3727/05

-against-

David Diaz,
Defendant-Appellant.

David Segal, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Malancha Chanda of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered February 8, 2006, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the second degree, and sentencing him, as a second felony drug offender, to a term of 7 years, affirmed.

Defendant was convicted of criminal possession of a controlled substance in the second degree after 253 packets of crack cocaine worth $3,000 were found in a hidden compartment of a minivan that was driven, but not owned, by defendant. The People prosecuted on a theory of constructive possession. We find that the evidence was legally sufficient to establish beyond a reasonable doubt that defendant knowingly and unlawfully possessed crack cocaine and that the crack cocaine he possessed weighed at least four ounces (*see* Penal Law § 220.18[1]).

Moreover, we find the court properly denied defendant's motion to suppress on grounds of an illegal search. Testimony at the suppression hearing established that on July 21, 2005, Officer Angel Torres of the Manhattan Gang Squad spotted a double-parked minivan, with its engine running, at the corner of W. 152nd Street and Broadway, a known drug-prone area. Torres observed defendant exit the vehicle from the driver's seat to scrape off a Sanitation Department sticker from the vehicle's window with a razor blade. Because the vehicle was illegally double parked in a drug-prone area, Torres approached defendant. When asked why he was double parked, defendant replied that he was waiting for a friend who was inside the grocery store across the street. When Torres asked defendant to move the vehicle, defendant replied that his friend would return from the store in five minutes. Torres testified that defendant had a calm demeanor.

Nevertheless, when the friend failed to return, Torres became suspicious, and believing that drug activity was taking place, asked defendant to show him paperwork for the vehicle. When defendant opened the door to reach into the minivan, Torres, who was standing behind defendant, looked inside the vehicle with a flashlight held on defendant's hands in order to ensure his safety. In doing so, Torres leaned partially into the vehicle.

Torres then observed two $100 bills near the center console of the vehicle and also a small one-inch bag. Although the bag

was empty, there appeared to be green particles in the bag which Torres believed to be marijuana. Torres did not smell any marijuana odor coming from the car but based on his observation, he asked defendant to step out of the vehicle.

After confirming that the small bag had contained marijuana, Torres searched the glove compartment and recovered nine new crack pipes, prescription drugs and registration papers. The prescription drugs were not in defendant's name. Moreover, the minivan was registered to a person of a different name but it had not been reported stolen.

At that point, Torres searched the vehicle, and by tugging on the right passenger air bag compartment, he noticed velcro material and determined there was a possibility of concealed items. Upon further searching, Torres discovered 253 bags of crack cocaine hidden in the compartment, whereupon he arrested defendant. After the arrest, defendant changed his story and told Torres that he had borrowed the minivan to buy "weed" and that he had nothing else to say. Torres further testified that he established that defendant lived just two blocks away from where he had double parked the minivan.

On August 31, 2005, a New York County grand jury handed up an indictment against defendant charging him with criminal possession of a controlled substance in the second and third degrees. Defendant moved to suppress the evidence seized from the minivan.

On October 31, 2005, the trial court held a suppression hearing, at the conclusion of which the court denied defendant's motion, finding that Torres was credible and acted reasonably when he testified that he leaned into the minivan to ensure his own safety.

In November 2005, after a jury trial, defendant was convicted of second-degree possession of a controlled substance, the only count submitted to the jury, pursuant to Penal Law § 220.18(1). On February 8, 2006, defendant was sentenced to seven years of imprisonment and five years of post release supervision.

On appeal, defendant argues that the trial court erroneously denied his motion to suppress since Torres lacked probable cause when he partially entered into the vehicle while defendant looked for paperwork. Thus, he argues, the search was illegal. Additionally, defendant claims that since he did not own the minivan and did not act suspiciously when being questioned by Torres, and that the drugs found by Torres were in a hidden compartment not visible to the naked eye, the evidence at trial was legally insufficient to establish the elements of criminal possession of a controlled substance beyond a reasonable doubt.

For the reasons set forth below, we affirm the trial court's judgment. In determining whether police conduct was proper, the Court must look at the "totality of the circumstances" (*Matter of Michael J.*, 270 AD2d 181, 181 [2000], *lv denied* 94 NY2d 762 [2000]). In the first instance, the prosecution must show the

legality of the police conduct in question (*see People v Allison*, 270 AD2d 148 [2000], *lv denied* 95 NY2d 792 [2000]). However, the defendant still "bears the ultimate burden of proving that the evidence should not be used against him" (*People v Berrios*, 28 NY2d 361, 367 [1971]). Also, "[i]t is fundamental that the determination of the hearing court should not be set aside unless clearly unsupported by the record" (*People v Spencer*, 188 AD2d 408, 408 [1992], *lv denied* 81 NY2d 893 [1993]).

The United States Supreme Court has recognized that "if there is a criminal suspect close enough to the automobile so that he might get a weapon from it ... the police may make a search of appropriately limited scope" (*Coolidge v New Hampshire*, 403 US 443, 461 n 18 [1971]). Finally, we have already held that an officer's use of a flashlight to view the area where a defendant was reaching with his hands, did not involve an unreasonable intrusion (*see People v Desir*, 138 AD2d 236, 237 [1988]).

In the case at bar, defendant challenges Torres's act of leaning into the vehicle with a flashlight. Torres leaned into the vehicle due to a safety concern to ensure that defendant was not reaching for something else besides the paperwork that Torres had requested. Defendant, at that time, had been double parked with the engine running at a drug-prone location and the excuse that defendant gave Torres, that he was waiting for a friend, appeared to be false since the friend never turned up during the time Torres waited with defendant. Torres's entry into the

vehicle was only partial and, thus, limited to his upper torso, head and flashlight, which he focused on defendant's hands. The totality of the circumstances therefore warrants a finding that Torres's limited intrusion was justified since he was trying to ensure his own safety. Therefore, the court properly denied defendant's motion to suppress the evidence.

Defendant further argues that the evidence was legally insufficient to prove criminal possession of the crack cocaine which had been hidden out of sight in an air bag compartment of a vehicle he occupied but did not own. We find this argument to be without merit.

In order to sustain a charge of criminal possession of controlled substance in the second degree, the prosecution must establish that defendant "knowingly and unlawfully possesse[d]" at least four ounces of a controlled substance (Penal Law § 220.18[1]). Where the issue is one of constructive possession, the People must show that the defendant exercised knowing "dominion and control" over the property by a sufficient level of control over the area in which the contraband was found (*People v Manini*, 79 NY2d 561, 573 [1992]). Constructive possession also can be demonstrated by a defendant's "presence under a particular set of circumstances" from which a jury may infer possession (*People v Bundy*, 90 NY2d 918, 920 [1997]).

In this case, we find that the verdict is based on legally sufficient evidence. The uncontroverted evidence clearly

established that defendant had actual possession of the vehicle and keys, and that he was the sole occupant and driver. First, he was sitting in the driver's seat with the engine running, then upon exiting the vehicle he attempted to remove a parking-violation sticker on the minivan with a razor blade. As the People assert, his attempt to remove the sticker reflected his dominion and control over the vehicle. Moreover his dominion became especially apparent when his alleged friend failed to return to the minivan, which contained at least $200 on the center console and a significant amount of drugs.

We do not agree that defendant's calm demeanor precludes a finding of guilt beyond a reasonable doubt. Indeed, in a case cited by defendant himself, the Fifth Circuit has held that, "[a]mong the types of behavior ... recognized as circumstantial evidence of guilty knowledge are ... absence of nervousness, i.e., a cool and calm demeanor" (*United States v Ortega Reyna*, 148 F3d 540, 544 [1998]). Furthermore, the facts that defendant was not the owner of the minivan and that the crack cocaine was hidden would require this Court to accept the absurd conclusion that the owner of a minivan that held $3,000 worth of crack cocaine casually loaned the vehicle to defendant so he could drive two blocks to buy marijuana. The jury correctly rejected such an absurdity. Its verdict, moreover, is consistent with our determination in *People v Caba* (23 AD3d 291, 292 [2005], *lv denied* 6 NY3d 810 [2006]), where we found that the jury "reasonably concluded that a person in possession of a large and

valuable quantity of drugs would not permit another person to be in close proximity [to such drugs] unless they were both part of the same criminal enterprise and were joint possessors."

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

RENWICK, J. (dissenting)

A jury found defendant guilty of criminal possession of a controlled substance based upon the People's theory that he constructively possessed 253 bags of crack cocaine that had been expertly hidden in the air bag compartment of an automobile he occupied but did not own. The majority properly denies suppression of the evidence as fruit of an illegal police intrusion. I disagree, however, with the majority's determination that in this wholly circumstantial evidence case, where the evidence implicates the owner of the minivan as much as the person in possession of the vehicle, the proof was sufficient to establish constructive possession of contraband. Accordingly, I respectfully dissent.

The relevant facts are as follows: The People's evidence at trial consisted entirely of the testimony of Police Officer Angel Torres. On July 21, 2005, Officer Torres was on patrol with his partner, as part of the Manhattan Gang Squad. At about 3:30 p.m., Torres observed defendant sitting in the driver's seat of a double-parked minivan, with the engine running, at the corner of West 152nd Street and Broadway. Officer Torres's initial concern arose from the fact that defendant's vehicle was double parked even though parking was available at the next intersection. Defendant exited the vehicle to remove a Sanitation Department sticker from its window, and when Officer Torres asked defendant why he was double parked, defendant replied that he was waiting

for a friend who just went into a store across the street.

Officer Torres found defendant to be acting in a normal manner. After conversing with defendant for a few minutes and noticing that defendant's friend failed to appear, Officer Torres asked defendant to produce the paper work for the minivan. Defendant readily complied. When defendant went into the minivan to retrieve the requested documents, Officer Torres leaned in behind with a flashlight. The officer observed an empty bag, which he later determined contained remnants of marihuana, and two $100 bills. Officer Torres then found nine crack drug pipes and two prescription bottles in the glove compartment. Upon further investigation, Officer Torres also recovered 253 bags of crack cocaine from a secret air bag compartment. According to Officer Torres, the drug concealment had been expertly done so that it would not have been visible to the average person.

The name on the van's registration, Brian Anderson, was confirmed by a computer search. It was further confirmed that the vehicle was not stolen. However, rather than investigate this evidence, Officer Torres summarily concluded that the owner was not relevant to his case, and he never investigated, contacted or tried to locate Anderson in any way. Likewise, Officer Torres never attempted to locate the people named on the prescription bottles. The officer did not find anything in the car with defendant's name or other property belonging to him.

Fifteen minutes transpired from the time Torres first

stopped defendant until his arrest, but the arresting officers never looked for defendant's friend in the bodega. Again, the officers concluded that the crack pipes belonged to defendant. Officer Torres interviewed defendant after his arrest, at which time defendant stated that he had borrowed the car to buy weed and had nothing further to tell the officer. Officer Torres failed to write this statement down and never asked defendant for details about his planned purchase.

Defendant presented no evidence at the trial. Instead, at the close of the People's case, his counsel moved to dismiss on sufficiency grounds, which Supreme Court denied. Defendant correctly contends that, based on the meager evidence presented against him, at the close of the People's case, no basis was established upon which the jury could find that he had constructive possession of the contraband.

To meet their burden under the theory of constructive possession, the People must present evidence that "the defendant exercised 'dominion or control' over the property" (*People v Manini*, 79 NY2d 561, 573 [1992], *quoting* Penal Law 10.00 [8]). Constructive possession requires that the defendant know of the location of the drugs and be able to exercise dominion and control over them, together with the intent to exercise such dominion and control (*People v Edwards*, 206 AD2d 597, 597 [1994], *lv denied* 84 NY2d 907 [1994]), and not merely that the defendant

had access to the contraband (*People v DeJesus*, 44 AD3d 464 [2007], *lv denied* 10 NY3d 763 [2008]). Thus, constructive possession requires knowledge coupled with the ability to exercise dominion and control over the area in which the contraband is found (*id.*).

Here, it is incontrovertible that the contraband was found expertly hidden in the air bag compartment of the minivan of which defendant had possession but no ownership. Additionally, there is no evidence that there was any bulge or discoloration or smell that may raise one's suspicion that the area was anything other than an ordinary air bag compartment. Defendant's ability to exercise control over the vehicle and his brief presence in the vehicle are insufficient, at least under the circumstances of this case, to establish constructive possession of the hidden contraband.

Initially it should be pointed out that the People did not, and could not, rely solely on defendant's presence in the vehicle to support the theory of constructive possession. The law is abundantly clear that evidence of a defendant's mere presence in the location where drugs are found is not sufficient evidence of constructive possession (*People v Headley*, 74 NY2d 858, 859 [1989] ["The People presented no evidence of defendant's dominion and control over the contraband. Proof that the premises were used for drug dealing was not sufficient to establish that defendant himself was guilty of unlawful drug and weapons

possession"]; *see also People v Brown*, 240 AD2d 675 [1997] [defendant, girlfriend of apartment's lessee, merely present when contraband discovered during execution of search warrant in apartment]; *People v Gil*, 220 AD2d 328, 328 [1995] ["Nothing other than defendant having been inside the apartment connects defendant to the apartment or the drugs"]).

Moreover, where the contraband is found in a place to which the accused and others have access and over which none had exclusive control, courts have shown reluctance to infer constructive possession of contraband by one occupant where there is evidence in the record explicitly linking contraband to another individual (*see e.g. People v Huertas*, 32 AD3d 795 [2006] [defendant's conviction was reversed because there was legally insufficient evidence to establish that defendant exercised dominion and control over contraband found in the garage; given that defendant was standing inside a garage entryway when police entered the garage, People failed to connect defendant to marihuana operation, which was located in two rooms of the garage]). Instead, in such a scenario, there must be additional independent conduct by the defendant indicating intent to exercise dominion and control over the contraband (*see e.g. People v Leader*, 27 AD3d 901 [2006]).

For example, in *People v Burns* (17 AD3d 709 [2005]), the Court found that the evidence was insufficient to establish defendant's constructive possession of bags of drugs found in the

trunk of the vehicle in which he was a passenger, which was required to support conviction of criminal possession of marihuana. There, the driver testified that he left the key in the car, as instructed, upon arrival at the casino and that he did not know what occurred in the parking lot while he was inside the casino. Instead, he noticed that both defendant and the back seat passenger were absent from the casino for about an hour and saw them return together, but he never saw bags before he left the casino and could not state who had placed them in the trunk. Defendant was not the owner or operator of the vehicle, and the only car key was in the driver's possession. The Court found such evidence insufficient to establish that the defendant participated in conduct establishing intent to exercise dominion and control over the contraband (*id.* at 710-711).

In this case, nothing in the evidence ties the contraband hidden in the air bag compartment to defendant as opposed to the owner of the minivan. There is absolutely no evidence with regard to the period of defendant's possession of the minivan prior to the police encounter. Essentially, all the People presented in this case was the contraband that the police discovered in the hidden air bag compartment of the minivan, in which defendant was present for a brief period of time and to which defendant had access but did not own. To permit a defendant to be convicted on such meager evidence comes perilously close to endorsing guilt by presence at the scene of

the contraband, a concept courts have persistently disavowed (*see e.g. People v Headley*, 74 NY2d at 859; *People v Brown*, 240 AD2d at 675-676; *People v Gil*, 220 AD2d at 328-329).

Contrary to the prosecutor's contention, the circumstances of defendant's arrest warranted no more than speculation that he may have been involved in the drug trade. Indeed, at no time prior to the arrest did the arresting officer observe defendant engage in any type of activity indicating that he was engaged in the drug trade. The only items the police found in the vehicle were two $100 bills and nine crack pipes. Neither of these items constitutes paraphernalia customarily identified with the drug trade, as compared to drug use, such as large amounts of money or agents used for cutting cocaine (*see e.g. People v Bond*, 239 AD2d 785 [1997], *lv denied* 90 NY2d 891 [1997] [testimony that razor, digital scales and plastic bags were used to cut, weigh and bag the cocaine for distribution, none of which would have been necessary if the cocaine was for personal use]).

The prosecutor and the majority herein, however, characterize as "absurd" that the owner of the minivan would place such a large quantity of contraband in a vehicle and then casually lend it to defendant with that precious cargo inside. Such characterization would have been compelling if the drugs had been placed in an area readily discoverable by an unsuspecting passenger or driver. The argument, however, loses its persuasiveness where, as here, the drugs were placed in a

hidden compartment and, as Officer Torres testified, had been so expertly concealed as to be undetectable by the average layperson. Rather, in the absence of any evidence with regard to the period of defendant's possession of the minivan vis-à-vis the owner's possession prior to the police discovery of the contraband, the expertly hidden compartment implicates the owner of the minivan as much as the person in possession of the vehicle. To convict here there must be evidence to preclude the possibility that the contraband was put in the hidden compartment by the owner of the car without defendant's knowledge. The People's evidence does nothing to exclude this possibility.

Indeed, while it appears that no New York State appellate case has examined a conviction for constructive possession of contraband under a factual scenario similar to this case, cases from other courts provide persuasive authority for the conclusion that the evidence adduced at trial was insufficient to sustain defendant's conviction. For instance, in *Commonwealth v Movilis* (46 Mass App Ct 574, 707 NE2d 845 [1999]), a Massachusetts appeals court determined that the Commonwealth had failed to prove that the defendant was in possession of a large amount of cocaine found in the vehicle he had been driving, which he had parked outside a café. The defendant and his passenger exited from the vehicle and entered the establishment. The police followed him inside, where they observed, in plain view, a small quantity of cocaine on a table in front of the defendant. The

police escorted him outside, obtained his car keys, searched the vehicle, and found a large quantity of cocaine hidden inside an electronically controlled, secret compartment built into the rear portion of the front passenger seat. The court found significant that the prosecution, like the People in this case, offered no evidence of the connection between the defendant and the registered owner of the vehicle, nor did it establish any link between the cocaine in the automobile and the traces of cocaine found in the café. On these facts, the appeals court concluded, the Commonwealth had not established that the defendant had knowledge of either the existence or contents of the secret compartment, and therefore possession had not been proved.

Similarly, the United States Fifth Circuit, in a factual scenario analogous to this case, held in *United States v Ortega Reyna* (148 F3d 540 [1998]) that the circumstantial evidence did not, as a matter of law, support a finding that the defendant knowingly possessed illegal drugs found in a hidden compartment of a borrowed truck's tire. There, the Fifth Circuit preliminarily noted that the agents' observations of alleged nervousness or lack of composure of a person they are detaining "provides equal circumstantial support for a finding of either

guilt or innocence." (*id.* at 545). The Fifth Circuit went on to hold the evidence insufficient to establish knowledge of the concealed marihuana where the vehicle had been borrowed by the defendant, the defendant hesitated briefly before answering questions about the marihuana, the tire containing the marihuana was noticeably larger than the other three, the defendant was in possession of over $700 in cash, and the defendant and his wife gave essentially consistent accounts of their travel destination and purpose (*id.* at 546-547).

In a case that rests solely upon circumstantial evidence of constructive possession (*see People v Torres*, 68 NY2d 677 [1986]), the test of legal sufficiency is a stringent one. It requires the court, while viewing the evidence in the light most favorable to the People and giving them the benefit of every reasonable inference to be drawn therefrom (*see* CPL 290.10[1][a]; 70.10[1]; *People v Way*, 59 NY2d 361, 365 [1983]; *People v Marin*, 102 AD2d 14, 27-28 [1984], *affd* 65 NY2d 741 [1985]), to determine whether the facts from which the inference of guilt is to be drawn are inconsistent with innocence and exclude every reasonable hypothesis of innocence (*see People v Giuliano*, 65 NY2d 766 [1985]; *People v Marin*, 102 AD2d at 27).

In sum, like in *Movilis* and *Ortega Reyna*, no matter how suspicious the facts might appear to be in this case, the People failed to present substantial, competent evidence inconsistent with the reasonable hypothesis that the owner of the van placed the cocaine in the hidden compartment of the car without

defendant's knowledge. Rather, the meager evidence presented here makes it more likely that the drugs belonged to the owner than the driver. It was therefore entirely consistent with defendant's statement that he borrowed the van without knowledge that it contained hidden cocaine, and it warranted no more than speculation that defendant exercised dominion and control over the drugs hidden in a secret compartment of another person's vehicle. Accordingly, the judgment of conviction should be reversed and the indictment dismissed.

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

ENTERED: DECEMBER 29, 2009

DEPUTY CLERK

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

78 The People of the State of New York, Ind. 3032/06
Respondent,

-against-

Daniel Thomas,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Simpson Thacher & Bartlett LLP, New York (Ian R. Dattner of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Richard Carruthers, J.), rendered March 27, 2007, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of 8 years, affirmed.

Evidence of guilt was overwhelming in this case. The arresting officer testified that defendant and his accomplice were both stopped at 103rd Street and Park Avenue. While the command log, which was completed by a desk officer not involved in the arrest, indicated that the two individuals had been arrested a block apart, the arresting officer testified, both on direct and on rebuttal, that they were arrested at the same location, after having been observed running together. At the time they were stopped, defendant's accomplice was in possession of a cell phone and some money which had just been stolen in a robbery a block away. The victim later positively identified defendant and his accomplice as the two individuals who had stolen the cell phone and the money from him.

Defendant was tried by himself. At the trial, the court permitted the victim to identify defendant's accomplice in a photograph. As a general rule, identification by the victim of an accomplice who is not on trial is not relevant to any material issue, inasmuch as the identification of one individual is not probative of the accuracy of the identification of another (*see generally People v Rosario*, 127 AD2d 209, 215 [1987], *lv denied* 70 NY2d 655 [1987]). In this case, however, in view of the overwhelming evidence of guilt, as discussed above, any error was harmless (*People v Jenkins*, 305 AD2d 287 [2003], *lv denied* 100 NY2d 621 [2003]).

More to the point, only the victim testified as to his identification of defendant. The court prohibited the People from presenting testimony by the police officers confirming that the victim had made an identification. This is not one of those cases where the bolstering error is compounded because a third party, such as a police officer or a companion, corroborated the fact that the victim identified a co-defendant on a prior occasion (*see e.g. People v Monroe*, 40 NY2d 1096, 1098 [1977]; *People v Samuels*, 22 AD3d 507, 508-509 [2005]).

Defendant's challenge to the victim's in-court identification of defendant is also unavailing. At an independent source hearing, the People proved by clear and convincing evidence that the identification was based upon a source that was independent of a showup identification, which the

court suppressed on Fourth Amendment grounds (*People v Young*, 7 NY3d 40, 44 [2006]; *People v Williams*, 222 AD2d 149, 153 [1996], *lv denied* 88 NY2d 1072 [1996]). During the robbery the victim had ample time to observe defendant's face. The record indicates that there was sufficient lighting at the location where the robbery occurred; the victim displayed a measured calm as he requested that the robbers take only his money and not his cell phone; and before the showup identification he had provided a description that described the robbers sufficiently enough for the police to surmise that the men already in custody were the perpetrators.

We perceive no basis for reducing sentence.

All concur except Catterson, J. who dissents in a memorandum as follows:

CATTERSON, J. (dissenting)

I must respectfully dissent because, in my opinion, the People improperly bolstered the in-court identification of the defendant. Because they acknowledge such improper bolstering on appeal, and since the defendant clearly preserved the issue for appellate review, I would reverse and remand for a new trial.

This appeal arises out of the defendant's conviction, after a jury trial, of robbery in the second degree. The defendant argues that without the bolstered identification testimony, the only evidence against him was police testimony that he was running in the street in the early hours of the morning with an alleged accomplice who was found to have a stolen cell phone on his person. Hence, the defendant asserts the admission of the bolstered identification testimony is reversible error.

Testimony at trial adduced the following: in the early hours of the morning of June 10, 2006, two plainclothes police officers traveling northbound along Park Avenue saw two men, the defendant and his alleged accomplice Victor Cruz, running. They turned the car around and signaled to the two men to stop to speak to them. One of the police officers patted down the defendant and asked for identification. While the majority points to the testimony of the arresting officer that the two men were arrested "at the same location," this was disputed by evidence of the command log, completed at the precinct, which indicated the two men were stopped a block apart.

In any event, after the stop, the defendant handed over

identification and, apparently inadvertently, a credit card which did not bear his name but which the defendant said belonged to a family member. Both the defendant and Cruz were then handcuffed and taken to the 23rd precinct where they were searched. A cell phone and some money were found on Cruz, while the defendant's pockets yielded a small glassine of crack cocaine and two dollars.

While the defendant and Cruz were being held, an officer from the precinct left in response to a report of a robbery on 103rd Street. The complainant reported that two men, "one black and one Hispanic," had "roughed him up" and taken his cell phone. At the time, the complainant could not provide any more of a description but the officer remembered seeing the cell phone among items taken from Cruz at the precinct and arranged for the defendant and Cruz to be brought to 103rd Street for a show-up identification. The defendant and Cruz were made to stand behind the patrol car so that only their torsos and faces were visible to the complainant who then identified the two men as his assailants. At this point, the defendant and Cruz were arrested.

Subsequently, the defendant moved to suppress the information learned or evidence recovered as a result of the arrest, and to preclude testimony regarding the show-up identification, as well as any in-court identification. The motion court agreed that the arrest was improper and ordered any evidence or statements made by the defendant suppressed. However, following an independent source hearing, the court

permitted the complainant's in-court identification of the defendant because it concluded that the complainant was a "credible witness [...] highly intelligent" and "observant" who had "adequate opportunity as well as ability to see" the defendant and Cruz. At the hearing, the complainant testified that the man who held him down, the defendant, was wearing a white T-shirt and was in his early 20s, while the second man went through the complainant's pockets. Subsequently at trial, the complainant testified that he had "no doubt" that the defendant was the man who held him down. By contrast, the police officer who arrested the defendant testified that the defendant was wearing a dark-colored jacket and yellow boots on the night of the robbery while Cruz was wearing sneakers, a white shirt, and blue jeans.

At trial, over defense counsel's objections, the People were permitted to present testimony of the complainant's identification of the alleged accomplice at the showup, as well as testimony that items taken from the complainant were recovered from Cruz. Counsel argued that prejudice would result from the jury's speculation that the defendant was also present at the showup identification.

At the close of testimony and before the jury was charged, defense counsel again objected to the Cruz identification testimony, citing to case law that established that in a severed trial, identification evidence of a codefendant that is not on trial is irrelevant and inadmissible. See People v. Monroe, 40

N.Y.2d 1096, 1098, 392 N.Y.S.2d 393, 395, 360 N.E.2d 1076, 1078 (1977); People v. Williams, 31 A.D.3d 797, 818 N.Y.S.2d 488 (2nd Dept. 2006). Counsel requested that the testimony be stricken or that a mistrial be granted. In response to defense counsel's argument, the court stated that the Cruz identification testimony was relevant and the prosecutor had the "obligation to prove beyond a reasonable doubt that both individuals were joined together." The trial court denied both requests.

At summation, the prosecutor then referenced the identification testimony as follows:

> "So, let's talk about those ID's and why when [the complainant] stands here in court and sits on that witness stand and tells you that that man is the man who held him down and covered his mouth[, that] is the man. How can you rely on that? Well, first of all, he's one for one, okay. He's one for one. And what I mean by that is he identified Mr. Cruz. And you heard testimony about the identification of Mr. Cruz at the scene shortly after the robbery. And he's one for one. We know he's accurate about that because Mr. Cruz has his property on him and he gets it back that night. So, he's one for one."

After summation, the trial court reiterated its reasoning as to the Cruz identification, stating "I believe that in this particular case the introduction of evidence concerning the identification of the co-defendant was appropriate [...] After all, the complainant's ability to observe and remember were crucial issues in this particular case."

In my opinion, the trial court erred in allowing the introduction of testimony as to complainant's identification of Cruz, and defendant's objections at trial as detailed above fully preserve the issue for appellate review. Since the defendant

objected to the complainant's identification of Cruz on precisely the same grounds as he now offers on appeal, the defendant made his position clearly known to the court. See People v. Gray, 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 175, 652 N.E.2d 919, 921 (1995). Moreover, the court had an opportunity, and indeed took the opportunity, to adjudicate the issue on the merits. Hence, the objection to the bolstering identification was properly preserved. See People v. Jean-Baptiste, 38 A.D.3d 418, 420, 833 N.Y.S.2d 31, 34 (1st Dept. 2007), lv. denied, 9 N.Y.3d 877, 842 N.Y.S.2d 789, 874 N.E.2d 756 (2007).

Further, in my opinion, the defendant correctly asserts that the admission of evidence of a witness's identification of an accomplice not on trial is an error because the prosecutor, in explaining the relevance of the Cruz identification testimony to the jury, used precisely that prejudicial logic that constitutes the basis for preclusion of third-party identification testimony.

It is well settled that the admission of evidence of a witness' identification of an accomplice not on trial is improper since it is not relevant to any material issue and cannot be used as a basis for evaluating the accuracy of that witness identification of the defendant on trial. See People v. Monroe, 40 N.Y.2d at 1098, 392 N.Y.S.2d at 395; People v. Rosario, 127 A.D.2d 209, 215, 514 N.Y.S.2d 362, 365 (1st Dept. 1987), lv. denied, 70 N.Y.2d 655, 518 N.Y.S.2d 1049, 512 N.E.2d 575 (1987) (a complainant's "ability to identify one perpetrator is not necessarily probative of the accuracy of his identification of

another").

Specifically in this case, such identification testimony was improper bolstering as clearly seen in the prosecutor's summation that because the complainant correctly identified the man who had complainant's cell phone in his pocket, then he was necessarily correct in his identification of the defendant as the second man involved in the robbery. Indeed, the People concede in their brief that in the summation they used the complainant's identification of Cruz to "improperly bolster" the complainant's identification of the defendant.

Moreover, I do not agree that, in this case, bolstering was harmless error. Cf. People v. Johnson, 57 N.Y.2d 969, 457 N.Y.S.2d 230, 443 N.E.2d 478 (1982); People v. Rosenberg, 46 A.D.3d 357, 848 N.Y.S.2d 56 (1st Dept. 2007); see also People v. Glenn, 52 N.Y.2d 880, 881, 437 N.Y.S.2d 298, 298, 418 N.E.2d 1316, 1317 (1981) (a court may uphold the conviction, notwithstanding a clear error, where the proof of guilt is "overwhelming").

The only direct evidence linking the defendant to the robbery was the complainant's identification testimony. He was the sole eyewitness. At trial, the police officer who stopped the defendant on the street acknowledged that he did so solely because the defendant was running, late at night. The evidence of the command log completed by the desk officer showed that the defendant was stopped at Park Avenue and 103rd, and that the alleged accomplice was stopped at Park and 104th - a block apart.

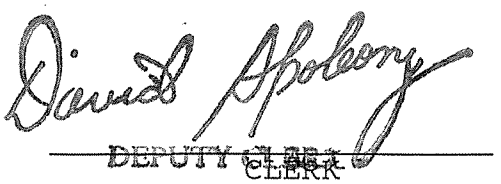
Moreover, the defendant was not found to be in possession of any item that was taken from the complainant during the robbery.

Additionally, testimony at the hearing adduced that prior to the showup identification, the complainant could not give any detailed physical description of the assailants. He testified that he was walking home wearing headphones; that he was surprised by the attack and that the robbery lasted less than one minute after which the assailants walked away with their backs to the victim. Indeed, the complainant's subsequent description at the independent source hearing that the defendant was wearing a white t-shirt and was in his early 20's was controverted at trial when it was established that the defendant was wearing a dark shirt and was nearly 40 years old at the time of his arrest for the robbery.

For all the foregoing reasons, I believe that, since there were reasons for the jury to doubt the accuracy of the complainant's identification of the defendant, and because the identification was the critical piece of evidence, the improper bolstering by the People constitutes reversible error. I would therefore vacate the judgment and remand for a new trial.

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

ENTERED: DECEMBER 29, 2009



DEPUTY CLERK

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

651 David Cucinotta, Index 101060/05
Plaintiff, 591111/06

-against-

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

Northside Realty Corporation,
Defendant-Respondent,

Meriken Ltd., etc.,
Defendant-Appellant.

[And a Third-Party Action]

Marshall Conway Wright & Bradley P.C., New York (Leonard Steven Silverman of counsel), for appellant.

Epstein & Rayhill, Elmsford (Russell Monaco of counsel), for Northside Realty Corporation, respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 19, 2008, which denied defendant-tenant Meriken Ltd.'s motion for summary judgment dismissing the complaint and defendant-owner Northside Realty Corp's cross claim as against it and granted defendant Northside's cross motion for common-law and contractual indemnification against Meriken to the extent of holding Meriken liable for all damages, including defense costs incurred by Northside arising from Meriken's failure to procure insurance naming Northside as an additional insured, unanimously modified, on the law, to grant Meriken's motion to dismiss the cross claims for common-law and contractual indemnification as against it, and to direct a trial of Northside's damages arising from Meriken's failure to procure insurance, and otherwise

affirmed, without costs. Appeal from so much of the order as denied Meriken's motion for summary judgment dismissing the complaint as against it, unanimously dismissed.[1]

Plaintiff was allegedly injured on August 21, 2004 when he tripped and fell on an allegedly defective sidewalk abutting the premises located at 162 West 21st Street, New York. The premises was owned by Northside, and leased by Meriken (the restaurant), pursuant to a lease agreement (lease) and a rider to the lease (rider) dated July 7, 2004.

Section 4 of the lease required Meriken to make all nonstructural repairs to the sidewalks. Paragraph 43(a) of the rider assigned responsibility to Meriken for, inter alia, structural repairs to the premises which arose from its negligence or misconduct or from a breach of any obligation or covenant to be performed by it under the lease. Further, paragraph 52 of the rider identified with specificity the restaurant's responsibilities regarding floors and sidewalk as follows:

> "[Restaurant] shall keep the floors of the [p]remises and the sidewalk in front thereof, and extending 18 inches into the street, free and clean of snow, ice, dirt, debris and other foreign matter and will, at its sole cost and expense, make suitable arrangements to dispose of all waste and rubbish in compliance with all laws, regulations and ordinances pertaining thereto."

Paragraph 45(a) of the rider (indemnification provision)

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[1]In April 2009 there was a trial on the underlying case. Meriken was granted a directed verdict at the trial. Accordingly, the appeal is moot with respect to whether Meriken's motion for summary judgment dismissing the complaint against it was properly denied.

requires Meriken to indemnify Northside for claims arising from, relating to or in connection with:

> "(i) [Meriken's] use or occupancy of the Premises or the conduct of business in or management of the Premises or any work or thing whatsoever done or any condition created in or about the Premises during the term of this lease; (ii) any act or omission of [Meriken]...; and (iii) any default in the performance or observance of any of the terms, provisions, conditions, or covenants of this lease on [Meriken's] part to be observed or performed."

Paragraph 45(b) of the rider (insurance provision) required Meriken to, inter alia, obtain insurance in Northside's name independent of Meriken's management of the property, acts/omissions or its defaulting on requirements of the lease.

On January 13, 2005, plaintiff commenced this negligence action against, inter alia, Northside and Meriken. Northside cross-claimed against Meriken based upon Meriken's alleged negligence and contractual indemnification. On January 28, 2008, Meriken moved for summary judgment and sought dismissal of both plaintiff's action and of Northside's cross claims as to indemnification. Northside cross-moved for indemnification and defense pursuant to the terms of the lease.

By order entered on May 19, 2008, the motion court (1) denied Meriken's motion for summary judgment against both plaintiff and Northside and (2) granted Northside's cross motion "only to the extent that defendant [Meriken] shall be liable for all damages, including the costs of defending the lawsuit as against Northside, which arise from its failure to procure insurance naming Northside as an additional insured."

On appeal, Meriken contends that the motion court, in

granting Northside's cross motion for summary judgment based upon Meriken's contractual failure to list Northside as an additional insured, incorrectly held that the measure of damages to Northside was "all damages, including the costs of defending the lawsuit." Instead, Meriken contends that Northside is only entitled to the full cost of insurance to Northside including premiums paid and any out-of-pocket costs incidental to obtaining such insurance that might have been incurred. Meriken also argues that since there is no evidence that the alleged defect was caused by its negligence or misconduct, it should not be responsible for indemnity under the contract or common law. For the reasons set forth below, we agree and modify.

At the outset, we find that Meriken met its burden of establishing that the lease and rider did not shift responsibility for the structurally defective concrete slab on the sidewalk from Northside to Meriken (*see* Administrative Code of the City of New York § 7-210). Moreover, the record does not raise any triable issues of fact with respect to whether the condition of the sidewalk was due to any acts of negligence on Meriken's part (*Berkowitz v Dayton Constr.*, 2 AD3d 764 [2003]; cf. *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 154 [1973]). Meriken therefore was entitled to summary judgment dismissing Northside's cross claims for common-law and contractual indemnification against it insofar as those claims are premised on the indemnification provision of the rider (*see Berkowitz* at 765-766).

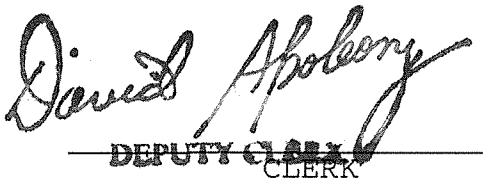
However, to the extent Northside's cross claims are premised on Meriken's undisputed failure to obtain insurance naming Northside as an additional insured, pursuant to the insurance provision of the rider, we find that the motion court correctly granted Northside's cross motion. In *Inchaustegui v 666 5th Ave. Ltd. Partnership* (268 AD2d 121 [2000], *affd* 96 NY2d 111 [2001]), this Court addressed the damages recoverable by a landlord for a subtenant's breach of a sublease provision requiring the subtenant to procure liability insurance covering the landlord after the landlord was sued for personal injuries covered under its policy. Notably, in *Inchaustegui*, the landlord had procured its own insurance. We held that the damages were limited to the landlord's costs of purchasing substitute insurance and other out-of-pocket expenses arising from the liability claim not covered by the substitute insurance, such as any deductibles or any increase in premiums resulting from the liability claim (*Inchaustegui* at 127).

In this Court, Meriken alleges for the first time, in mitigation, that Northside itself purchased insurance equivalent to that which Meriken was contractually obligated to procure. Thus, citing *Inchaustegui*, Meriken contends that the measure of damages is limited to the cost of Northside's insurance, including premiums paid and any out-of-pocket costs incidental to obtaining such insurance that might have been incurred. Although Northside does not deny that it obtained such insurance, the record does not indicate that this allegation was before the

motion court. Therefore, the appropriate measure of damages must be determined upon proper proof at trial.

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

ENTERED: DECEMBER 29, 2009



DEPUTY CLERK

CLERK

Saxe, J.P., Sweeny, Moskowitz, Richter, JJ.

1128N Barry Jacobson, et al., Index 105923/06
Plaintiffs-Appellants,

-against-

McNeil Consumer & Specialty Pharmaceuticals, etc., et al.,
Defendants,

G.D. Searle & Co., et al.,
Defendants-Respondents.

The Brualdi Law Firm, P.C., New York (Michael B. Brualdi of counsel), for appellants.

Nixon Peabody LLP, Jericho (Santo Borruso of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered February 13, 2009, which, to the extent appealed from, denied plaintiffs' motion to amend their first amended complaint, to extend their time to complete fact discovery, and to compel defendants to respond to their second set of requests for production of documents, unanimously reversed, on the law and the facts, without costs, the motion granted, the second amended complaint, in the form submitted on the motion, is deemed served and filed as of the date of this decision, and defendants directed to answer the second amended complaint within 20 days hereof.

On March 30, 2004, plaintiffs' nine-year-old daughter had two seizures and was brought to NYU-Tisch Hospital, where she was diagnosed with a brain tumor and hydrocephalus. Surgery was performed the next day to remove the tumor, but the child

continued to have seizures thereafter. Her doctors prescribed Dilantin, an anticonvulsant, and several medications to treat the pain. On April 26, the child was transferred to the Rusk Institute of Rehabilitation Medicine. While there, the child continued to receive Dilantin and was prescribed additional medications including Flagyl and Children's Motrin. On or about May 6, the child developed a rash and fever and was readmitted to Tisch Hospital for treatment, where she was diagnosed with Stevens-Johnson Syndrome (SJS), which later progressed into Toxic Epidermal Necrolysis (TEN). Both conditions are characterized by rashes, blisters and large areas of skin peeling off. On May 12, the child was transferred to the burn unit at Cornell Medical Center for further treatment. Over the course of the next 21 days, her condition continued to deteriorate. On June 2, 2004, the child died of TEN, complicated by multi-organ failure.

On May 1, 2006, plaintiffs commenced this wrongful death action against G.D. Searle & Co., Pharmacia Corp., Pharmacia & Upjohn Company, Pfizer (collectively, the Pfizer defendants), and McNeil Consumer & Specialty Pharmaceuticals. On May 9, 2006, plaintiffs filed an amended complaint adding John Doe corporations, physicians and health care providers as parties. Both the initial and first amended complaints alleged that Flagyl and Children's Motrin, manufactured by the named defendants, caused the child to develop to SJS/TEN, which ultimately caused her death.

On or about September 4, 2008, plaintiffs retained new

counsel. Promptly thereafter, on September 15, the new attorneys moved to amend the first amended complaint to add Dilantin, a drug manufactured by the Pfizer defendants, to the claims already made about Flagyl and Children's Motrin. The proposed second amended complaint did not seek to add any new defendants. The motion to amend was denied, and this appeal ensued.

CPLR 3025(b) specifies: "A party may amend his pleading . . . at any time by leave of court," and "leave shall be freely given upon such terms as may be just." Accordingly, leave to amend a complaint to add an additional theory of liability is generally granted when the defendants were placed on notice of such theory by the allegations in the initial complaint, such that the defendants cannot establish that they will be prejudiced by the amended complaint (*Panto v J & M Salvage Co.*, 157 AD2d 582, [1990]). If the amended complaint includes time-barred claims, these claims are deemed to have been interposed at the time of the initial complaint when the initial complaint gave notice of the series of occurrences to be proved pursuant to the amended complaint (*id.*; CPLR 203[f]).

In the initial and amended complaints, plaintiffs' allegations arise out of the child's postoperative treatment from March 31 through June 2, 2004. Both the initial and the first amended complaints specifically alleged facts related to the use of Dilantin, and both complaints noted that "on March 31, 2004 . . . [the child's] postoperative course was complicated by seizures, which required the use of Dilantin." All versions of

the complaint mentioned that the child's "medications upon admission [to the Rusk Institute] on April 26, 2004 included Colace, Dilantin, Pepcid, Decadron, Tylenol, and Proventil," and that "by April 29, 2004 . . . [t]he Dilantin was reduced to sub-therapeutic levels." The second amended complaint did not allege any new facts or occurrences, but merely set forth an additional legal theory, namely, that Dilantin was another possible cause of the child's development of SJS/TEN. As such, we conclude that the initial pleading provided sufficient notice of the series of occurrences from which the Dilantin claims arise.

The Pfizer defendants have not established that they would be prejudiced by allowing the second amended complaint. When plaintiffs moved to amend the complaint a second time in September 2008, fact discovery was still being conducted, the deadline to complete expert depositions was eight months away, the deadline to file a note of issue was nine months away, and no trial date had yet been set. Upon the filing of the second amended complaint, it does not appear that the Pfizer defendants will have to request significant additional records because the Dilantin claims are based upon the same medical records as plaintiffs' Flagyl and Children's Motrin claims. Notably, the record indicates that all of these records were previously obtained by defendants. Likewise, the record indicates that Pfizer has been repeatedly sued regarding Dilantin such that Pfizer went so far as to establish a "Dilantin settlement program." As such, the Pfizer defendants are already aware of

the potential issues concerning this drug and can easily compile the necessary documents to respond to plaintiffs' Dilantin-based discovery requests. Moreover, the need for additional discovery does not constitute prejudice sufficient to justify denial of an amendment (*Rutz v Kellum*, 144 AD2d 1017, 1018 [1988]).

The Pfizer defendants' contention that plaintiffs and the treating medical staff will have difficulty remembering the pertinent facts regarding Dilantin is illogical, given that the claims regarding Flagyl and Children's Motrin involved the same set of facts, namely, the child's postoperative treatment. Indeed, the record contains excerpts of deposition testimony from plaintiffs and the child's principal treating physicians that specifically discuss when the child received doses of Dilantin, and that drug's known association with SJS/TEN.

The Pfizer defendants also contend that they will have to alter their defense strategy to address the Dilantin claims. We reject that argument. Prejudice does not occur simply because a defendant is exposed to greater liability (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]) or because a defendant has to expend additional time preparing its case (*Rutz*, 144 AD2d at 1018). Rather, prejudice occurs when the party opposing amendment "has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis*, 54 NY2d at 23).

In the absence of prejudice, plaintiffs' delay in seeking to amend a second time is not a sufficient reason to deny

the amendment (*Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 [2001]; *see also Masterwear Corp. v Bernard*, 3 AD3d 305, 306 [2004]). Plaintiffs and their current counsel offered a reasonable excuse for their delay, noting that it was a result of an oversight by a previous attorney (*see Carte v Segall*, 134 Ad2d 397 [1987]; *see also Di Simone v Good Samaritan Hosp.*, 100 NY2d 632 [2003]). This oversight was promptly rectified by plaintiffs' current counsel as soon as they came into the case.

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

ENTERED: DECEMBER 29, 2009

DEPUTY CLERK
CLERK

Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1335 Martin Carlin, Index 113396/07
Plaintiff-Appellant,

-against-

Stephan Jemal, etc, et al.,
Defendants-Respondents.

Jan Ira Gellis P.C., New York (Jan Ira Gellis of counsel), for appellant.

Karson & Long LLP, New York (Stephen P. Long of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 28, 2009, which denied plaintiff's motion for summary judgment seeking enforcement of a promissory note made by defendants Stephan Jemal, individually, and SSJ Development, LLC, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for further proceedings, including the calculation of appropriate attorneys' fees, costs, and interest.

Regardless of whether plaintiff is a "holder in due course" (*see* UCC 3-302), a mere "holder" (see UCC 1-201[20]), or only an "assignee" or "transferee" (*see National Bank of N. Am. v Flushing Natl. Bank*, 72 AD2d 538, 539 [1979]; *Phoenix Global Ventures, LLC v Phoenix Hotel Assoc., Ltd.*, 10 Misc 3d 1066[A] [Sup Ct, NY County 2006]), he has standing to bring this action (*see* UCC 3-201, 3-301, 3-305, 3-306; *National Fin. Co. v Uh*, 279 AD2d 374 [2001]). The record, including the unrefuted testimony of the original named payee of the note and of plaintiff,

establishes that, at the very least, plaintiff took the note as assignee prior to commencement of the action.

Even if plaintiff is not a holder in due course, but only a holder or assignee/transferee, and thus subject to all defenses (*see* UCC 3-306; *National Bank of N. Am.*, 72 AD2d at 539), he is entitled to summary judgment, since defendants failed to raise a triable issue of fact regarding their proffered defenses.

With respect to the defense of oral modification of the repayment terms, the note contained an express provision requiring that any modification thereof be in writing to be enforceable, the integrity of which is protected by General Obligations Law § 15-301(1) (*see DFI Communications v Greenberg*, 41 NY2d 602, 606-607 [1977]). There is no evidence in the record of partial performance by plaintiff or defendants that is unequivocally referable to either of the two oral modifications alleged by defendants (*see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 [1977]; *Fairchild Warehouse Assoc. v United Bank of Kuwait*, 285 AD2d 444, 445 [2001]). Neither defendants' failure to pay on the due date nor plaintiff's apparent failure to demand immediate payment constitutes partial performance, because neither is unequivocally referable to the alleged oral modifications, as there may have been other explanations for such decisions (*see e.g. National Westminster Bank USA v Vannier Group*, 160 AD2d 348, 349-350 [1990]). There is also no evidence in the record that defendants changed their position in any way or relied to their detriment on any oral modification so as to

estop plaintiff from asserting the absence of a writing and enforcing the original June 1, 2007 maturity date (*see id.*).

The defense of lack of consideration is equally unsupported by the record. Contrary to defendants' contention, plaintiff was not required to demonstrate that there was adequate consideration for the note. Since plaintiff met his initial burden of demonstrating entitlement to recovery on the note by submitting proof of the note and defendants' default thereon, and defendants have not challenged the authenticity of their signatures on the note, the burden then shifted to defendants to demonstrate lack of consideration as a defense (*see* UCC 3-307[2]; *DiMarco v Bombard Car Co., Inc.*, 11 AD3d 960 [2004]). Defendants make only conclusory allegations that the loan was not fully funded, and fail to offer any evidence, documentary or otherwise, to substantiate that allegation. Moreover, their concession that at least some portion of the loan was funded defeats their defense of lack of consideration (*see Laham v Bahia Mehmet Bin Chambi*, 299 AD2d 151, 152 [2002]), particularly where, as here, the note is "clear, complete and unambiguous" on its face and recites that it was executed for value (*DiMarco*, 11 AD3d at 961 [internal quotation marks and citation omitted]).

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

ENTERED: DECEMBER 29, 2009

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1423 In re Verizon New York, Inc., Index 117078/07
Petitioner-Respondent,

-against-

Environmental Control Board
of the City of New York, et al.,
Respondents-Appellants.

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

Debevoise & Plimpton LLP, New York (Jyotin Hamid of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), entered August 28, 2008, vacating 112 notices of violation (NOV) issued to petitioner by respondent Department of Information Technology and Telecommunications (DoITT), and directing remission of fines paid by petitioner, unanimously affirmed.

DoITT's rule on public pay telephones (67 RCNY 6-05) conflicts with the authorizing statute (New York City Administrative Code § 23-408) (*see Matter of Jones v Berman*, 37 NY2d 42, 53 [1975]). Section 23-408(b) provides that a pay phone owner may be cited for a violation in two circumstances: when the owner "repeatedly fails to provide phone services from a public pay telephone for any sustained period of time," or "fails to provide coinless twenty-four hour 911 service from such public pay telephone." Section 6-05(a) of the City Rules requires 24-hour access to 911 service from any public pay phone, and section 6-05(e)(1) states that a pay phone owner may be cited for failure

to provide coinless 911 access when a phone is found to be fully inoperable "on two occasions within a period no shorter than twenty-four hours." If a phone is thus found to lack a dial tone over a 24-hour period (as was the case with most of the NOVs issued herein), the rule provides that the owner of the pay phone may be cited under the regulation for a 911 violation.

Section 6-05(a) thus effectively eliminates the Administrative Code's requirement that a failure to provide phone services be "repeated" and "sustained" before a violation can be issued for that condition. Instead, under the rule, pay phones out of service for as brief a period as 24 hours may be cited for a violation. The administrative rule disregards the distinction, set forth in the City Council's Code enactment, between an inoperability condition (which must be repeated and sustained) and a 911 violation (which may be issued in 24 hours).

DoITT's interpretation of section 23-408(b) of the Administrative Code, in light of section 6-05, disregards legislative history and the practical reality that general serviceability of pay phones and coinless access to 911 are separate issues having different causes and warranting different levels of regulation. The history of pay phone legislation in New York reflects that inoperability and the failure of otherwise operable phones to provide coinless access to 911 have been considered separate and distinct problems. In the early 1980s, certain pay phone service providers, known as Customer Owned Currency Operated Telephones (COCOT), sometimes programmed their

phones to block coinless 911 calls. This prompted the State Legislature in 1990 to enact section 92-c(7) of the Public Service Law, which provides that "No . . . COCOT service provider shall restrict access . . . to any emergency telephone number, including, where available, 911."

The fact that section 23-408(b) of the Administrative Code requires an inoperability condition to be "repeated" and "sustained" before an NOV is issued, while setting forth an unqualified prohibition against blocking coinless access to 911, reflects that the two issues have separate causes and warrant different levels of regulation. Because coinless access to 911 is centrally programmed, it makes sense to issue a 911 violation whenever such access is blocked by the owner, regardless of whether access is blocked repeatedly or for a sustained period of time. On the other hand, maintaining the operability of thousands of pay phones against vandalism, theft, weather conditions and other circumstances is a demanding challenge, which is why section 23-408(b) authorizes issuance of an NOV for an inoperability condition only if that condition is "repeated" and "sustained." Section 6-05 of the City Rules, which permits the agency to issue an NOV for a 911 violation whenever a pay phone becomes inoperable for any reason and is not repaired within 24 hours, not only conflicts with the language of section

23-408(b), but erases the distinction between the two very different problems the City Council addressed separately in enacting that section.

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

ENTERED: DECEMBER 29, 2009

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1874 Elizabeth Frances Kerrigan, as Executrix of the Estate of Thomas Connelly, etc., et al., Plaintiffs-Respondents-Appellants, Index 100316/08

-against-

RM Associates, Inc., etc., et al., Defendants-Appellants-Respondents,

Tri-City Insurance Brokers, Inc., etc., et al., Defendants,

Ace INA, et al., Defendants-Respondents.

Milber Makris Plousadis & Seiden, LLP, Rochelle Park, NJ (Debra Miller Krebs of counsel), for appellants-respondents.

B. Jennifer Jaffee, New York, for respondents-appellants.

Nixon Peabody LLP, New York (Aidan M. McCormack of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 12, 2008, which, in an action seeking, inter alia, a declaration that plaintiff Estate of Thomas Connelly is covered under an excess insurance policy issued by defendant Westchester Fire Insurance Company, inter alia, granted Westchester's motion to dismiss plaintiffs' cause of action for breach of contract insofar as asserted against it, and denied the motion by the broker defendants (collectively, Omni) to dismiss the breach of contract and negligent misrepresentation claims insofar as asserted against them, unanimously modified, on the law, to reinstate plaintiffs' cause of action for breach of contract insofar as asserted against

Westchester, to declare that the subject excess policy issued by Westchester covers the Estate of Thomas Connelly, and to dismiss, as academic, plaintiffs' remaining causes of action against Omni, and otherwise affirmed, without costs.

It appears that Connelly was killed in a construction site accident; that his estate brought the underlying action against, among others, various contractors at the site, alleging, inter alia, that Connelly had entered into an agreement with Erin Erectors (Erin), the Estate's co-plaintiff herein, to provide work, labor and services at the site; that one of the contractors counterclaimed against the Estate for contractual indemnification; and that plaintiffs and Westchester dispute whether Connelly was covered under Westchester's excess policy, and thus whether his Estate is entitled to indemnification under that policy. It further appears that Westchester's excess policy lists Erin as the only "Named Insured," and defines the term "Insured" to include, at Erin's option, any person, other than Erin, "included as an additional insured" in the underlying comprehensive general liability insurance; and that the underlying CGL policy lists Erin, Connelly and a company called Erin Interiors as the named insureds, and lists no additional insureds.

Plaintiffs argue that Connelly was an "additional insured" within the meaning of Westchester's excess policy by virtue of his being a named insured in the underlying CGL policy. The motion court rejected that argument, holding that the "[t]he

terms additional insured and named insured are not synonymous in the [underlying] CGL policy," and that because Connelly was listed as a named insured in the CGL policy, not an additional insured, he was not covered under the excess policy. We disagree because, as plaintiffs and Omni accurately point out, the term "additional insured" is nowhere defined in either the underlying or excess policy. Absent such definition, Westchester's excess policy should be interpreted based on "common speech" (*Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]) and "the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract" (*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 457 [2005] [internal quotation marks omitted]). Under an ordinary interpretation of an ordinary business contract, the term "additional insured" in the excess policy would be understood to mean anyone other than the "Named Insured" in the excess policy (i.e., Erin) who is insured under the underlying CGL policy (i.e., Connelly and Erin Interiors) (*see St. Paul Fire & Mar. Ins. Co. v American Intl. Specialty Lines Ins. Co.*, 365 F3d 263, 277 [2004]). Such interpretation, we would add, is not inconsistent with the well-understood meaning of "additional insured" as "an entity enjoying the same protection as the named insured" (*Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003] [internal quotation marks omitted]). The cases cited by the motion court (*General Sec. Prop. & Cas. Co. v American Fleet Mgt., Inc.*, 37 AD3d 345 [2007], *affg* 10 Misc 3d

1075[A], 814 NYS2d 890, 2005 NY Slip Op 52244[U] [2005], *affd* 37 AD3d 345 [2007]; *Wausau Underwriters Ins. Co. v QBE Ins. Corp.*, 496 F Supp 2d 357 [2007]), which draw distinctions between additional insureds and named insureds by differentiating between their obligations to pay deductibles or give notice to the insurer, do not require a finding that an ordinary businessperson would be mindful of these distinctions in entering into an ordinary business contract.

As the Estate is covered under the excess policy, Omni cannot be held liable for failing to obtain the appropriate coverage, and, accordingly, the remaining claims asserted against Omni are dismissed as academic.

Westchester's argument urging dismissal of the action as against certain of its apparently affiliated entities is raised for the first time on appeal, and we accordingly do not consider it.

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

ENTERED: DECEMBER 29, 2009

DEPUTY CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1875 Eirit Simantov, Index 13165/07
Plaintiff-Respondent,

-against-

Kipps Taxi, Inc., et al.,
Defendants-Appellants.

Mead, Hecht, Conklin & Gallagher, LLP, Mamaroneck (Elizabeth M. Hecht of counsel), for appellants.

Gary B. Pillersdorf & Associates, P.C., New York (Heidi L. Wickstrom of counsel), for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered July 14, 2009, which denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants failed to make a prima facie showing of entitlement to judgment as a matter of law. The range of motion findings of defendants' neurologist, who had not reviewed any of plaintiff's medical records, were not probative since they were not stated to be based on objective tests (*see Linton v Nawaz*, 62 AD3d 434, 438-439 [2009]; *Glynn v Hopkins*, 55 AD3d 498 [2008]), and their radiologist failed to address a number of the injuries

claimed in the bill of particulars (*see Menezes v Khan*, __ AD3d __, 2009 NY Slip Op 7991 [2d Dept 2009]; *Delayhaye v Caledonia Limo & Car Serv., Inc.*, 61 AD3d 814, 815 [2009]). Furthermore, defendants only addressed plaintiff's claimed 90/180 day disability in reply (*see Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1992]).

Defendants' failure to meet their initial burden of establishing a prima facie case renders it unnecessary to consider plaintiff's opposition to the motion (*see Offman v Singh*, 27 AD3d 284 [2006]).

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

ENTERED: DECEMBER 29, 2009

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1876 In re Marvin M.,

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

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

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

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about February 23, 2009, which adjudicated appellant a juvenile delinquent, upon a finding that he committed acts which, if committed by an adult, would constitute the crimes of criminal trespass in the third degree and resisting arrest, and placed him with the Office of Children and Family Services for 12 months, unanimously modified, on the law, to the extent of vacating the finding as to criminal trespass in the third degree, dismissing that count of the petition and remanding for a new dispositional hearing, and otherwise affirmed, without costs.

The court's finding as to resisting arrest was based on legally sufficient evidence and was not against the weight of the evidence. The evidence established that appellant entered the lobby of a school where he was not a student and, after being told to leave, unlawfully remained and then resisted arrest by struggling. The arrest was lawful, because it was based on

probable cause to believe defendant was "in violation of a personally communicated request to leave the premises from a principal, custodian or other person in charge thereof" (Penal Law § 140.10[c]). There is no record support for appellant's assertion that the lobby was open to the public.

However, the criminal trespass finding was based on insufficient evidence because the petition limited the presentment agency's theory to trespass on school property "in violation of conspicuously posted rules or regulations governing entry and use thereof," pursuant to Penal Law § 140.10(b), and there was no evidence regarding posted rules or regulations. The supporting deposition did not cure this defect so as to afford appellant sufficient notice of this charge, and the presentment agency never sought to amend the petition.

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

ENTERED: DECEMBER 29, 2009

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1878 The People of the State of New York, Ind. 4307/07
Respondent,

-against-

Lawrence Mendez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Andrew I. Gerber of counsel), for respondent.

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered July 7, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously reversed, on the law, the motion to suppress granted and the indictment dismissed.

The arresting officer's observations warranted a common-law inquiry into whether defendant was carrying an illegal gravity knife, but they did not provide reasonable suspicion of criminality warranting a seizure. The officer testified that he saw a portion of a knife handle and a clip on defendant's pocket, leading him to believe that it was a folding knife. When the officer asked defendant "if he had anything on him that he shouldn't have" such as a "knife or a gun," defendant, who was not engaged in any suspicious behavior, said he had a knife. The officer did not see any characteristics of an illegal type of knife, and testified, in essence, that the only reason he

suspected the knife might be a gravity knife is that any folding knife could, upon inspection, turn out to be a gravity knife. While the officer could have lawfully asked to see the knife, he lacked reasonable suspicion justifying a seizure (*compare People v Fernandez*, 60 AD3d 549 [2009] [officer had reasonable suspicion where observed item was "at least likely to be a gravity knife"]). We have considered and rejected the People's remaining arguments.

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

ENTERED: DECEMBER 29, 2009

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1880 The People of the State of New York, Ind. 4026/08
Respondent,

-against-

Robert Harmon,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman 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 May 7, 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: DECEMBER 29, 2009

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

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1881 In re Anne Baldwin, Index 400571/08
Petitioner,

-against-

Tino Hernandez, as Chairman and Member of the New York City Housing Authority,
Respondent.

Bushwick Housing & Legal Assistance, Brooklyn (Stephen S. Burzio of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Corina L. Leske of counsel), for respondent.

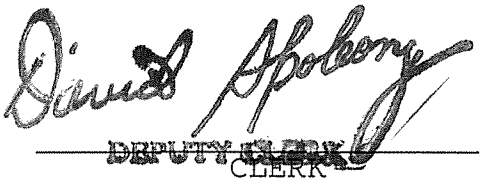
Determination by the Housing Authority, dated November 28, 2007, which permanently excluded petitioner's son from her public housing apartment, unanimously confirmed, the petition denied, and this proceeding, transferred to this Court under CPLR 7804(g) by order of Supreme Court, New York County (Marylin G. Diamond, J.), entered August 7, 2008, dismissed, without costs.

The conditioning of petitioner's continued tenancy on exclusion of her son for non-desirability is supported by substantial evidence, and was not arbitrary and capricious (*see Matter of Canales v Hernandez*, 13 AD3d 263 [2004]). Where this petitioner's son had pleaded guilty to the assault of a female, threatened two Housing Authority employees, and left harassing messages on the home telephone of his former supervisor, the penalty of continued tenancy conditioned on his exclusion was appropriate and was not shocking to the conscience (*see Matter of Featherstone v Franco*, 95 NY2d 550 [2000]).

The hearing officer's grant of additional time for the Housing Authority to submit a written closing statement caused no prejudice to petitioner. Furthermore, the issuance of a decision within one week after receipt of the parties' submissions was not contrary to the Housing Authority's Termination of Tenancy Procedures, which require a reasonably timely decision. Petitioner was not deprived of due process.

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

ENTERED: DECEMBER 29, 2009



DEPUTY CLERK

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

1882 Dart Mechanical Corp., Index 116018/06
Plaintiff-Appellant,

-against-

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

Tunstead & Schechter, Jericho (Michael D. Ganz of counsel), for appellant.

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

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered October 16, 2008, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to meet its heavy burden of establishing that the 32-month delay in the construction project falls within an exception to the rule that a "no damages for delay" clause in a construction contract such as the instant contract will be enforced (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297 [1986]; *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377 [1983]; *North Star Contr. Corp. & Tern Star v City of New York*, 203 AD2d 214 [1994]).

The record shows that the primary responsibility for the delay lay with another contractor, that defendants retained a construction manager and a scheduling consultant to set and maintain a schedule for completion, that regular progress and scheduling meetings were held, and that defendants and their

representatives repeatedly requested that the delinquent contractor adhere to the schedule and perform the necessary work. This evidence raises no issue of fact as to defendants' bad faith or gross negligence (*see Kalisch-Jarcho*, 58 NY2d at 385-386; *Norelli & Oliver Constr. Co. v State of New York*, 30 AD2d 992 [1968], *affd* 32 NY2d 809 [1973]). Nor was the delay uncontemplated, as evidenced by several contract provisions (*see Corinno Civetta*, 67 NY2d at 309-310; *Buckley & Co. v City of New York*, 121 AD2d 933, 933-934 [1986], *lv dismissed* 69 NY2d 742 [1987]). Further, plaintiff failed even to allege any breach of a "fundamental, affirmative obligation" expressly imposed on defendants (*see Corinno Civetta* at 313).

Moreover, plaintiff waived any claim for delay damages by failing to strictly comply with the contract's notice provisions (*see MRW Constr. Co. v City of New York*, 223 AD2d 473 [1996], *lv denied* 88 NY2d 803 [1996]). Its submission of a detailed delay claim in connection with its request for final payment nearly one year after substantial completion of its work under the contract cannot act to revive its already waived claims for delay damages.

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

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

ENTERED: DECEMBER 29, 2009

DEPUTY CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1884 The People of the State of New York, Ind. 848/07
Respondent,

-against-

John Vega,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered January 5, 2009, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

The court properly declined to submit manslaughter in the first and second degrees as lesser included offenses. There was no reasonable view of the evidence, viewed most favorably to defendant and in connection with his justification defense, that he acted with anything less than homicidal intent. Defendant inflicted 49 stab wounds, mostly to his victim's neck and chest. Of the 23 stab wounds to the victim's neck, 1 cut his carotid artery and 2 severed his jugular vein. The 20 wounds to the victim's chest and back included wounds that penetrated the heart, lung, liver and spleen. Notwithstanding the "principle of deference to the jury on questions of mens rea" (*People v Fernandez*, 64 AD3d 307, 310 [2009], *appeal withdrawn* 13 NY3d 796 [2009]), this conduct could only be interpreted as evincing a

deliberate design to ensure the victim's death, and there was no reasonable view that defendant acted recklessly or only with intent to cause serious physical injury (*see People v Butler*, 84 NY2d 627 [1994]).

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

ENTERED: DECEMBER 29, 2009

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1885 The People of the State of New York, Ind. 4783/07
Respondent,

-against-

Jose Encarnacion,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Michael Ambrecht, J. at plea; Robert Stolz, J. at sentence), rendered on or about February 4, 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: DECEMBER 29, 2009

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1886-
1887-
1888 Index 17904/03

Naziya Borrero, etc., et al.,
Plaintiffs-Appellants,

-against-

Juan Jose Baturone, M.D., et al.,
Defendants-Respondents,

Roy Lerner, M.D., et al.,
Defendants.

Grace and Grace, Yorktown Heights (William J. Grace of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Anna R. Mercado of counsel), for Juan Jose Baturone, M.D. and Gracie Square Hospital, respondents.

MacCartney, MacCartney, Kerrigan & MacCartney, Nyack (Catherine Friesen of counsel), for Joel Howard Fields, M.D., respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered September 29, 2008, which, in an action for prenatal injuries allegedly caused by defendants' medical malpractice, insofar as appealed from, granted defendant Fields's motion for summary judgment dismissing the complaint as against him, unanimously modified, on the law, to deny the motion insofar as the action is based on the prescription given to plaintiff mother for the drug Depakote, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about April 23, 2009, which granted plaintiffs' motion to reargue Dr. Fields's motion but, on reargument, adhered to the above order, unanimously dismissed, without costs, as moot. Order, same court and Justice, entered December 31, 2008, which granted the motion

of defendants Baturone and Gracie Square Hospital for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

In support of his summary judgment motion, Dr. Fields submitted the affirmation of Dr. Nass, who opined that the infant plaintiff's hypotonia was not caused by plaintiff mother's ingestion of either Depakote or Celexa. In opposition, plaintiffs submitted the affirmation of Dr. DiGregorio, who opined that the infant plaintiff's hypotonia was caused by plaintiff mother's ingestion of Depakote. In reply, Dr. Fields submitted another affirmation from Dr. Nass, who stated that one needs to take Depakote during one's entire pregnancy for the baby to be harmed.

We affirm the dismissal of so much of the action as is based on plaintiff mother's ingestion of Celexa because Dr. DiGregorio's affirmation, by mentioning only Depakote, effectively conceded that Celexa could not have caused the infant plaintiff's hypotonia. In dismissing so much of the action as is based on plaintiff mother's ingestion of Depakote, the motion court noted (1) Dr. DiGregorio's failure to address whether plaintiff mother's extremely limited use of Depakote was related to the infant plaintiff's hypotonia, and (2) the absence of evidence that the infant plaintiff was born with any of the fetal teratogenic effects that, according to Dr. DiGregorio, the medical literature associates with Depakote, such as a tall, narrow forehead or an epicanthic fold. However, because the

issue of short-term exposure was first raised only in Dr. Nass's reply affirmation, plaintiffs had neither the obligation nor opportunity to respond thereto (*see Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1992]). And Dr. DiGregorio did not say that one had to have any of the fetal teratogenic effects he mentioned in order to have hypotonia. Indeed, immediately after listing these effects, he went on to say that there are other abnormalities associated with prenatal use of Depakote, including limb abnormalities such as hypotonia. Dr. Nass's reply affirmation should be disregarded insofar as it states, for the first time, that in examining the infant, she found none of the "physical markers or symptoms which are found in cases where Depakote has affected a pregnancy."

Dr. Fields moved for summary judgment only on the ground that Celexa and Depakote did not proximately cause the infant plaintiff's hypotonia. By contrast, Dr. Baturone and Gracie Square Hospital moved for summary judgment on the additional ground that they had no duty to perform a blood test to determine if plaintiff mother was pregnant at the time of her admission to Gracie Square when a blood test performed the previous day at another hospital demonstrated that she was not pregnant. This summary judgment motion was properly granted. In opposition to Dr. Baturone and Gracie Square's motion, plaintiffs' evidence was

insufficient to raise a question of fact (*see Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 8-9 [2005]; *Jones v City of New York*, 32 AD3d 706, 707 [2006]).

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

ENTERED: DECEMBER 29, 2009

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1889 Gerard Malloy, et al., Plaintiffs-Respondents, Index 109054/05 113716/07

-against-

Stellar Management, et al., Defendants-Appellants.

[And a Third-Party Action]

Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Christopher Simone of counsel), for appellants.

Alexander J. Wulwick, New York, for respondents.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 16, 2008, following a jury trial, insofar as appealed from, as limited by the briefs, awarding plaintiffs $3,398,346.98 in damages and structuring the award in compliance with CPLR article 50-B, unanimously modified, on the law and the facts, to allow a collateral source reduction of $107,038 against damages awarded for past lost earnings, and otherwise affirmed, without costs.

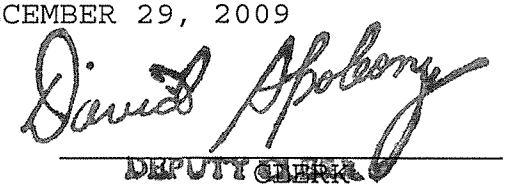
Plaintiff Gerard Malloy suffered spinal injury requiring fusion surgery and resulting in complications which include constant and severe pain. As conceded by plaintiff on appeal, the award for past lost earnings was subject to a collateral source reduction of $107,038 due to Social Security Disability (SSD) benefits paid to plaintiff prior to the entry of judgment (*see* CPLR 4545[c]). A collateral source offset for future SSD benefits was not warranted. Defendants did not meet their burden of showing that it is 'highly probable' that plaintiff will

continue to be eligible for benefits (*see id.*), as the record evidence demonstrates that his condition had improved and, although still primarily disabled, he was capable of performing some limited sedentary work (*see Ruby v Budget Rent A Car Corp*, 23 AD3d 257 [2005], *lv denied* 6 NY3d 712 [2006]; *Young v Knickerbocker Arena*, 281 AD2d 761 [2001]).

The discount rate adopted by trial court in structuring the judgment was adequately supported by plaintiff's expert's affidavit and was otherwise a proper exercise of discretion (*see Calaway v Metro Roofing & Sheet Metal Works*, 284 AD2d 285, 286 [2001]; *Reed v Harter Chair Corp.*, 196 AD2d 123, 127 [1994]). The trial court did not abuse its discretion by requiring the purchase of an annuity contract to secure periodic payment of future damages from an insurance carrier with an A+ rating (CPLR 5042).

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

ENTERED: DECEMBER 29, 2009



Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1890 Lon Silvers, etc., Claim No. 110663
Claimant-Appellant-Respondent,

-against-

State of New York, et al.,
Defendants-Respondents-Appellants.

Kenneth Cooperstein, Centerport, for appellant-respondent.

Andrew M. Cuomo, Attorney General, Albany (Michael S. Buskus of counsel), for respondents-appellants.

Order of the Court of Claims of the State of New York (Thomas H. Scuccimarra, J.), entered May 2, 2007, which, in an action seeking recoupment of money paid to the client of an insurance broker, denied the parties' respective motions for summary judgment, unanimously modified, on the law, to grant defendants' motion for summary judgment dismissing the complaint, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Claimant insurance broker seeks recoupment of money from defendant State Insurance Fund (SIF) that he was compelled to pay one of his clients after it was determined that he had negligently failed to obtain workers' compensation insurance for that entity's out-of-state employees (*see Electronic Servs. Intl. v Silvers*, 284 AD2d 367 [2001], *lv dismissed* 97 NY2d 700 [2002], *lv denied* 99 NY2d 508 [2003]). Although SIF has never sold out-of-state coverage, claimant maintains that one of SIF's field representatives advised him that the policy that he had acquired on behalf of his client would cover its out-of-state employees,

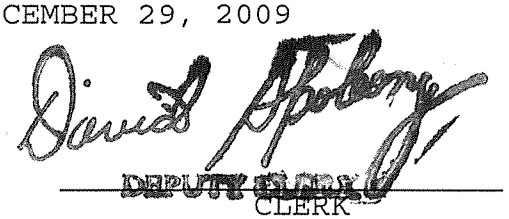
and the Court of Claims found the existence of triable issues of fact precluding summary judgment to either side. However, in the absence of any evidence that this field representative was authorized to speak for SIF with respect to coverage for out-of-state employees, any statement on his part is not an admission that can be received in evidence against the principal (*see Loschiavo v Port Auth. of N.Y. & N.J.*, 58 NY2d 1040 [1983]; *Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 221 [2007].

Furthermore, even assuming that such field representative could bind SIF by his statements to claimant, any reliance by claimant upon the representative's purported misrepresentations was unreasonable as a matter of law. "A claim for negligent misrepresentation requires the [claimant] to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the [claimant]; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Here, apart from the fact that the arm's-length business relationship, such as that between claimant and the field representative, is not generally considered to be of the sort of a confidential or fiduciary nature that would support a cause of action for negligent misrepresentation (*see e.g. Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 884 [2009]), claimant, as a sophisticated insurance broker, is unable to show any reasonable reliance upon the representative's alleged misrepresentations inasmuch as a broker

is presumed to have read, and have knowledge of, the insurance policy that is being procured on behalf of the insured (*see Western Bldg. Restoration Co., Inc. v Lovell Safety Mgt. Co., LLC*, 61 AD3d 1095, 1100 [2009]; *Greater N.Y. Mut. Ins. Co. v White Knight Restoration, Ltd.*, 7 AD3d 292 [2004]).

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

ENTERED: DECEMBER 29, 2009



DEPUTY CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1892 In re Krystal F., and Others,

Children Under the Age of
Eighteen Years, etc.,

Liza R.,
Respondent-Appellant,

Adalberto R.,
Respondent,

Commissioner of Administration
for Children's Services,
Petitioner-Respondent.

Kenneth M. Tuccillo, Hastings-On-Hudson, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for respondent.

Order, Family Court, New York County (Jane Pearl, J.), entered on or about January 27, 2009, which, insofar as appealed from, after a fact-finding hearing, found that respondent mother neglected the subject child Krystal F., unanimously reversed, on the law, without costs, the finding of neglect vacated and the petition dismissed as against respondent mother.

On or about March 12, 2009, the Family Court issued a dispositional order, placing custody of the child with her father, and no appeal has been taken from this order. Ordinarily, the right of direct appeal from an intermediate order terminates with entry of a judgment (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). However, this Court has jurisdiction to hear this appeal since "[a]n appeal from an intermediate or final order in a case involving abuse or neglect may be taken as of

right" (Family Court Act § 1112[a]); *but see Matter of Leah F.*, 61 AD3d 535 [1st Dept. 2009]).

The finding of neglect was not supported by a preponderance of the evidence (Family Court Act § 1012[f][i][B]; § 1046[b][i]).

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

ENTERED: DECEMBER 29, 2009

DEPUTY CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1893N Lynne Perry-Bottinger, Index 310354/07
Plaintiff-Appellant,

-against-

Erwin Bottinger,
Defendant-Respondent.
- - - - -
Frederic P. Schneider,
Non-party Respondent.

Dobrish Zeif Gross LLP, New York (Nina S. Gross of counsel), for appellant.

Warner Partners, P.C., New York (Rita W. Warner of counsel), for respondent.

Frederic P. Schneider, New York, pro se.

Order, Supreme Court, New York County (Harold Beeler, J.), entered October 15, 2008, which denied plaintiff's motion to disqualify the attorney for the children, unanimously affirmed, without costs.

The record supports the claim of the attorney for the children that the professional opinion he formed as to the impairment of the children, which reflected his unfavorable judgment of plaintiff's character and influence, was a result of his interactions with the parties during the course of his representation and his consideration of the conclusions in the forensic report and proof of plaintiff's conduct. His advocacy of the children's best interests based on that opinion was a proper exercise of his authority and does not form a basis for his disqualification (*see Matter of Carballeira v Shumway*, 273 AD2d 753 [2000], *lv denied* 95 NY2d 764 [2000]). We reject

plaintiff's contention that the attorney was impermissibly biased against her.

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

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

ENTERED: DECEMBER 29, 2009

DEPUTY CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1894N Carlos Lopez,
Plaintiff,

Index 22579/04
84852/05

-against-

Post Management LLC, et al.,
Defendants.

- - - - -

Post Management LLC, et al.,
Third-Party Plaintiffs,

-against-

Metcon Construction Corp.,
Third-Party Defendant,

Metcon Construction Management, LLC, et al.,
Third-Party Defendants-Appellants,

LEA Electrical Corp., et al.,
Third-Party Defendants-Respondents.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for appellants.

Goodman & Leopold, L.L.P, New York (Howard B. Leopold of counsel), for respondents.

Appeal from order, Supreme Court, Bronx County (Howard R. Silver, J.), entered October 22, 2008, which denied appellants' motion to reargue a prior order summarily dismissing third-party claims against respondents, unanimously dismissed as taken from a non-appealable paper, without costs.

No appeal lies from denial of reargument (*Kaminer v Wexler*,

40 AD3d 405 [2007], *lv dismissed* 9 NY3d 955 [2007]). The suggestion that the motion court effectively granted reargument and adhered to the prior ruling is without merit.

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

ENTERED: DECEMBER 29, 2009

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1895 The People of the State of New York, Ind. 3870/05
Respondent,

-against-

Cathy Meller,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Lindsey M. Kneipper of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J. at motions; Arlene R. Silverman, J. at plea and sentence), rendered April 6, 2007, convicting defendant of criminal possession of a controlled substance in the fourth degree, and sentencing her to a term of 5 years' probation, unanimously affirmed.

The court properly denied defendant's motion to controvert a search warrant for defendant's apartment, issued in connection with a controlled delivery of a package that had been intercepted and found to contain cocaine, and that had been addressed to a person other than defendant while listing defendant as the contact person. Defendant did not preserve her claim that she was entitled to an evidentiary hearing based on her assertion that, when she accepted the package, she protested that the addressee did not live there, and we decline to review it in the interest of justice. As an alternative holding, we find it without merit. The legality of the search was established by the

warrant and its supporting papers (*see People v Glen*, 30 NY2d 252, 262 [1972], *cert denied sub nom. Baker v New York*, 409 US 849 [1972]), and there was no factual dispute requiring a hearing (*cf. People v Burton*, 6 NY3d 584, 587 [2007]). Regardless of the relevance of defendant's statements at the time of the controlled delivery to the issue of her guilt or innocence had she chosen to go to trial, they were irrelevant to the legality of the search (*see People v Wyatt*, 60 AD2d 958, 959 [1978], *affd* 46 NY2d 926 [1979]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 29, 2009

DEPUTY CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1896 Matapos Technology Limited, Index 600384/08
Plaintiff-Respondent,

-against-

Compania Andina de Comercio Ltda, etc.,
Defendant-Appellant.

Jose Luis Torres, White Plains, for appellant.

Menaker & Herrmann, LLP, New York (Samuel F. Abernethy of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered December 22, 2008, which granted plaintiff's motion for summary judgment in lieu of complaint and denied defendant's cross motion for summary judgment, unanimously affirmed, with costs.

Plaintiff demonstrated it was a holder of the subject notes, and had a capacity to sue thereunder. Defendant failed to demonstrate a genuine defense to the notes. The notes were made payable to a Delaware corporation that later merged with another Delaware corporation, which in turn assigned to plaintiff its rights to the notes. The surviving corporation had the power to make that assignment (*see* Business Corporation Law § 906[b]; 8 Del Code Ann § 259[a]).

In its reply, plaintiff submitted a supplemental affidavit containing endorsements to the notes, which had inadvertently been omitted on the initial moving papers. The court properly considered this submission because defendant had made an issue of the omission in response to the motion (*see Matter of Kennelly v*

Mobius Realty Holdings LLC, 33 AD3d 380, 382 [2006]; *Ryan Mgt. Corp. v Cataffo*, 262 AD2d 628, 630 [1999]).

There were no triable issues of fact precluding the grant of summary judgment. Even if there had been an issue as to whether defendant was given notice of the assignment of the notes, the controlling credit agreement provided that no failure by the lender to deliver a notice of assignment would affect defendant's obligations. Accordingly, any purported issue of fact regarding notice of the assignment is inconsequential. Nor is an indispensable party to the action absent.

Defendant has not preserved its argument that the foreign affidavits were invalid for lack of the certification required by CPLR 2309(c) and Real Property Law § 299-a. In any event, the courts are not rigid about this requirement. As long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary (*see* Siegel, Practice Commentary, McKinney's Cons Laws of NY, CPLR 2309:3). The absence of such a certificate is a mere irregularity, and not a fatal defect (*see Smith v Allstate Ins. Co.*, 38 AD3d 522 [2007]).

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

ENTERED: DECEMBER 29, 2009

DEPUTY CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1897-
1897A Index 600672/04

Casa Redimix Concrete Corp.,
Plaintiff-Respondent,

-against-

Cosner Construction Corp., et al.,
Defendants-Appellants,

501 West 41st Street Associates, LLC, et al.,
Defendants.

Welby, Brady & Greenblatt, LLP, White Plains (Geoffrey S. Pope of counsel), for appellants.

Peckar & Abramson, P.C., New York (Alan Winkler of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered September 23, 2003, after a nonjury trial, inter alia, awarding plaintiff subcontractor $261,197.60, plus prejudgment interest in the amount of $162,879.96, and costs and disbursements, jointly and severally against defendant Cosner Construction Corp. and its surety, defendant Liberty Mutual Insurance Company, unanimously modified, on the law, to reduce Liberty Mutual's liability to $288,000, the amount of its lien discharge bond, and otherwise affirmed, with costs in favor of Liberty against plaintiff. Appeal from order, same court and Justice, entered February 4, 2009, unanimously dismissed, without costs, as academic.

The award of prejudgment interest against Liberty violates the well established rule, embodied in General Obligations Law § 7-301, that the liability of a surety is limited to the "amount

specified in the undertaking" plus interest "from the time of default by the surety" (*see e.g. Tri-City Elec. Co. v People*, 63 NY2d 969 [1984]; *Fidelity N.Y. v Aetna Ins. Co*, 234 AD2d 261 [1996]; *Mendel-Mesick-Cohen-Architects v Peerless Ins. Co.*, 74 AD2d 712, 713 [1980]; *see generally Morrison Knudsen Corp. v Ground Improvement Techniques, Inc.*, 532 F3d 1063, 1072 [10th Cir 2008]). Since Liberty was not in default, its liability was capped at the face amount of the bond.

Lien Law § 19(4)(d), which makes the provisions of CPLR article 25 applicable to a bond given for the discharge of a mechanic's lien for private improvements, was intended only to streamline procedures for posting bond and provides no authority for the imposition of greater liability upon the surety (Sponsor's Mem in support of amendment to the Lien Law repealing subdivision 4 of section 19 and adding a new subdivision 4, 2002 McKinney's Session Laws of NY, at 2062-2063). Nor does CPLR 2508, which permits a lienor to apply for a "new or additional undertaking," authorize the court to increase the original surety's liability beyond its contractual undertaking. To the contrary, CPLR 2508 provides that the original surety's liability continues only until the court's order directing such new or additional undertaking is complied with, and that "the original undertaking shall be otherwise without effect." Thus, the court exceeded its authority in directing Liberty Mutual to post additional security of $425,000 and in adjudging it liable, jointly and severally with Cosner, for the entire amount of the

judgment, including prejudgment interest.

To the extent Liberty Mutual failed to preserve its appellate arguments by asserting them in opposition to plaintiff's motion for an additional undertaking, they are reviewable by this Court because they involve questions of pure law that appear on the face of the record and could not have been avoided if brought to plaintiff's attention at the proper juncture (*Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]).

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

ENTERED: DECEMBER 29, 2009

DEPUTY CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1898 In re Devon G.,

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

Frederic P. Schneider, New York, for appellant.

Michel A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about February 29, 2009, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed an act, which, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and also committed the act of unlawful possession of a weapon by a person under 16, and placed him in with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

There was sufficient evidence to satisfy the requirement that a confession be corroborated (*see* Family Ct Act § 344.2[3]; *Matter of Carmelo E*, 57 NY2d 431, 433 [1982]). The police saw and heard a weapon fired four times from within a group that included appellant, they pursued appellant and apprehended him a block away, and they immediately found a revolver containing four empty shells and two live rounds along the path where appellant

had run. This evidence amply corroborated appellant's out of court confession that he carried the revolver after its discharge and discarded it while fleeing (*see Matter of Victor V.*, 30 AD3d 430, 432 [2006], *lv denied* 7 NY3d 710 [2006]).

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

ENTERED: DECEMBER 29, 2009

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1899-
1900

Index 102854/06
590495/06

Peter Siegel,
Plaintiff-Respondent,

-against-

RRG Fort Greene, Inc., et al.,
Defendants-Respondents-Appellants,

JLS Industries, Inc., et al.,
Defendants-Respondents.

- - - - -

JLS Industries, Inc.,
Third-Party Plaintiff-Respondent,

-against-

H&L Electric, Inc.,
Third-Party Defendant-Appellant-Respondent.

Camacho Mauro & Mulholland, LLP, New York (Kathleen M. Mulholland of counsel), for appellant-respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Debra A. Adler of counsel), for respondents-appellants.

The Feld Law Firm P.C., New York (John G. Korman of counsel), for Peter Siegel, respondent.

Garbarini & Scher, P.C., New York (Thomas M. Cooper of counsel), for JLS Industries respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 23, 2009, which granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), and granted the cross motions by defendants RRG Fort Greene, Inc., Atlantic Center Fort Green, Inc., both of the foregoing individually and d/b/a Atlantic Center Fort Greene Associates, L.P. (collectively, Atlantic Center), and defendant/third-party plaintiff JLS Industries, Inc. and J.L.S.

Industries, Inc., both of the foregoing individually and d/b/a JLS Industries, Inc. (collectively, JLS), for summary judgment on their contractual indemnification claims against third-party defendant H&L Electric, Inc., unanimously modified, on the law, to deny JLS's cross motion and, to the extent it was denied, to grant Atlantic Center's cross motion for summary judgment on its cross claim for contractual indemnification as against JLS, and otherwise affirmed, without costs.

Plaintiff made a prima facie showing of liability under section 240(1) by his testimony that the ladder tipped, causing him and the ladder to fall (*see Panek v County of Albany*, 99 NY2d 452, 458 [2003]). In opposition, defendants and H & L failed to raise an issue of fact whether plaintiff's negligence was the sole proximate cause of the accident. Contrary to H&L's contention, plaintiff was not required to show that the ladder was somehow defective (*see McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [2008]).

As there is no evidence that Atlantic Center, the owner of the mall where plaintiff's accident occurred, created or had notice of the alleged defective condition on the floor, Atlantic Center is entitled to summary judgment on its cross claim for contractual indemnification against H&L. However, an issue of fact exists whether JLS, the general contractor, created the alleged defective condition by failing to properly cover the expansion joint on the floor. Accordingly, JLS is not entitled to summary judgment on its third-party action against H&L (*see*

Callan v Structure Tone, Inc., 52 AD3d 334, 335-336 [2008]). JLS failed to preserve its contention that the accident report is inadmissible, and we decline to review it. Contrary to JLS's contention, the photographs depicting the hole on the floor, together with plaintiff's testimony that the photographs accurately depict the floor after his accident, raised issues of fact whether a defective condition existed on the floor and whether that condition proximately caused plaintiff's accident.

To the extent the motion court denied Atlantic Center's cross motion for summary judgment on its claim for contractual indemnification as against JLS, the motion should have been granted. JLS does not dispute that Atlantic Center is entitled to indemnification pursuant to the terms of the parties' contract.

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

ENTERED: DECEMBER 29, 2009

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1902 The People of the State of New York, Ind. 5697/80
Respondent,

-against-

James Rodriguez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Malancha Chanda of counsel), for respondent.

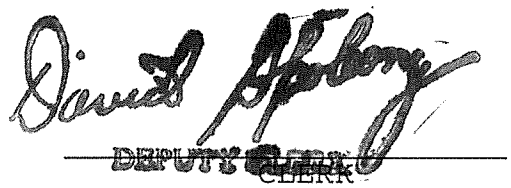
Order, Supreme Court, New York County (Robert M. Stolz, J.), entered on or about February 8, 2008, which denied defendant's motion to be resentenced, unanimously affirmed.

Defendant is not eligible to be resentenced under the 2004 Drug Law Reform Act (L 2004, ch 738, § 23). That act "was not intended to apply to those offenders who have served their term of imprisonment, have been released from prison to parole supervision, and whose parole is then violated, with a resulting period of incarceration" (*People v Bagby*, 11 Misc 3d 882, 887 [2006]; *see also People v Mills*, 11 NY3d 527, 537 [2008]). If defendant had not violated his parole conditions, he would not have been in the custody of the Department of Correctional Services when he moved to be resentenced, and he would therefore

have been ineligible for resentencing (*see Mills*, 11 NY3d at 537). "Surely the Legislature did not intend fresh crimes to trigger resentencing opportunities" (*id.*).

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

ENTERED: DECEMBER 29, 2009



DEPUTY CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1903 ESE Funding SPC Ltd., Index 603292/07
Plaintiff-Appellant,

-against-

Morgan Stanley, et al.,
Defendants-Respondents.

Scarola Ellis LLP, New York (Richard J.J. Scarola of counsel), for appellant.

Venable LLP, New York (Edward P. Boyle of counsel), for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 29, 2009, which, to the extent appealed from, granted that portion of defendants' motion to dismiss the 9th, 10th and 11th causes of action, alleging negligent misrepresentation, unanimously affirmed, with costs.

Plaintiff negotiated an arm's length commercial contract with defendant Morgan Stanley Altabridge to purchase defendants' financial risk associated with a third-party security transaction. Plaintiff has made no showing that any of these defendants had a "special relationship" with plaintiff (*cf. Kimmell v Schaefer*, 89 NY2d 257 [1996]).

We have reviewed plaintiff's remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 29, 2009

DEPUTY CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1904 The People of the State of New York, Ind. 4401/07
Respondent,

-against-

Russell Grier,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for appellant.

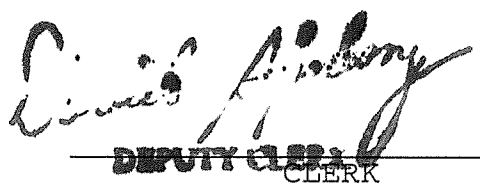
Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

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

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

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

ENTERED: DECEMBER 29, 2009



DEPUTY CLERK

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

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1905 Concord Village Owners, Inc., Index 106917/04
Plaintiff-Respondent, 590684/04

-against-

Keyspan Corporation,
Defendant-Appellant,

Trinity Communications Corp., et al.,
Defendants.

[And a Third-Party Action]

Cullen and Dykman LLP, Brooklyn (Patrick Neglia of counsel), for appellant.

Dunnington, Bartholow & Miller LLP, New York (Carol A. Sigmond of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 9, 2009, which, in an action for property damage caused by a ruptured gas main, insofar as appealed from, granted plaintiff's motion to reargue and, upon reargument, denied defendant Keyspan Corporation's previously granted motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting reargument (*see Sheridan v Very, Ltd.*, 56 AD3d 305 [2008]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 281 [2006], *appeal dismissed* 8 NY3d 837 [2007]). Keyspan was on notice of the theory alleging that it was negligent in failing to provide complete and accurate information as to the precise location of the ruptured gas line, since the theory had been advanced in the complaint of another party in the consolidated

action, had been raised in plaintiff's opposition papers on the prior motion and had been the subject of extensive deposition testimony (*see Manhattan Ctr. for Early Learning Inc. v New York Child Resource Ctr., Inc.*, 59 AD3d 365 [2009]; *see also Ramos v Jake Realty Co.*, 21 AD3d 744, 745 [2005]). Furthermore, the record demonstrates that there are triable issues of fact as to this theory of liability.

We have considered Keyspan's other contentions and find them unavailing.

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

ENTERED: DECEMBER 29, 2009

DEPUTY CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1906 The People of the State of New York, Ind. 798/97
Respondent,

-against-

Koren Stanley,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheryl Feldman of counsel), for respondent.

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered May 7, 1998, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of 3 to 6 years, unanimously affirmed.

The court properly exercised its discretion in denying youthful offender treatment. In any event, since defendant is now serving an aggregate term of 50 years to life for subsequent convictions of murder and other crimes, it would serve no legitimate purpose to grant him youthful offender treatment on this case.

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

ENTERED: DECEMBER 29, 2009

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1910 Sannon-Stamm Associates, Inc., Index 106510/08
Plaintiff-Appellant,

-against-

Keefe, Bruyette & Woods, Inc.,
Defendant-Respondent.

A. Bernard Frechtman, New York (Diane B. Kaplan of counsel), for appellant.

Eiseman Levine Lehrhaupt & Kakoyiannis, P.C., New York (Eric Aschkenasy of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Jane S. Solomon, J.), entered on or about December 4, 2008, which granted defendant's motion to dismiss the complaint, deemed to be an appeal from judgment, same court and Justice, entered December 9, 2008 (CPLR 5501[c]), dismissing the complaint, and so considered, the judgment unanimously reversed, on the law, with costs, and the complaint reinstated.

The doctrine of res judicata may be invoked in instances of claim splitting to prohibit a plaintiff from bringing an action for only part of his claim; the judgment obtained in that action would preclude him from bringing a second action for the residue of the claim (*see Stoner v Culligan, Inc.*, 32 AD2d 170, 171-72 [1969]).

Here, however, since the issues relating to the nonpayment of the subsequent installments of the placement fee had not matured when the Civil Court action was brought for nonpayment of

the first installment of the referral fee, and consequently had never been litigated, this action is not barred by res judicata (*see Gelb v Hatton*, 128 AD2d 501, 501-02 [1987]).

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

ENTERED: DECEMBER 29, 2009

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1911 In re Jerome M. Weinraub, etc., Index 2095/06

- - - - -

S. Sidney Mandel,
Appellant,

Jerome M. Weinraub,
Respondent.

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Howard J. Neuthaler of counsel), for respondent.

Decree, Surrogate's Court, New York County (Renee R. Roth, S.), entered on or about February 25, 2008, which, to the extent appealed from, as limited by the briefs, granted the motion of the co-trustee, Jerome M. Weinraub, to remove S. Sidney Mandel, Esq. as trustee of the captioned trust pursuant to SCPA 719, unanimously affirmed, with costs.

The Surrogate's Court providently exercised its discretion in removing appellant as trustee of the captioned trust (see SCPA 719[1], [3], [10]; 711[3], [8], [12]; *Matter of Duke*, 87 NY2d 465, 472-473 [1996]). The appellant failed to account over many years, despite repeated requests by a co-trustee and beneficiary and a court order compelling him to do so by a date certain. In a parallel proceeding in Westchester County, the appellant, who is an attorney, was removed as trustee of the same decedent's testamentary trusts after he not only failed to purge a contempt order by providing accountings, but then failed to appear for the subsequent removal hearing and left the jurisdiction despite a

warrant of commitment being issued by the Surrogate's Court of that County (2008 NY Misc LEXIS 4366, *affd* __ AD3d __, 885 NYS2d 643 [2009]). Under these circumstances, his removal as co-trustee by the Surrogate of New York County was warranted (*see Flaum v Birnbaum*, 191 AD2d 227 [1993]; *In re Estate of Britton*, 173 Misc 2d 300, 303 [1997]).

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

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

ENTERED: DECEMBER 29, 2009

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1912N-
1912NA

Index 2709/06

In re Application to Fix the
Legal Fees of Counsel for
Proponent of the Will of Howard C. Wallace,
Deceased.

- - - - -

In re Application to Release Funds
in the Estate of Howard C. Wallace,
Deceased.

- - - - -

Heinrich J. Ziegler,
Respondent-Appellant,

-against-

McCallion & Associates LLP,
Petitioner-Respondent,

Bank of America, N.A., etc.,
Respondent-Respondent.

Finkelstein & Virga, P.C., New York (Steven R. Finkelstein of counsel), for appellant.

McCallion & Associates, LLP, New York (Kenneth F. McCallion of counsel), respondent pro se.

Moses & Singer LLP, New York (Philippe Zimmerman of counsel), for Bank of America, respondent.

Order, Surrogate's Court, New York County (Renee R. Roth, S.), entered on or about December 15, 2008, which, insofar as appealed from, fixed and determined the attorneys' fees of petitioner McCallion & Associates LLP (the Law Firm) in the sum of $985,000.00 and fixed disbursements to the Law Firm in the sum of $10,016.05, unanimously affirmed, with costs. Order, same court and Surrogate, entered on or about December 26, 2008, which granted the Law Firm's motion seeking payment of the sum of $995,016.05 from funds held by Bank of America, N.A. to the

extent of directing said Bank to pay the Law Firm the sum of $300,000, and enjoined appellant Ziegler from collecting any amount from a certain trust that would reduce the value of that trust to less than $1.7 million, unanimously modified, on the law and the facts, that portion of the order directing payment to the Law Firm denied, and otherwise affirmed, without costs.

The Surrogate's Court has broad discretion under SCPA 2110 to consider a wide range of factors in fixing attorneys' fees (*Matter of Tendler*, 12 AD3d 520, 521 [2004]; *Matter of Gluck*, 279 AD2d 575 [2001]; *see Matter of Sall*, 292 AD2d 195 [2002], *lv denied* 98 NY2d 606 [2002], *appeal dismissed* 98 NY2d 726 [2002]). Additionally, on appeal from an order fixing the value of legal services, an award of counsel fees will not be disturbed unless it constitutes an abuse of discretion (*Matter of Patchin*, 106 AD2d 730 [1984]; *see also Matter of Klein*, 285 AD2d 718 [2001]). The test is to ascertain whether Surrogate's Court "[took] into account all of the various factors entitled to consideration" (*Matter of Greatsinger*, 67 NY2d 177, 181-182 [1986]; *see Matter of Piterniak*, 38 AD3d 780, 781 [2007]). The relevant factors, in turn, include the amount of time involved, the degree of difficulty of the matter in which services were rendered, the amount of money involved, the extent of the attorney's experience, and the results obtained (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]; *Piterniak*, 38 AD3d at 781; *Gluck*, 279 AD2d at 576).

Here, Surrogate's Court had before it ample information with

which to make a determination regarding the attorneys' fees, as the Surrogate had presided over the case from its inception, and therefore was well aware of the difficulty of the issues involved and the services rendered (*see Matter of Smith*, 131 AD2d 913, 915 [1987]. Indeed, as the Surrogate noted, the Law Firm obtained a favorable result for Ziegler despite the significant difficulties that the facts presented for his case presented.

With respect to the December 26, 2008 order, "[t]he general rule is that, where legal services have been rendered for the benefit of the estate as a whole, resulting in the enlargement of all the shares of all the estate beneficiaries, reasonable compensation should be granted from the funds of the estate" (*Matter of Kinzler*, 195 AD2d 464, 465 [1993]). However, where the legal services rendered did not benefit the estate but benefitted only the individuals whom the attorney represented, the attorney must seek compensation from the clients individually (*Matter of Baxter (Gaynor)*, 196 AD2d 186, 190 [1994], *lv denied* 84 NY2d 808 [1994]).

Here, the Law Firm did not render services to the estate, but rather, to Ziegler, and the Law Firm's actions did not benefit the estate generally. Moreover, the record contains no suggestion that the Law Firm's efforts enlarged the estate for all the legatees (*see Matter of Ricca*, 55 AD3d 838, 839-840 [2008]; *Matter of Baxter (Gaynor)*, 196 AD2d at 190). As a

result, the Law Firm must look to Ziegler, not to the estate, for the $300,000 awarded in the December 26, 2008 order.

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

ENTERED: DECEMBER 29, 2009

Andrias. J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1913N Ben Gersten, Index 110651/07
Plaintiff-Respondent,

-against-

Dennis M. Lemke,
Defendant-Appellant,

Peace Agresta & Lemke, et al.,
Defendants.

Lawrence V. Carra, Mineola, for appellant.

Law Offices of Sanford F. Young, New York (Sanford F. Young of counsel), for respondent.

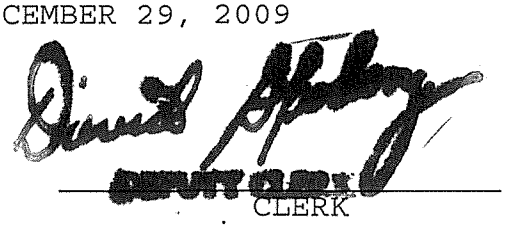
Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered November 24, 2008, which denied defendant-appellant's motion to change venue to Nassau County on the ground of witness convenience, unanimously affirmed, without costs.

Defendant's bare assertions of inconvenience fail to show the manner in which his proposed witnesses would be inconvenienced by having to travel between Nassau and New York Counties (*see Schoen v Chase Manhattan Automotive Fin. Corp.*, 274 AD2d 345 [2000]; *cf. Cardona v Aggressive Heating*, 180 AD2d 572, 573 [1992]; *Heinemann v Grunfeld*, 224 AD2d 204). In addition, the home or work addresses of allegedly inconvenienced witnesses

were improperly first provided in defendant's reply papers (*see Schoen, supra; Root v Brotmann*, 41 AD3d 247 [2007]).

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

ENTERED: DECEMBER 29, 2009



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Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1914N Leticia Beltrez, as Administratrix of the Estate of Mariano S. Beltre, Plaintiff-Appellant, Index 105762/07

-against-

Paul Chambliss, M.D., et al., Defendants-Respondents,

Polari Medical Group, et al., Defendants.

Koehler & Isaacs, LLP, New York (Omar D. Lopera of counsel), for appellant.

Schiavetti, Corgan, DiEdwards & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for respondents.

Order, Supreme Court, New York County (Joan B. Carey, J.), entered November 18, 2008, which granted the motion by defendants Paul Chambliss, M.D., Florentino Reyes, PAC, and Howard A. Grossman, M.D. to dismiss the complaint as against them for failure to timely serve the complaint, and denied plaintiff's cross motion to compel defendants' acceptance of the untimely served complaint, unanimously affirmed, without costs.

Plaintiff failed to demonstrate that she had a reasonable excuse for her delay in serving the complaint after defendants served their demand for it and a meritorious cause of action

(CPLR 3012[b], [d]; *see e.g. Jee Foo Realty Corp. v Lemle*, 259 AD2d 401 [1999]).

Contrary to plaintiff's contention, service of the demand extended defendants' time to appear in the action until 20 days after plaintiff served her complaint (CPLR 3012[b]).

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

ENTERED: DECEMBER 29, 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Angela M. Mazzarelli
John W. Sweeny
Dianne T. Renwick
Rosalyn H. Richter, JJ.

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Index 24420/03

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Keira M. Broderick, an infant by her mother and natural guardian, Edith M. Lee, et al.,
Plaintiffs-Appellants,

-against-

RY Management Co., Inc., et al.,
Defendants-Respondents,

Linda M. Lanier,
Defendant.

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Plaintiffs appeal from an order of the Supreme Court, Bronx County (Stanley Green, J.), entered on or about June 9, 2008, which, to the extent appealed from as limited by the briefs, granted respondents' motion for summary judgment dismissing the complaint as against them.

Kravet, Hoefer & Maher, P.C., Bronx (John A. Maher of counsel), for appellants.

Fabiani Cohen & Hall LLP, New York (Lisa A. Sokoloff and John V. Fabiani, Jr. of counsel), for respondents.

RICHTER, J.

Plaintiffs Edith Lee and her 14-month-old daughter Keira Boderick were injured when, while attending a barbeque in the common area of a building owned and managed by the respective defendants-respondents, a party guest emptied hot cooking oil from a deep-fat turkey fryer into a nearby storm drain while another person poured water from a garden hose on the grate of the drain. The oil's contact with water caused a reaction resulting in fire and a steam cloud. Lee was burned on the back of her legs and Boderick suffered burns on her face, hands, legs and arms. The infant, who was hospitalized for over two months and underwent several skin graft surgeries, has numerous permanent scars on her body, hearing loss, speech impairment and developmental deficits. The court below granted respondents' motion for summary judgment and dismissed the complaint as against them, finding, as a matter of law, that their actions were not the proximate cause of plaintiffs' injuries. We now reverse.

The evidence before the motion court revealed that on July 4, 2003, defendant Linda Lanier and her husband Hosea Swinson hosted the barbecue at the building, a 16-story multiple dwelling

in the Bronx.[1] Prior to the party, Elron Williams, the building's superintendent, gave Swinson permission to hold the party in a partially enclosed gated alcove on the building's ground floor. On the morning of the party, Williams unlocked the gate to the alcove area and Swinson set up the cooking equipment, including two charcoal grills and a deep-fat turkey fryer.[2] Swinson specifically told Williams that the fryer would be used at the barbecue, which was attended by approximately 150 people.

The fryer consisted of a two-foot-high metal cooking pot that sat on a burner and tripod standing approximately eight inches off the ground. A 20-pound round propane tank, approximately two feet high, was attached to the fryer by a hose and provided fuel to heat the pot. To cook in the deep fryer, a large quantity of cooking oil must be heated in the pot to a very high temperature. The record indicates that in this case, eight gallons of oil were heated to a boil, indicating that the oil was at least 425 to 450 degrees Fahrenheit.

Despite the fact that a turkey fryer was being used, a

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[1] The complaint was also dismissed as against Lanier, but that part of the court's order is not challenged on this appeal.

[2] Although at his deposition, Williams denied any knowledge of the party, respondents do not contest, for purposes of this appeal, that the party was held with their permission. Nor do they contest that their agents or employees were aware of the use of the turkey fryer on the premises.

building employee, identified by Swinson as superintendent Williams, provided Elder Sanders, a guest at the party who tended the fryer, with a garden hose. Williams unlocked the door to a nearby storage room, turned on the water and unraveled the hose. Because the end of the hose did not have a nozzle which would allow the party organizers to regulate the water flow, Williams left the water running.[3] The hose was placed near the cooking area and the water flowed into a nearby storm drain, continuously running during the entire time Sanders was cooking. After frying a number of turkeys, Sanders left the area to get some cigarettes. Sometime thereafter, a party guest named DJ emptied the hot oil into the drain while another attendee poured water from the hose onto the drain. The oil's contact with water from the hose or in the drain caused a fire and steam cloud resulting in plaintiffs' injuries.

A landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding

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[3] The dissent notes that there was contradictory deposition testimony as to whether the hose had a nozzle. Any factual questions raised by the depositions would warrant the denial of summary judgment, not the granting of summary judgment to respondents.

the risk (*Basso v Miller*, 40 NY2d 233, 241 [1976]; *Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 [2006], *affd* 8 NY3d 931 [2007]). In order to recover damages for an alleged breach of this duty, the plaintiff must first demonstrate that the defendant created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 240 [2004], *lv denied* 4 NY3d 705 [2005]). The plaintiff must also show that the defendant's negligence was a proximate cause of the injuries. To do so, the negligence must be a substantial cause of the events which produced the injury (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

Viewing the evidence in the light most favorable to plaintiffs and drawing all reasonable inferences in their favor (*see Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2005]), we find that there are triable issues of fact as to whether respondents, by allowing the turkey fryer to be used while providing a continuously running water source in close proximity, breached their duty to maintain the premises in a safe condition, and whether that breach proximately caused plaintiffs' injuries.

Plaintiff submitted an affidavit from a fire prevention and

safety expert who stated that cooking using a deep-fat turkey fryer is an activity fraught with danger. The expert explained that the National Fire Protection Association and the American Burn Association discourage consumer use of deep fryers and warn against the dangers of their use. According to the expert, because the deep fryer here included a 20-pound propane tank, it could not be lawfully used on the premises under the then-existing New York City Fire Code (former 3 RCNY 25-01[c][5]). Additionally, he stated that the use of the turkey fryer with the propane tank also violated section 25-01(f)(2) of the former Fire Code because the fryer had not been approved or listed by a nationally recognized testing laboratory.

The expert explained that the accident here occurred when the hot oil came into contact with the water. As a result, pockets of steam were formed which exploded through the oil spewing superheated water and hot oil through the air. The expert stated that the dangerous combination of hot oil and water is a known hazard encountered with the use of turkey fryers, a warning reiterated by the New York City Fire Department. Indeed, Underwriters Laboratories, a product safety certification organization, refuses to certify turkey fryers and specifically notes that "oil and water don't mix," warning that such a

combination could cause a fire or explosion hazard. In light of this evidence, and given the dangers inherent in hot oil mixing with water, a jury could reasonably find that by allowing the fryer to be used while providing a continuously running water source nearby, respondents breached their duty of care by creating or exacerbating a dangerous condition (*see Schosek v Amherst Paving, Inc.*, 11 NY3d 882, 883 [2008]; *Figueroa v West 170th Realty, Inc.*, 56 AD3d 299 [2008]).

In attempting to distinguish *Schosek* and *Figueroa*, the dissent apparently believes that this opinion turns on a finding that respondents had a duty to control the actions of third parties on their premises. This misconstrues the primary basis on which summary judgment should be denied. Here, the triable issue of fact is whether respondents' actions created or exacerbated a dangerous condition, the very legal issue addressed in these two cases. Moreover, even the dissent acknowledges the legal principle that respondents could be held liable if they had the opportunity to control the third parties and were reasonably aware of the need to intervene.

Respondents maintain that, regardless of any breach of the duty of care, the accident was not foreseeable as a matter of law because it was caused by an intervening act, namely the party

guests' disposal of the oil down the drain. It is well settled that where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence (*Derdiarian*, 51 NY2d at 315). However, the plaintiff need not establish that the precise manner in which the accident occurred was foreseeable (*White v Diaz*, 49 AD3d 134, 140 [2008]). Rather, it is sufficient that she demonstrate that the risk of some injury from the defendant's conduct was foreseeable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]).

We find that there is an issue of fact as to whether it was reasonably foreseeable that the hot oil from the fryer could come into contact with the water resulting in injury. Given the evidence that superintendent Williams provided running water from the hose in close proximity to the turkey fryer and that there were a large number of guests at the party, a jury could reasonably conclude that some accident resulting from contact between hot oil from the fryer and the water could occur, whether by oil spilling out of the fryer, the fryer falling over or, as here, the oil being poured into the nearby drain. The record does not establish whether the steam explosion occurred because the hot oil combined with water that had already run down the

drain or water being poured from the hose. The outcome would be the same in either circumstance because a jury could reasonably find that the water that contributed to the accident came from the continuous running of respondents' hose.

We do not believe that the guests' disposing of the oil into the drain was so extraordinary or attenuated from respondent's conduct so as to relieve respondents of liability as a matter of law (see *Derdiarian*, 51 NY2d at 315). There is evidence in the record that superintendent Williams knew the fryer was in use in this area, was aware that the hose with the running water was placed near the fryer and, as a result of his duties at the complex, knew where the storm drains were located. Despite this, there is no evidence that Williams inquired as to whether the party organizers had come up with a safe method to dispose of the oil. Under these circumstances, a jury could reasonably find that Williams could have anticipated that party guests would get rid of the oil by pouring it down the drain. Because questions concerning what is foreseeable may be the subject of varying inferences, these issues should be for the jury to resolve *(see id.)*. Thus, the motion court erred in determining that the accident was unforeseeable as a matter of law.

Accordingly, the order of Supreme Court, Bronx County (Stanley Green, J.), entered on or about June 9, 2008, which, to the extent appealed from as limited by the briefs, granted respondents' motion for summary judgment dismissing the complaint as against them, should be reversed, on the law, the motion denied and the complaint against respondents reinstated.

All concur except Gonzalez, P.J. who dissents in an Opinion:

GONZALEZ, P.J. (dissenting)

On July 4, 2003, plaintiffs Edith Lee and her 14-month-old daughter, Keira Boderick, went to a barbeque at 2311 Southern Blvd, Bronx, New York. The party was hosted by Hosea Swinson, whose wife, Linda Lanier, was a tenant in the building. The building was co-owned by defendants Grote Street Associates and Twin Parks Northeast Site II Houses. R.Y. Management Co., Inc. was the building's managing agent.

Elron Williams, the building's superintendent, gave Swinson permission to hold the party in a partially enclosed alcove on the building's ground floor. Williams also provided Swinson with a garden hose for cleanup. The hose was connected to a water source in an adjacent laundry room. There were storm drains on the ground. Swinson brought the cooking equipment for the party, including two grills and a turkey fryer that held eight gallons of cooking oil and was heated by a propane tank. The fryer was placed against the wall of the building.

Deposition testimony indicates that during the barbeque, someone poured the hot oil from the turkey fryer into one of the storm drains, and another person may have poured water from a garden hose on the grate of the same drain. The oil's contact with water caused a steam explosion. Both plaintiffs, who were near the drain at the time, suffered burns from the explosion.

The infant plaintiff's injuries were particularly severe. She spent over two months in the burn unit of the hospital, underwent multiple surgeries and skin grafts, and has permanent hearing loss, speech impairment, and scars on her face, hands, legs and body.

Plaintiffs brought this action against the building's owners, the managing agent, and the tenant-hostess, Lanier.[1] The complaint alleges, inter alia, that these defendants were negligent in (1) failing to properly supervise and control visitors on their property; (2) allowing the use of a dangerous turkey fryer in a partially enclosed alcove of the building; (3) exacerbating the danger posed by the turkey fryer by supplying the party's hosts with a garden hose.

Upon completion of discovery, defendants moved for summary judgment, arguing that they had no duty to plaintiffs to prevent third parties from pouring hot oil into a storm drain with water, the undisputed cause of the steam explosion. They also argued that while continued use of the fryer throughout the day may have furnished the occasion for a need to dispose of oil, it was not the legal cause of the steam explosion that caused plaintiffs'

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[1]Lanier never appeared in the action. The order appealed from dismissed the complaint against her, a determination that has not been challenged on the appeal.

injuries. In opposition, plaintiffs contended that there was a question of fact whether defendants breached a duty to them, as the depositions supported an inference that the building superintendent was the individual who poured the water on the drain. They also argued, in reliance upon the affidavit of their fire prevention and safety expert, that the steam explosion was a foreseeable consequence of allowing the use of a propane turkey fryer in an alcove area in close proximity to guests. In reply, defendants offered the affidavit of their own fire/burn investigation consultant. This expert opined that defendants did not act unreasonably in permitting the use of the turkey fryer in the "unenclosed courtyard," and that none of the rules alleged to have been violated were connected to the happening of the accident.

The court granted defendants' motion. It held that there was no factual dispute as to the cause of the accident, and that no inference could be drawn from the speculative deposition testimony of one witness that it was the superintendent who poured water onto the storm drain. The court concluded that none of plaintiffs' theories of alleged negligence - the use of the turkey fryer, its location, or the use of the propane tank - were a proximate cause of plaintiffs' injuries. I would affirm this determination.

The law is settled that defendants, as landowners, have a duty to act in a reasonable manner to prevent harm to those on their property (*D'Amico v Christie*, 71 NY2d 76, 85 [1987]). This includes an obligation to control the conduct of third persons on the property when they have the opportunity to control such persons and are reasonably aware of the need for such control (*id.*). Further, "[w]here the evidence as to the cause of the accident which injured plaintiff is undisputed, the question as to whether any act or omission of the defendant was a proximate cause thereof is one for the court and not for the jury" (*Rivera v City of New York*, 11 NY2d 856, 857 [1962]). Moreover, the negligence complained of must have caused the occurrence of the accident from which the injuries flowed, not merely set the occasion for or facilitated its occurrence (*id.*).

The Court of Appeals' decision in *Rivera* is instructive. There, the plaintiff had complained to the superintendent of the premises that hot water was leaking from the faucet of a bathtub and that the drain pipe was bent in such a manner that the water would not flow out until it reached the height of the overflow, with the result that the bathtub was always filled with hot water. Three or four weeks after the tenant lodged the complaint, his nine-year-old son entered the bathroom at 11:30 P.M. and tried to reach a light cord by standing on the edge of

the tub. The child was wearing wet boots, lost his balance, and slipped and fell into the hot water, severely burning his lower back. The Court of Appeals held that the hot water may have injured the child, but that the accident was proximately caused by the unforeseeable act of the child slipping in wet boots while balancing on the curved edge of the bathtub.

Here, it is undisputed that third parties caused the steam explosion by pouring hot oil from the turkey fryer into a storm drain, and that the oil came into contact with water either in the drain or from the hose[2]. In my view, the existence of the turkey fryer, storm drains and hose may have provided the occasion for this accident, but it was not reasonably foreseeable that a third party would try to dispose of the oil in this

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[2]The majority states that "[b]ecause the end of the hose did not have a nozzle which would allow the party organizers to regulate the water flow, [the superintendent] left the water running. The hose was placed near the cooking area and the water flowed into a nearby storm drain, continuously running during the entire time that [the turkey chef] was cooking." This is not the uniform recollection of the deponents. Several witnesses testified that the hose had a nozzle which could control the flow of water. In addition, there is deposition testimony that the drain was a distance from where the cooking took place. Thus, we cannot conclude, as a matter of law, that the superintendent left a steady stream of water "in close proximity" to the hot turkey fryer. Further, it is uncontested that the explosion causing plaintiffs' injuries did not occur until someone attempted to pour to boiling oil into the drain. Furthermore, any dispute as to whether there was running water in close proximity to the turkey fryer does not rise to the level of a material disputed issue of fact warranting the denial of summary judgment.

manner. In fact, plaintiffs' own expert set forth the hazards normally associated with use of turkey fryers - tipping, spilling oil, overfilled pots, overheated oil, hands contacting the pot - and disposing of the oil in conjunction with water is not one of them.

It is the majority's position that defendants breached their duty to plaintiffs by allowing the fryer to be used "while providing a continuously running water source nearby," and that there is an issue of fact as to whether defendants are liable for "creating or exacerbating a dangerous condition." However, the cause of this accident is undisputed, and it was a third party, not defendants, who poured the hot oil into the storm drain. I would find that defendants' activities may have set the occasion for an accident, but they did not cause plaintiffs' injuries (*see Rivera*, 11 NY2d at 857).

The majority cites *Schosek v Amherst Paving, Inc.* (11 NY3d 882 [2008]) and *Figueroa v West 170th Realty, Inc.* (56 AD3d 299 [2008]), in support of denying summary judgment. These cases are both factually distinguishable. Neither involved the duty to control the actions of third parties. In *Schosek*, the Court of Appeals found that there were issues of fact as to whether a defendant paving company had created or exacerbated a dangerous condition for drivers by temporarily halting its operations on a

roadway, leaving a height differential of 4½ inches between the paved portion of the roadway and a gravel shoulder. The plaintiff was injured when she lost control of her car after driving onto the shoulder and then attempting to navigate the height differential to return to the traveled portion of the roadway.

In *Figueroa*, the plaintiff slipped and fell on snow and ice outside the defendants' building, and this Court affirmed the denial of the building owner's motion to dismiss the complaint. We found issues of fact as to whether the owner was responsible for removing the snow and ice in the area where plaintiff fell, and whether it had exacerbated a dangerous condition by not completing its shoveling across the entire property (56 AD3d at 299).

Here, unlike *Schosek* and *Figueroa*, the alleged breach of duty involved failing to prevent third parties from simultaneously pouring boiling oil from a turkey fryer and water from a hose into the storm drain. In such a situation, defendants would only be liable where they had the opportunity to control the third parties and were reasonably aware of a need to intervene. An example of such a case, cited by plaintiffs, is *Lasek v Miller* (306 AD2d 835 [2003]). In *Lasek*, the infant plaintiff was injured when she was playing on a trampoline with

three other children. The trampoline was owned by the defendants and it contained a clear warning that it was to be used by one person at a time. The Fourth Department held that there was a triable issue of fact as to the landowners' liability, based upon their knowledge of the unsafe use of the trampoline, and a reasonable opportunity to prevent or control it.

Similarly, in *White v Diaz* (49 AD3d 134 [2008]), cited by the majority, we affirmed the denial of a motion for summary judgment made by the driver and owner of a van which was rear ended while double parked on a city street. We concluded that a third party's rear-end collision with the van was a reasonably foreseeable consequence of double parking, even for five minutes, on a busy city street.

Here, by contrast to *Lasek* and *White*, a steam explosion was not a foreseeable consequence of these defendants' acts in allowing the hosts to have a barbeque, with a turkey fryer, on their property. Defendants did not own the turkey fryer, they did not operate it at any time during the barbeque, and there is no evidence, other than speculation by one of a number of attendees at the party, that anyone connected with defendants was near the storm drain where the accident occurred, that defendants left running water from a hose in close proximity to the turkey fryer, or that they had an opportunity to stop the parties who

were pouring the oil into the storm drain.

Accordingly, I would affirm the motion court's determination to grant defendants' motion for summary judgment dismissing the complaint.

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

ENTERED: DECEMBER 29, 2009

CLERK
DEPUTY CLERK