

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13549 & 70 Pinehurst Avenue LLC,
M-5382 Plaintiff-Respondent,

Index 653664/13

-against-

RPN Management Co., Inc.,
Defendant-Appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Chevon A. Brooks of counsel), for appellant.

Troutman Sanders LLP, New York (Deanna DeFrancesco of counsel), fo respondent.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 19, 2014, which granted plaintiff's motion for partial summary judgment, and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny plaintiff's motion for partial summary judgment, and to grant defendant's cross motion to the extent of dismissing the third cause of action, and otherwise affirmed, without costs.

This action stems from the collapse of a retaining wall located on plaintiff's property, which plaintiff alleges is also partially located on defendant's property. Plaintiff's allegations are based on statements in two land surveys from 2001 and 2011, both describing the presence of a retaining wall

located at the "west face of wall on [property] line." Both surveys also indicate, however, "the offsets (or dimensions) shown hereon from the structures to the property lines . . . are not intended to guide the erection of fences, retaining walls, pools, and any other construction." Their import is therefore unclear. Moreover, a survey alone, without an accompanying affidavit from the surveyor, does not constitute competent evidence of the location of property lines and fences or retaining walls (see *Thomson v Nayyar*, 90 AD3d 1024, 1026, [2d Dept 2011]). Plaintiff has therefore failed to tender sufficient evidence to demonstrate entitlement to a declaratory judgment on its claim brought pursuant to Administrative Code of City of NY § 28-305.1.1.

Defendant met its prima facie burden as cross movant by submission of the affidavit of a land surveyor who inspected and measured the property subsequent to the collapse of the retaining wall in June 2013, and concluded that no portion of the wall had been upon defendant's property. That plaintiff's two surveys indicate that the wall was "on [the] line" of both properties, is sufficient, however, to raise a question as to the location of the wall relative to the two properties; we have long held that otherwise inadmissible evidence may be considered to *defeat* an

application for summary judgment (see *Cohen v Herbal Concepts*, 100 AD2d 175, 182 [1st Dept 1984], *affd* 63 NY2d 379 [1984]). We do not consider the contents of plaintiff's land surveyor's affidavit submitted in surrepley as defendant had no opportunity to respond, nor do we consider plaintiff's arguments addressing that affidavit's contents (see *Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1st Dept 1995]; see also *Rhodes v City of New York*, 88 AD3d 614, 615 [1st Dept 2011]). Were we to consider them, our analysis would be unchanged.

In construing the evidence in the light most favorable to plaintiff (see *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]), we find that the claim of negligence is expressed throughout plaintiff's papers, and there is a question of fact as to whether defendant owed a duty of care to plaintiff, if the retaining wall is found to rest on both parties' premises. The claim of nuisance, based on allegations that defendant's ongoing refusal to participate in the repairs and maintenance of the retaining wall substantially interferes with plaintiff's ability to use and enjoy its property, arises solely from plaintiff's claim of negligence. Where nuisance and negligence elements are "so intertwined as to be practically inseparable," a plaintiff may recover only once for the harm suffered (*Murphy v*

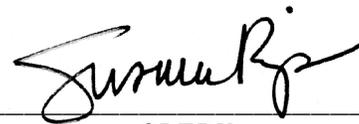
Both, 84 AD3d 761, 762 [2d Dept 2011], citing *Morello v Brookfield Constr. Co.*, 4 NY2d 83, 91 [1958]; see also *Copart Indus., Inc. v Consolidated Edison Co.*, 41 NY2d 564, 569 [1977]). Upon a search of the record, we conclude that the third cause of action, nuisance, should be dismissed as duplicative of the negligence cause of action, although this argument was not previously made or considered (CPLR 3212[b]; see *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110 [1984]).

**M-5382- 70 Pinehurst Avenue LLC v RPN
Management Co., Inc.**

Motion to strike reply brief granted to the extent of striking references to matters outside the record and the discussion of two survey reports, and otherwise denied.

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

ENTERED: DECEMBER 30, 2014



CLERK

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13560-

Index 105585/07

13561 Luis Alcantara,
Plaintiff-Appellant,

-against-

Eric W. Knight,
Defendant-Respondent,

TMCC,
Defendant.

Pollack Pollack Isaac & De Cicco, LLP, New York (Michael H. Zhu of counsel), for appellant.

White Fleischner & Fino, LLP, New York (Nancy Davis Lyness of counsel), for respondent.

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered August 13, 2013, bringing up for review an order, same court and Justice, entered August 6, 2013, which denied plaintiff's motion to set aside the jury verdict as inconsistent and for a new trial, and granted defendant's cross motion to enter a complete defense verdict and reduce the damages awarded to plaintiff to zero, unanimously affirmed, without costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The verdict sheet in this personal injury action instructed the jurors to determine (1) whether defendant was negligent, and

(2) if so, whether defendant's negligence was a substantial factor in causing plaintiff's injuries. The jurors found that defendant was negligent, but that his negligence was not a substantial factor in causing plaintiff's injury. The verdict sheet instructed that if the jurors answered the second question in the negative, they should cease deliberations and report their verdict. The jurors, however, continued deliberating and determined that plaintiff was also negligent; that plaintiff's negligence was a substantial factor in causing his own injury; that plaintiff was 95% at fault, and defendant was 5% at fault; and that plaintiff was entitled to \$200,000 in damages.

This case is controlled by *Pavlou v City of New York* (21 AD3d 74 [1st Dept 2005], *affd* 8 NY3d 961 [2007]), a Labor Law case in which the plaintiff was injured due to a damaged crane hoist. In *Pavlou*, the jurors determined that the City (the owner of the construction site) was negligent under the Industrial Code, but that its negligence was not a substantial factor in causing the plaintiff's injury. The jury also found that the crane manufacturer was not negligent (*id.* at 75). The verdict sheet instructed that upon making these findings, the jurors were to stop deliberations. The *Pavlou* jury, however, went on to find the third-party defendant-employer negligent for operating a

damaged crane; the jury then apportioned the employer's degree of fault and fixed the amount of damages (*id.* at 81). This Court held that the plaintiff was not entitled to a new trial as against the City, stating, "[T]he jury should not have apportioned [the employer's] liability . . . or fixed the amount of damages, once it determined that the violation of the Industrial Code was not a proximate cause and that the crane manufacturer was not negligent. The fact that the jury attempted such an award was a superfluous act that does not require a new trial" (*id.* at 76). The Court of Appeals affirmed (8 NY3d 961 [2007]).

The same reasoning as in *Pavlou* applies here. Once the jurors determined that defendant's negligence was not a substantial factor or proximate cause (see PJI 2:70, Proximate Cause - In General; see also PJI 2:36) of plaintiff's injuries, they should not have attempted to assess plaintiff's own negligence and to fix damages. That they did so was a

superfluous act that does not require a new trial. We note that plaintiff moved to set aside the verdict only after the jury was discharged, rather than alerting the court at a time when the jurors could have been questioned about the verdict.

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

employed an incorrect standard in discharging the juror (see *People v Velez*, 255 AD2d 146 [1st Dept 1998], *lv denied* 93 NY2d 858 [1999]; see also *People v Norell*, 105 AD3d 546, 546 [1st Dept 2013], *lv denied* 21 NY3d 1007 [2013]), and we decline to review it in the interest of justice. As an alternate holding, we reject it on the merits.

As in *People v Davis* (292 AD2d 168 [1st Dept 2002], *lv denied* 98 NY2d 674 [2002]), defendant had no objection to a delay in swearing the jurors after the completion of jury selection, and thus effectively “agreed to create a category of jurors, i.e., selected but unsworn jurors, about which the Criminal Procedure Law is silent as to criteria for discharge” (*id.* at 169). The record reveals that the court merely used CPL 270.35 as a guideline in deciding whether to delay the trial by waiting for the juror. In any event, “[t]he power to excuse an unsworn juror is much *broader* than the statutorily limited power to discharge a sworn juror” (*Velez*, 255 AD2d at 146 [emphasis added]). Therefore, if the criteria set forth in CPL 270.35 for the dismissal of a sworn juror have been met, then, a fortiori, the same considerations would warrant dismissal of a selected but unsworn juror (see *People v Williams*, 44 AD3d 326, 326 [1st Dept 2007] [dismissal of selected unsworn juror proper

"even under the sworn juror standard"], *lv denied* 9 NY3d 1010 [2007]).

"The Court of Appeals has held that the 'two-hour rule' gives the court broad discretion to discharge any juror whom it determines is not likely to appear within two hours" (*People v Kimes*, 37 AD3d 1, 24 [1st Dept 2006], *lv denied* 8 NY3d 881 [2007], citing *People v Jeanty*, 94 NY2d 507, 517 [2000]). Using the two-hour rule as a guideline, it is clear that the court providently exercised its discretion in replacing the juror with an alternate (*see e.g. Davis*, 292 AD2d at 169).

Contrary to defendant's argument, there is nothing in Judiciary Law § 517 that sheds any light on the issue of selected but unsworn jurors. It would make no sense for the absence of express statutory guidance on this issue in the Criminal Procedure Law or elsewhere to render a court powerless when such a juror, while otherwise qualified for continued service, inordinately delays the trial, even though a sworn juror may be dismissed under the same circumstances.

Defendant's pro se ineffective assistance of counsel claims involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]), and thus may not be addressed on this

appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). We have considered and rejected defendant's remaining pro se claims.

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

ENTERED: DECEMBER 30, 2014



CLERK

Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13835 Vikram J.,
Petitioner-Respondent,

-against-

Anupama S.,
Respondent-Appellant.

Fersch Petitti LLC, New York (Patricia A. Fersch of counsel), for appellant.

Law Offices of Ilysa M. Magnus, P.C., New York (Ilysa M. Magnus of counsel), for respondent.

Lawyers For Children, New York (Shirim Nothenberg of counsel), attorney for the child.

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about June 6, 2014, which, to the extent appealed from, directed respondent to appear in New York to litigate custody of the parties' child, unanimously reversed, on the law, without costs, and the order vacated to that extent.

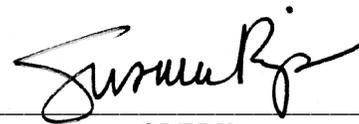
Respondent's actual notice of the custody proceedings is insufficient to subject her to the court's jurisdiction (see *Frankel v Schilling*, 149 AD2d 657 [2d Dept 1989]). She was not properly served with process. The Central Authority of India, where respondent resides, did not send a certificate of service to petitioner, as required by Article 15 of the Convention on

Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 261, TIAS No. 6638). Nor has a showing been made that the Central Authority actually transmitted the documents to respondent or that a period of not less than six months had elapsed after the date of petitioner's transmission of the documents to the Central Authority.

We note that the service attempted by petitioner's friend was ineffective. As India has objected to Article 10 of the Convention, service is required to be effected pursuant to Article 5, i.e. either by or at the behest of the Central Authority (see *Wood v Wood*, 231 AD2d 713 [2d Dept 1996], *lv dismissed in part, denied in part* 89 NY2d 1073 [1997]).

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R.", written over a horizontal line.

CLERK

Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13836-

Ind. 5482/02

13836A The People of the State of New York,
Respondent,

-against-

Jamal Wilson,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (E. Deronn Bowen of
counsel), for appellant.

Jamal Wilson, appellant pro se.

Robert T, Johnson, District Attorney, Bronx (Justin J. Braun of
counsel), for respondent.

Judgment, Supreme Court, Bronx County (Martin Marcus, J.),
rendered December 20, 2007, convicting defendant, after a jury
trial, of murder in the second degree and criminal possession of
a weapon in the second degree, and sentencing him, as a second
violent felony offender, to an aggregate term of 25 years to
life, and order, same court and Justice, entered on or about
March 8, 2010, which denied defendant's motion to vacate the
judgment, unanimously affirmed.

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

was extensive evidence of defendant's guilt, including eyewitness testimony and the presence of the victim's blood on defendant's clothing.

Defendant did not preserve his challenge to a witness's testimony that fear was the cause of her long delay in revealing that she was able to identify defendant, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. "It was necessary and proper for the District Attorney to elicit the reason in the witness' mind for [her] conduct" (*People v Buchalter*, 289 NY 181, 202 [1942]; see also *People v Howard*, 7 AD3d 314 [1st Dept 2004], lv denied 3 NY3d 675 [2004]; *People v Worthierly*, 68 AD2d 158, 163-164 [1st Dept 1979]). The witness expressed only a generalized fear, and there was no implied connection to defendant. There is no merit to defendant's arguments that this testimony constituted either improper "bolstering," or impeachment by the People of their own witness. Even if a limiting instruction might have been appropriate, defendant made no such request, and he may have had strategic reasons to avoid highlighting this evidence.

Defendant's challenges to the People's summation, and his claim that the Medical Examiner's testimony violated his right of confrontation, are unpreserved and we decline to review them in

the interest of justice. As an alternative holding, we find no basis for reversal.

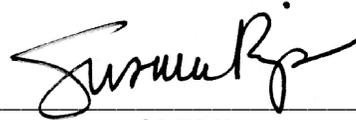
The court properly denied defendant's CPL 440.10 motion, which raised record-based evidentiary issues, as procedurally defective.

Defendant's pro se claim that his counsel rendered ineffective assistance is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record concerning counsel's decisions (see *People v Rivera*, 71 NY2d 705, 709 [1988]). Since the CPL 440.10 motion raised entirely different issues, the merits of the ineffectiveness claim may not be addressed on this appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant's remaining pro se claim is waived and unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

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

ENTERED: DECEMBER 30, 2014

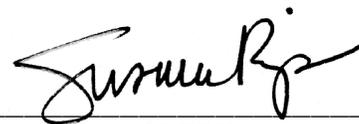
A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Plaintiff's cross motion for an extension of time to serve Da Nico with the summons and complaint, pursuant to CPLR 306-b, should be granted in the interest of justice (see *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]). The absence of due diligence on plaintiff's part is mitigated by the facts that Da Nico had timely notice of the claim; Da Nico had been timely, albeit defectively, served; plaintiff had communicated with Da Nico's insurer and provided the insurer with copies of relevant medical records; there was no prejudice to Da Nico; and the statute of limitations had expired since the commencement of the action (see *Nicodene v Byblos Rest., Inc.*, 98 AD3d 445 [1st Dept 2012]; *Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430 [1st Dept 2011]; *Spath v Zack*, 36 AD3d 410, 413-414 [1st Dept 2007]).

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

ENTERED: DECEMBER 30, 2014



CLERK

Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13838 Earl Holmes, Index 251171/12
Plaintiff-Respondent,

-against-

Brini Transit Inc., et al.,
Defendants,

Glass Castle of Flemington, Inc.,
et al.,
Defendants-Appellants.

Litchfield Cavo LLP, New York (Hyun-Baek Sean Chung of counsel),
for appellants.

Jacoby & Meyers, LLP, Newburgh (Kara Campbell of counsel), for
respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.),
entered November 7, 2013, which, to the extent appealed from,
denied defendants-appellants' motion for summary judgment
dismissing the complaint as against them for failure to meet the
serious injury threshold of Insurance Law § 5102(d), unanimously
modified, on the law, to dismiss the claim alleging injuries
under the permanent consequential limitation of use category, and
otherwise affirmed, without costs.

On June 8, 2009, plaintiff Earl Holmes allegedly sustained
injuries to both knees when the car he was driving was rear ended
by appellants' vehicle. He had arthroscopic surgery in September

2009 on the right knee, and in December 2009 on the left knee.

Defendants established prima facie that plaintiff did not sustain a significant or permanent injury to his knees by submitting their orthopedist's report finding normal range of motion and absence of residuals upon examination in 2010 (see *Batista v Porro*, 110 AD3d 609 [1st Dept 2013]; *Zambrana v Timothy*, 95 AD3d 422 [1st Dept 2012]). Defendants' orthopedist also opined that the tears found in both knees during surgery were preexisting degenerative conditions. Defendants also demonstrated lack of causation through evidence that plaintiff had previous surgery to his right knee following a prior accident, a radiologist's opinion that a tear in the left knee was preexisting, and the affidavit of a biomechanical engineer opining that plaintiff could not have sustained such injuries in the subject accident, which involved minor damage to the vehicles (see *Thomas v NYLL Mgt. Ltd.*, 110 AD3d 613 [1st Dept 2013]; *Anderson v Persell*, 272 AD2d 733, 734-735 [3d Dept 2000]).

In opposition, plaintiff raised triable issues of fact as to whether he sustained a "significant limitation" in both knees as a result of the accident by submitting the affirmation of his orthopedic surgeon, who measured limitations in range of motion during the six months following the 2009 accident, and opined

that the trauma caused damage to both knees that required surgery. He sufficiently addressed plaintiff's prior right knee injury by opining that the 2009 accident caused additional damage to the internal aspect of that knee (see *Fuentes v Sanchez*, 91 AD3d 418, 420 [1st Dept 2012]), and his description of the left knee injuries sustained in 2009 differs from that identified in the prior records, thus raising an issue of fact as to causation.

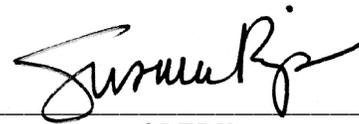
Although plaintiff's orthopedist also found limitations during a July 2013 examination, plaintiff failed to adequately address his complete cessation of all treatment after the December 2009 surgery, which interrupts the chain of causation and renders the finding of permanency speculative (see *Merrick v Lopez-Garcia*, 100 AD3d 456, 456-457 [1st Dept 2012]; see generally *Pommells v Perez*, 4 NY3d 566, 572, 574 [2005]). While plaintiff testified that he stopped treatment because his no-fault benefits ended, he failed to explain why he could not continue treatment through his other health insurance (see *Windham v New York City Tr. Auth.*, 115 AD3d 597, 599 [1st Dept 2014]). Plaintiff's failure to raise an issue as to permanency of his knee injuries following surgery to correct the damage allegedly caused by the 2009 accident, does not preclude recovery under the "significant limitation of use" category (*Vasquez v*

Almanzar, 107 AD3d 538, 539-540 [1st Dept 2013]; see *Thomas v NYLL Mgt. Ltd.*, 110 AD3d 613).

Defendants were entitled to dismissal of the 90/180-day injury claim, as plaintiff's testimony and bill of particulars show that he was not disabled for the minimum statutory period necessary to support such a claim (see *Abreu v NYLL Mgt. Ltd.*, 107 AD3d 512, 513 [1st Dept 2013]).

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

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 30, 2014

A handwritten signature in black ink, appearing to read "Susan R.", is written above a horizontal line.

CLERK

Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13842- Ind. 4277/10
13843 The People of the State of New York, 1174/10
Respondent,

-against-

William Foskey,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (William Condo, J.), rendered on or about July 11, 2013,

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

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

ENTERED: DECEMBER 30, 2014



CLERK

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

The order appealed from did not decide a motion made upon notice and is therefore not appealable as of right (CPLR5701[a][2]); *Serradilla v Lords Corp.*, 12 AD3d 279, 280 [1st Dept 2004]). We decline to exercise our discretion to deem the notice of appeal a motion for leave to appeal (*see id.*).

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R.", is written above a horizontal line.

CLERK

Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13846- Ind. 2596/09
13846A The People of the State of New York, Dkt. 50208C/10
Respondent,

-against-

Robert Johnson,
Defendant-Appellant.

Seymour W. James, Jr., Center for Appellate Litigation, New York
(Joanne Legano Ross of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Julia L. Chariott of
counsel), for respondent.

Judgments, Supreme Court, Bronx County (Steven L. Barrett,
J.), rendered July 5, 2011, convicting defendant, upon his pleas
of guilty, of petit larceny and unauthorized use of a vehicle in
the third degree, and sentencing him to concurrent terms of 1
year and 4 months, respectively, unanimously affirmed.

The misdemeanor information alleging unauthorized use of a
vehicle in the third degree was not jurisdictionally defective.
Defendant's employer at the time of the incident alleged that he
was the lawful owner of the vehicle, that he gave defendant the
keys to the vehicle to make deliveries in the morning and early
afternoon of the date of the incident, and that he instructed
defendant to return the keys by 2:00 p.m. The owner further

alleged that he saw defendant in possession of the keys at 9:30 p.m. that day. Defendant's possession of the keys after the time he was supposed to have returned them established that he exercised control over or otherwise used the vehicle (see *People v McCaleb*, 25 NY2d 394, 399 [1969]). The allegation that defendant exercised control over the van without the owner's consent raised a presumption that he knew that he did not have such consent (see Penal Law § 165.05[1]), and such knowledge was also supported by the owner's instruction to defendant.

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

ENTERED: DECEMBER 30, 2014

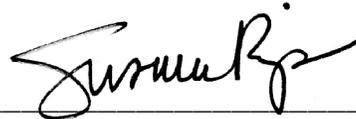
A handwritten signature in black ink, appearing to read "Susan R. Jones", written over a horizontal line.

CLERK

authorized by CPL 220.50(6), because it was an agreed upon condition of a plea to an indictment (see *People v Escaloria*, 119 AD3d 707 [2d Dept 2014]). We have considered and rejected defendant's remaining arguments.

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

ENTERED: DECEMBER 30, 2014

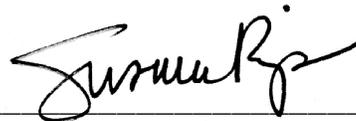
A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

incarcerated was adequately taken into account by the risk assessment instrument (see *People v Gillotti*, 23 NY3d 841, 861 [2014]), and his other arguments in support of a downward departure are unavailing.

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

ENTERED: DECEMBER 30, 2014



CLERK

Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13851 In re Diana M.,
Petitioner-Appellant,

-against-

Nityanan T.,
Respondent-Respondent.

- - - - -

In re Nityanan T.,
Petitioner-Respondent,

-against-

Diana M.,
Respondent-Appellant.

Amed Marzano & Sediva PLLC, New York (Naved Amed of counsel), for appellant.

Neal D. Futerfas, White Plains, for respondent.

Order, Family Court, New York County (Jane Pearl, J.), entered on or about December 5, 2013, which, to the extent appealed from, denied petitioner mother's application to relocate with the parties' child to Florida, unanimously affirmed, without costs.

The Family Court properly found, after consideration of the evidence adduced at trial, that the proposed relocation would not serve the child's best interests (see *Matter of Tropea v Tropea*, 87 NY2d 727, 741 [1996]; *Matter of David J.B. v Monique H.*, 52

AD3d 414 [1st Dept 2008])). While petitioner established that a slight economic advantage would be realized by the move to Florida, the advantage did not outweigh the disruption in the child's bond with respondent father so as to warrant relocation (*compare Matter of Harrsch v Jesser*, 74 AD3d 811 [2d Dept 2010]; *Matter of Kevin McK. v Elizabeth A.E.*, 111 AD3d 124 [1st Dept 2013])).

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R.", is written over a horizontal line.

CLERK

Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13853N American Home Assurance Company, Index 651096/12
Plaintiff-Appellant,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Respondent,

Alcoa, Inc., et al.,
Defendants.

Simpson Thacher & Barlett LLP, New York (Michael J. Garvey of
counsel), for appellant.

Anderson Kill P.C., New York (Robert M. Horkovich of counsel),
for respondent.

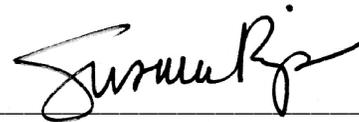
Order, Supreme Court, New York County (Eileen Bransten, J.),
entered on or about June 4, 2014, which granted defendant The
Port Authority of New York and New Jersey's (defendant) motion
for attorneys' fees, unanimously affirmed, without costs.

"An insured who is cast in a defensive posture by the legal
steps an insurer takes in an effort to free itself from its
policy obligations, and who prevails on the merits, may recover
attorneys' fees incurred in defending against the insurer's
action" (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3
NY3d 592, 597-598 [2004] [internal quotation marks omitted]).
Here, the motion court correctly determined that defendant is

entitled to the legal fees incurred in connection with its prior successful motion for summary judgment on its counterclaim for declaratory relief. Defendant's counterclaim is a mirror image of the declaratory claim asserted against it by plaintiff, its insurer. Accordingly, the counterclaim did not cast plaintiff in a defensive posture (*compare West 56th St. Assoc. v Greater N.Y. Mut. Ins. Co.*, 250 AD2d 109, 114 [1st Dept 1998] [successful insureds in a declaratory judgment action were not entitled to attorneys' fees and costs since the insurer's counterclaim was "redundant and mere surplusage" and did not "cast [the insureds] in a defensive posture"]).

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Acosta, J.P., Moskowitz, Richter, Feinman, Clark, JJ.

13856 The People of the State of New York Ind. 260993/12
 ex rel. Niall Macgiollabhui, Esq., on 4538/10
 behalf of Michael Clare, 933/12
 Petitioner-Appellant,

-against-

Dora B. Schriro, Commisioner, New York
City Department of Corrections,
Respondent-Respondent.

Law Office of Michael G. Dowd, New York (Niall Macgiollabhui of
counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon
of counsel), and Robert T. Johnson, District Attorney, Bronx
(Marc I. Eida of counsel), for respondent.

Appeal from judgment (denominated an order), Supreme Court,
Bronx County (Megan Tallmer, J.), entered May 8, 2013, denying
the petition for a writ of habeas corpus and dismissing the
proceeding brought pursuant to CPLR article 70, unanimously
dismissed, without costs, as moot.

This appeal challenging the legality of petitioner's
preconviction detention is moot, since petitioner is currently
incarcerated pursuant to a judgment of conviction and sentence
rendered upon his plea of guilty (see *People ex rel. Megaro*
[*Santiago*] v *Walsh*, 15 AD3d 238 [1st Dept 2005]). Further,

petitioner has failed to demonstrate the applicability of an exception to the mootness doctrine (see *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]; see also *Megaro*, 15 AD3d 238).

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R. Jones", written over a horizontal line.

CLERK

Tyrell (22 NY3d 359, 364 [2013]), defendant had the opportunity to move to withdraw his plea or otherwise raise the issue, and the deficiency in the *Boykin* warnings did not rise to the level of a mode of proceedings error.

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

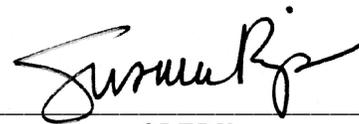
CLERK

properly determined that petitioner is responsible for respondent's counsel's fees. We note that petitioner has filed three petitions alleging violation of court orders, an enforcement petition and a letter motion, all of which were dismissed or withdrawn after argument.

The record reflects that in determining the appropriateness and necessity of the fees, the court properly considered the services rendered, an estimate of the time involved, and the parties' financial status (*see Domestic Relations Law § 237[b]*). It also carefully reviewed the billing records and providently exercised its discretion in crediting the testimony related to the fees in finding that they are reasonable.

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R. Jones", written over a horizontal line.

CLERK

Acosta, J.P., Moskowitz, Richter, Feinman, Clark, JJ.

13860 Stanley Wolfson, et al., Index 150429/11
Plaintiffs-Appellants,

-against-

Metropolitan Transportation
Authority, et al.,
Defendants-Respondents.

Segan, Nemerov & Singer, P.C., New York (Jeff Nemerov of
counsel), for appellants.

Sullivan & Brill, LLP, New York (Adam A. Khalil of counsel), for
respondents.

Order, Supreme Court, New York County (Ellen M. Coin, J.),
entered April 5, 2013, which, to the extent appealed from as
limited by the briefs, denied plaintiffs' cross motion for leave
to serve a late notice of claim upon defendant Phillip J. Mann,
unanimously affirmed, without costs.

Plaintiff Stanley Wolfson's vehicle was allegedly struck by
a bus operated by defendant Mann and owned by nonparty MTA Bus
Company, a subsidiary of defendant the Metropolitan
Transportation Authority (MTA).

There is no evidence that plaintiff presented the requisite
demand for settlement of his claims to MTA Bus Company within the
then-applicable one-year statutory period for commencing a

personal injury action against a public authority (see Public Authorities Law § 1276[1], [former (2)]; *Arrigo v Metro-North Commuter R.R.*, 244 AD2d 208 [1st Dept 1997]; see also *Burgess v Long Is. R.R. Auth.*, 79 NY2d 777, 778 [1991]). Although there is no statutory or legal authority requiring service of a demand on an employee of a subsidiary of the MTA, the motion court properly determined that an action should not proceed against Mann individually, because MTA Bus Company, his employer, is the real party in interest (see *Albano v Hawkins*, 82 AD2d 871, 871 [2d Dept 1981]). Indeed, it is undisputed that Mann was operating the bus owned by the MTA Bus Company during the course of his employment when the accident occurred; therefore, he is entitled to indemnification from his employer (see Public Authorities Law § 1276[3]; *Albano*, 82 AD2d at 871).

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

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

ENTERED: DECEMBER 30, 2014



CLERK

level three adjudication independent of any point assessments, and he does not seek a discretionary downward departure. Moreover, he was previously adjudicated a level three sex offender as a result of the prior conviction that forms the basis of the presumptive override.

In light of the foregoing, we find no reason to address defendant's challenges to particular point assessments (see *People v Pratt*, 121 AD3d 462 [1st Dept 2014]; *People v Lucas*, 118 AD3d 415, 416 [1st Dept 2014]). In any event, we find that the contested points were properly assessed.

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

ENTERED: DECEMBER 30, 2014

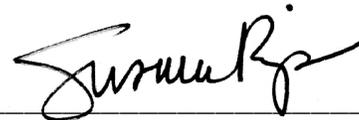
A handwritten signature in black ink, appearing to read 'Susan R. [unclear]', written over a horizontal line.

CLERK

renewed attempts to vacate the judgment and collaterally attack the prior ruling holding her personally liable for the repayments owed to respondent are barred by the doctrines of res judicata and law of the case, and are otherwise without merit (see 107 AD3d 544 [1st Dept 2013]).

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R.", is written above a horizontal line.

CLERK

Acosta, J.P., Moskowitz, Richter, Feinman, Clark, JJ.

13863-

Ind. 1406N/12

13864 The People of the State of New York,
Respondent,

-against-

John Cancel,
Defendant-Appellant.

Scott A. Rosenberg, The Legal Aid Society, New York (Jeffrey Dellheim of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz 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 (Laura Ward, J. at plea; Melissa Jackson, J. at sentencing), rendered on or about March 4, 2013,

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

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

ENTERED: DECEMBER 30, 2014



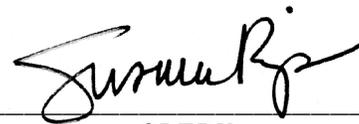
CLERK

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

allocution, but the plea met constitutional standards for that type of arrangement (see *People v Fiumefreddo*, 82 NY2d 536 [1993]). The promised sentence was substantially less than the one defendant would have faced had he been convicted of the present charges after trial, and convictions of additional crimes arising out of the other schemes then under investigation would have resulted in even greater sentencing exposure. Accordingly, there is no reason to believe that any possible leniency to defendant's mother was a significant factor in his decision to plead guilty (see *id.* at 547). Defendant gave a lengthy statement reciting the facts underlying his plea and the court ensured the accuracy of that statement.

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R.", written over a horizontal line.

CLERK

Acosta, J.P., Moskowitz, Richter, Feinman, Clark, JJ.

13869 In re Elissa A.,
 Petitioner-Appellant,

-against-

 Samuel B.,
 Respondent-Respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of
counsel), for appellant.

Veronica H. Mandel, Scarsdale, for respondent.

 Order, Family Court, Bronx County (David B. Cohen, J.),
entered on or about November 25, 2013, which, after a hearing,
awarded sole legal and physical custody of the subject child to
respondent father, with visitation to petitioner mother,
unanimously affirmed, without costs.

 The court's determination that the child's best interests
will be served by awarding sole legal and physical custody to the
father has a sound and substantial basis in the record (see
Eschbach v Eschbach, 56 NY2d 167, 171 [1982]). As the court's
evaluation turned "almost entirely on assessments of the
credibility of the witnesses and particularly on the assessment
of the character and temperament of the parent," its findings
"must be accorded the greatest respect" (*Matter of Irene O.*, 38

NY2d 776, 777 [1975]).

The evidence shows that the mother has not behaved with the child's best interests in mind, as she has impeded the father's visitation with the child (see *Matter of Alfredo J.T. v Jodi D.*, 120 AD3d 1138, 1139 [1st Dept 2014]). Further, the mother has instigated arguments and otherwise acted out aggressively, sometimes with violence, in front of the child, the father, and others (see *Matter of Kenneth H. v Fay F.*, 113 AD3d 542, 543 [1st Dept 2014]). Moreover, the evidence shows that the father is more stable and has taken good care of the child.

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R.", written over a horizontal line.

CLERK

exercised its discretion when it declined to grant a downward departure (see *People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were outweighed by the seriousness of defendant's underlying crimes and his pattern of recidivism.

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R.", is written above a horizontal line.

CLERK

Acosta, J.P., Moskowitz, Richter, Feinman, Clark, JJ.

13871 Sylvia Varga, Index 107184/10
Plaintiff-Respondent,

-against-

North Realty Co., et al.,
Defendants-Appellants,

Love Club Inc., etc., et al.,
Defendants.

Rubin, Fiorella & Friedman LLP, New York (Wendy Eson of counsel),
for appellant.

Pazer, Epstein & Jaffe, P.C., New York (Matthew J. Fein of
counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.),
entered April 23, 2014, which denied defendants North Realty Co.,
Tabs Real Estate Inc., and A.J. Clarke Real Estate Corp.'s motion
for summary judgment dismissing the complaint as against them,
unanimously reversed, on the law, without costs, and the motion
granted. The Clerk is directed to enter judgment accordingly.

Defendants established prima facie that North Realty, the
out-of-possession landlord of the premises in which plaintiff was
injured, and Tabs Real Estate, a part owner of North Realty,
cannot be held liable to plaintiff because the alleged dangerous
condition of the premises is not a significant structural or

design defect that violates a specific statutory safety provision (see *Malloy v Friedland*, 77 AD3d 583 [1st Dept 2010]). New York City Building Code (Administrative Code of City of NY) § 27-103 is a general provision addressing the scope of the Building Code. Section 28-301.1 imposes on owners the general duty to maintain their buildings in safe condition. The provisions that address means of egress (§ 27-530]), vertical exits (§ 27-538]), aisles and cross aisles § 27-532]), seating in assembly spaces (§ 27-531[a][1]), interior stairs (§ 27-375[f]), and exit lighting (§§ 27-540 and 27-381) are inapplicable to the facts of this case.

Defendants established that defendant A.J. Clarke, North Realty's managing agent), cannot be held liable for plaintiff's injuries because it exercised no control over the leased premises (see *Howard v Alexandra Rest.*, 84 AD3d 498 [1st Dept 2011]).

In opposition, plaintiff failed to raise an issue of fact as to any of these defendants.

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

ENTERED: DECEMBER 30, 2014

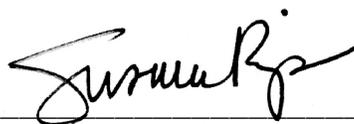


CLERK

criminal history, including repeated parole violations, demonstrates a chronic inability to refrain from criminal conduct (see e.g. *People v Correa*, 83 AD3d 555 [1st Dept 2011], *lv denied* 17 NY3d 805 [2011]).

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read "Susan R.", is written above a horizontal line.

CLERK

officer, as well as committing many other infractions (see *People v Birch*, 99 AD3d 422 [1st Dept 2012], lv denied 20 NY3d 854 [2012]). To the extent defendant is challenging any other point assessments, we find those challenges unavailing.

The court properly exercised its discretion when it declined to grant a downward departure (see *People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant, including his age (mid 50s) and lack of a prior criminal record, do not warrant a downward departure in light of the seriousness of the underlying offense, which was a heinous crime of predatory violence.

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

ENTERED: DECEMBER 30, 2014

A handwritten signature in black ink, appearing to read 'Susan R. [unclear]', written over a horizontal line.

CLERK

plaintiff's favor on its behalf. Northeast Inc.'s interests are not adverse to those of the other defendants; Northeast Community Bancorp, MHC, and the directors have not asserted any counterclaims against plaintiff, and Northeast Inc. has not asserted any cross claims against them (*cf. Schmidt v Magnetic Head Corp.*, 101 AD2d 268, 278-279 [2d Dept 1984]). Northeast Inc. is a passive litigant, and Kilpatrick's appearance on its behalf is merely nominal (*see 207 Second Ave. Realty Corp. v Salzman & Salzman*, 291 AD2d 243 [1st Dept 2002]; *Greenfield v Giambalvo*, 36 Misc 3d 1209[A], 2012 NY Slip Op 51232[U], *6-7 [Sup Ct, Kings County 2012]).

Even if we were to find that a conflict of interest existed, we would nevertheless agree with the motion court that plaintiff waived its objection to the representation (*see Hele Asset, LLC v S.E.E. Realty Assoc.*, 106 AD3d 692 [2d Dept 2013]). Plaintiff's delay of more than two years after this action was commenced before moving to disqualify, during which time its counsel discussed settlement with Kilpatrick, supports the court's finding that the motion is an attempt to gain a tactical

advantage (see e.g. *St. Barnabas Hosp. v New York City Health & Hosps. Corp.*, 7 AD3d 83, 95 [1st Dept 2004]).

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 30, 2014

A handwritten signature in black ink, appearing to read "Susan R.", is written over a horizontal line.

CLERK

Acosta, J.P., Moskowitz, Richter, Feinman, Clark, JJ.

13875N St. Stephen Community A.M.E. Church, Index 650558/11
Plaintiff-Respondent,

-against-

2131 8th Avenue, LLC, et al.,
Defendants-Appellants.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of
counsel), for appellants.

Douglas M. Reda, Woodbury, for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.),
entered June 4, 2013, which, to the extent appealed from, as
limited by the briefs, determined that plaintiff is entitled to
prejudgment interest on an award of \$1.3 million for defendants'
breach of a purchase and sale agreement between plaintiff and
2131 8th Avenue, LLC., unanimously affirmed, without costs.

In this action for breach of contract related to the sale of
real property, defendants' arguments that prejudgment interest is
unavailable because the money at issue was held in escrow,
depriving them of its use, and rendering the imposition of
interest an improper penalty, were squarely addressed and
rejected by the Court of Appeals in *J. D'Addario & Co., Inc. v
Embassy Indus., Inc.* (20 NY3d 113 [2012]), where, as here, the

losing party was found to be in breach of the contract. As the Court of Appeals recognized, the purpose of awarding statutory interest on amounts held in escrow "is to make [the] aggrieved party whole," and "not to punish the breaching party" (*id.* at 118 [internal quotation marks and citations omitted]).

We also reject defendants' equitable estoppel argument, since any construction work which plaintiff had assumed, and which had not yet been completed, did not affect plaintiff's right to payment of the \$1.3 million remaining on the purchase price. Nor was that payment affected by the failure of plaintiff to close on certain portions of the project of which it was to take title, since the failure was caused solely by defendants' improper demands that plaintiff accept a backdated deed and execute improper tax documents, in an apparent attempt to avoid or evade certain tax payments.

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

ENTERED: DECEMBER 30, 2014



CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12619-

Index 13911/99

12620 Shelton Stewart,
 Plaintiff-Appellant,

-against-

New York City Transit Authority,
 Defendant-Respondent,

Sonin & Genis,
 Non-Party Appellant.

Alexander J. Wulwick, New York, for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York
(Joel M. Simon of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.),
entered January 14, 2013, reversed, on the law, without costs,
defendant's motion denied, and the matter remanded to Supreme
Court for consideration of plaintiff's cross motion. Appeal from
order, same court and Justice, entered May 15, 2013, dismissed,
without costs, as taken from a nonappealable order.

Opinion by Manzanet-Daniels, J. All concur except Friedman
and Saxe, JJ. who dissent in an Opinion by Saxe, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
David B. Saxe
Sallie Manzanet-Daniels
Paul G. Feinman, JJ.

12619-12620
Index 13911/99

x

Shelton Stewart,
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

x

Plaintiff appeals from an order of the Supreme Court, Bronx County (Stanley Green, J.), entered January 14, 2013, which, in this personal injury action, to the extent appealed from as limited by the briefs, granted defendant's motion to vacate a further amended judgment to the extent it ordered defendant to pay plaintiff's counsel additional legal fees for the underlying appeal, and denied plaintiff's cross motion to accelerate payment of the judgment, and from the order, same court and Justice, entered May 15, 2013, which denied plaintiff's motion for reargument, improperly denominated a motion for renewal and/or reargument.

Alexander J. Wulwick, New York, for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for respondent.

MANZANET-DANIELS, J.

The motion court erroneously determined that it had the inherent authority to reduce the fee plaintiff and his attorneys had agreed upon in connection with the successful defense of the verdict on appeal. Since the parties clearly excluded appellate work from the initial retainer, and executed a second retainer providing for a separate fee for appellate work, it cannot be said that the award of an additional 10% contingency fee ran afoul of precedent or section 603.7(e) of the Rules of the Appellate Division, First Department, governing contingent fee arrangements. We accordingly reverse.

On December 7, 1998, plaintiff retained nonparty law firm Sonin & Genis to prosecute his negligence action against defendant arising out of a slip and fall at an elevated subway station. Plaintiff and the firm entered into a retainer agreement on an approved OCA form providing for a one-third contingent fee of the net recovery through trial and further providing that in the event of an appeal a separate fee agreement would be entered into. The agreement specifically stated, "Client further understands that the services to be provided through this agreement will not extend through the prosecution of an appeal or representation on appeal brought by any of the parties to the lawsuit," and that "[c]lient understands that SONIN & GENIS, ESQS may charge reasonable additional compensation

. . . if the case is appealed This further representation will require a new [f]ee [a]greement.”

The firm represented plaintiff throughout seven years of discovery, motion practice and trial preparation. Following a three-week trial, the jury returned an approximately \$7 million verdict in plaintiff’s favor. The firm successfully opposed defendant’s posttrial motions, and entered into a structured judgment which provided that the firm would receive attorneys’ fees equal to one third of the recovery.

Defendant appealed the judgment to this Court. On July 19, 2010, plaintiff and Sonin & Genis entered into a new and separate retainer agreement pursuant to which it was agreed that the firm would “provide APPELLATE legal services” for 10% of the net sum recovered. The second retainer expressly stated that “[c]lient further understands that the services to be provided through this agreement is [sic] only for prosecution/defense of an appeal only and for no other purpose, and is [sic] in addition to the retainer signed for the litigation and trial of this matter, wherein SONIN & GENIS, ESQS., are to receive ONE THIRD (33 1/3 %) OF THE NET RECOVERY.”

On March 3, 2011, this Court modified the judgment to the extent of setting aside the amounts for lost earnings and future medical expenses unless plaintiff stipulated to a reduction in the amounts awarded, and otherwise affirmed (*Stewart v New York*

City Tr. Auth., 82 AD3d 438 [1st Dept 2011], *lv denied* 17 NY3d 712 [2011]). Plaintiff so stipulated, and an amended judgment was entered on May 5, 2011 reflecting the reductions and granting attorneys' fees in the amount of 43 1/3 %, i.e., one third plus 10%. Defendant did not contest the award of attorneys' fees. Following the denial of motions for reargument and leave to appeal to the Court of Appeals (during which defendant, again, did not contest the award of attorneys' fees), a further amended judgment, containing the same terms but providing for additional costs and interest, was signed and entered on December 16, 2011, and served on defendant with notice of entry.

On February 16, 2012, defendant moved by order to show cause for a stay of enforcement of the December 16, 2011 judgment and to vacate it, pursuant to CPLR 5015(a), on the ground that the attorneys' fees were "erroneously set . . . in excess of 40%."

Plaintiff opposed the motion, arguing that defendant lacked standing to challenge the contracts between plaintiff and his attorneys, and had waived its right to make the motion at that late stage of the litigation. Plaintiff asserted that since the Court of Appeals refused to alter or vacate the May 5, 2011 judgment (which differed only in the calculation of costs and interest), the motion court lacked authority to revisit the issue of the propriety of the judicially approved judgment or its terms. Plaintiff cross-moved for sanctions and for acceleration

of the payment of the further amended judgment in a lump sum, pursuant to CPLR 5043(b) and 5044.

By order entered January 14, 2013, the motion court granted defendant's motion "to the extent that plaintiff's attorney is not entitled to additional fees for the appeal." The court did not rule on plaintiff's cross motion for sanctions and for acceleration of the judgment.

We now reverse, and hold that the motion court lacked the authority to reach the issue of the propriety of the fee arrangement between plaintiff and his counsel. We find, moreover, that the contractual arrangement between plaintiff and his attorneys providing for a separate fee for appellate work was entirely proper and in conformity with the rules of this Court.

Initially, we note that defendant has no standing to challenge the fees agreed upon as between plaintiff and his counsel. CPLR 5015(a)(3) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, *on motion of any interested person . . . upon the ground of . . . fraud, misrepresentation, or other misconduct of an adverse party (emphasis added).*" Defendant is not an "interested person" within the meaning of the statute, as even the motion court appeared to recognize. Defendant will pay the same amounts pursuant to the judgment regardless of the division of fees as between plaintiff and his counsel.

Defendant's proffered rationale as to why it has standing to challenge the award - that one day in the unforeseen future, plaintiff might seek to hold it liable for excess fees disbursed to his attorney - does not withstand scrutiny.

Further, there is no evidence whatsoever that the judgment was procured by fraud, misrepresentation or other misconduct by plaintiff or his attorneys. As the motion court went out of its way to remark, "[T]here is absolutely no feeling or finding of bad faith, unconscionable conduct, on [the part] of Mr. Genis [plaintiff's attorney]."

Defendant having no standing under CPLR 5015(a)(3) to challenge the separate fee for appellate work, the court relied on its "inherent authority" to reach the issue. A court, however, has no inherent authority to sua sponte reach the issue of attorneys' fees (see *State of New York v Philip Morris Inc.*, 308 AD2d 57 [1st Dept 2003], *lv denied* 1 NY3d 502 [2003]). In *Phillip Morris, Inc.*, we noted that a court has inherent authority over attorneys' fees in "two situations: (i) an attorney asking the court to approve a fee, or (ii) a client complaining about a fee" (*id.* at 68-69). We distinguished between the inherent power of courts to promulgate rules of general applicability regarding attorneys' fees, and an individual judge's authority to conduct "a sua sponte inquiry

into the appropriate amount of attorneys' fees" (*id.* at 68). In the latter case, the Supreme Court "ha[s] no authority or jurisdiction sua sponte to make an independent inquiry into the amount or method used in fixing the attorneys' fees" (*id.* at 65).

Moreover, Supreme Court was without jurisdiction to revisit the issue of the propriety of the fees, even upon the motion of a proper party. Since the Court of Appeals denied applications for review of the May 5, 2011 judgment (which contained the same apportionment of fees, the subsequent judgment differing only in the calculations of costs and interest), the judgment was final, and Supreme Court lacked jurisdiction to, in effect, reverse the Court by modifying the judgment (*see Pjetri v New York City Health & Hosps. Corp.*, 169 AD2d 100, 103-107 [1st Dept 1991] ["once the appellate process has been concluded, alleged errors of law which could have been reviewed but were not, may not be addressed except insofar as the grounds for relief set forth in CPLR 5015 are present"], *lv dismissed* 79 NY2d 915 [1992]).

Counsel herein is entitled to a separate fee for work performed in connection with the appeal, and is not limited to one third of the recovery as set forth in the initial retainer. Where the parties expressly contemplate additional fees in connection with a successful appeal, such an award is legally and ethically permissible, and does not run afoul of the rules of

this Court governing contingent fee arrangements. Indeed, the Court of Appeals, in the recent case of *Albunio v City of New York* (23 NY3d 65 [2014]), recognized that attorneys and their clients can negotiate a different retainer agreement for work performed in connection with an appeal (*id.* at 76).

In making this determination, we are guided by the clear and unequivocal language of the retainer agreement in this case, which was expressly limited to work through trial; explicitly excluded appellate work from the scope of the retainer; and provided that any work done by the firm on the appeal would be performed under a separate fee agreement providing for further compensation for the firm and appellate counsel.

Plaintiff, in an affidavit submitted in opposition to defendant's motion to vacate, acknowledged that he understood that the attorneys "were only agreeing to represent me through trial, and that if there were any appeals, that a separate retainer would have to be signed, with a separate fee agreement" amounting to "an additional ten percent . . . of the recovery." Plaintiff averred that the attorneys worked "relentless[ly]" on his behalf, and that he was "extremely satisfied" with their representation. Plaintiff averred that payment of an additional 10% of the recovery of the appeal seemed fair and appropriate, given the circumstances and the extraordinary amount of work

required. Plaintiff had the opportunity to hire other appellate counsel, but declined, trusting Mr. Genis's skill, judgment, knowledge, work ethic, and talent.

Plaintiff's expert, a leading expert on legal ethics, opined that it was legally and ethically permissible for the firm to collect a separate fee for appellate work, notwithstanding that the firm is entitled, under the original retainer, to a contingency fee of one third of the recovery. Plaintiff's expert opined that limiting counsel's contingent fee to that encompassed in the initial retainer "does not advance the purpose behind Section 603.7 . . . i.e., protecting clients from gouging by attorneys." The expert also observed that had plaintiff chosen to retain new counsel for the appeal, there would be absolutely no question that the new counsel would be entitled to a fee for his or her work, notwithstanding the fact that trial counsel was entitled to receive 33 1/3% of any recovery. Plaintiff's expert noted that it would be "anomalous" to assert that trial counsel should be compensated less favorably than new counsel for performing the work that had not been contemplated by the initial retainer.

This is not a case, like those relied on by defendant, in which the retainer did not contemplate an additional fee for the appeal, or an attorney sought a midstream modification of the original fee agreement (*compare Matter of Cramer*, 24 AD3d 864,

865-66 [3d Dept 2005] [retainer did not contemplate additional contingent fees, and client registered objection to additional fees sought]; *Naiman v New York Univ. Hospitals Ctr.*, 351 F Supp 2d 257 [SD NY 2005] [retainer silent on the issue of fees for the appeal]; *Belzer v Bollea*, 150 Misc 2d 925 [Sup Ct, NY County, 1990] [client objected to enhanced contingent fee not contemplated in initial retainer]; *Siagha v David Katz & Assoc., LLP*, 16 Misc 3d 1130[A], 2007 Slip Op 51650[U], *10-11 [Sup Ct, NY County, 2007] [retainer agreement silent as to fees for appellate work or collateral litigation, and the plaintiff objected to an enhanced contingency fee]).

Nor is the charging of a separate fee for appellate work prohibited by section 603.7(e) of this Court's rules (22 NYCRR 603.7[e]), which sets forth schedules of permissible contingent fee arrangements in personal injury cases other than those involving medical practice. Section 603.7 does not address the specific question presented by this case - namely, whether the firm can receive separate compensation under a separate retainer agreement for appellate work not covered by the original retainer, when the original retainer provided for a one-third contingency fee for work performed through trial.

The dissent opines that the fee arrangement for appellate work in this case was somehow improper. Yet even the dissent is

compelled to admit that no statute, rule or case law prohibited the arrangement. The dissent recognizes that had plaintiff engaged another attorney to defend the verdict on appeal, said attorney would be entitled to a fee for the appellate work. That the attorneys who represented plaintiff through trial also represented him on the appeal ought not to deprive them of the fee to which they are entitled by the clear and unambiguous terms of the retainer agreements.

We remit the matter to Supreme Court so that it might rule on plaintiff's cross motion pursuant to CPLR 5043(b) and 5044 for acceleration of the judgment and payment in full of a lump sum.

Accordingly, the order of the Supreme Court, Bronx County (Stanley Green, J.), entered January 14, 2013, which, in this personal injury action, to the extent appealed from as limited by the briefs, granted defendant's motion to vacate a further amended judgment to the extent it ordered defendant to pay plaintiff's counsel additional legal fees for the underlying appeal, and denied plaintiff's cross motion to accelerate payment of the judgment, should be reversed, on the law, without costs, defendant's motion denied, and the matter remanded to Supreme Court for consideration of plaintiff's cross motion. The appeal

from the order of the same court and Justice, entered May 15, 2013, which denied plaintiff's motion for reargument, improperly denominated a motion for renewal and/or reargument, should be dismissed, without costs, as taken from a nonappealable order.

All concur except Friedman and Saxe, JJ. who dissent in an Opinion by Saxe, J.

SAXE, J. (dissenting)

An apparently straightforward court rule, establishing schedules setting maximum contingency fees that may be charged in personal injury and wrongful death cases (see Rules of App Div, 1st Dept [22 NYCRR] § 603.7[e]), presents a problem here because while it sets policy regarding the maximum allowable contingency fee, it fails to make any mention of whether, or how, that policy applies to appeals. In the present case, the nonparty law firm's initial retainer agreement charged the maximum allowable contingency fee for its work, but specified that its retainer was only for trial work and did not cover appellate work. Then, having prevailed at trial, entitling it to the maximum contingency fee, it entered into a new retainer agreement with the client, in which the firm charged the client an additional 10% contingency fee for its appellate work. Although no statute, rule or case law specifically prohibits that arrangement, I believe that it contravenes the spirit and purpose of this Court's rule.

Attorney retainer agreements, although subject to judicial scrutiny on grounds of unconscionability (*Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172, 176 [1986]), are generally treated as entitled to enforcement, as any other contract: "As a general rule, we enforce clear and complete documents, like the

revised retainer agreement, according to their terms" (*Matter of Lawrence*, - NY3d -, 2014 NY Slip Op 07291, *10 [2014]). However, when retainer agreements provide for contingency fees in personal injury and wrongful death matters, court rules of each Judicial Department impose additional limitations on attorneys (see 22 NYCRR 603.7[e], 22 NYCRR 691.20[e], 22 NYCRR 806.13[b], 22 NYCRR 1022.31[b]). Limitations are also imposed by statute for medical, dental and podiatric malpractice actions (see Judiciary Law § 474-a). Specifically, the foregoing rules define and limit reasonable fees for attorneys to maximums set by provided fee schedules. The schedule applicable here, under 22 NYCRR 603.7(e), permits the attorney to contract for a fee equal to a maximum of one third of the net recovery. The question presented here is whether, under the present circumstances, section 603.7(e) precludes trial counsel from contracting with the client for an additional percentage of the recovery, beyond that one-third fee, as counsel's fee for the preparation of the client's appellate case. I believe that the motion court was correct when it vacated the further amended judgment insofar as the judgment directed defendant to pay to plaintiff's counsel, from the total amount awarded, legal fees totaling 43⅓% of the award.

Preliminarily, I disagree with the majority's conclusion that defendant Transit Authority lacked standing to bring the

motion. Because its application was a motion rather than an appeal, the question is not whether the Transit Authority is aggrieved, as would have been required by CPLR 5511 if it were the appellant; rather, the applicable standard is simply whether the movant is an "interested person" under CPLR 5015(a). To establish that showing, the movant must show "some legitimate interest . . . [that would] be served and that judicial assistance [would] avoid injustice" (*Oppenheimer v Westcott*, 47 NY2d 595, 602 [1979] [internal quotation marks omitted]). The legitimate interest presented by the Transit Authority was, contrary to the law firm's dismissive characterization, a very real possibility. That is, as the Transit Authority pointed out, at some later date plaintiff could have challenged the propriety of its counsel taking an extra 10% of the award for its fee on appeal. Furthermore, in doing so, plaintiff could seek to recoup that extra 10% not only from his trial/appellate counsel, but also from the Transit Authority, on the ground that the Transit Authority should have known of the impropriety of paying directly to plaintiff's counsel a contingency fee larger than the permissible one third.

The majority asserts that there is no misconduct supporting a vacatur of the judgment as required by CPLR 5015. However, if the fee to plaintiff's counsel provided for by the judgment violated applicable court rules regarding the maximum allowable

contingency fee, that rule violation could constitute misconduct in procuring the judgment such as would properly support the remedy provided by CPLR 5015(a)(3).

In my view, the motion court had the authority to vacate the directive ordering defendant to pay plaintiff's counsel legal fees totaling 43.3% of the amount awarded. "[I]t is well established that Supreme Court has inherent power to supervise the fees attorneys charge for legal services" (*Matter of Stortecky v Mazzone*, 85 NY2d 518, 525 [1995]), and "a court may vacate its own judgment for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). Since attorneys are barred from charging fees that are excessive or unreasonable (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.5[a]), and attorneys in personal injury cases are more particularly limited to an established maximum percentage (22 NYCRR 603.7[e]), and since the Transit Authority qualified as an "interested person" to bring the issue before the court pursuant to CPLR 5015(a), the motion court was certainly authorized to rule on the question. But, even if the Transit Authority had not been a proper party to make the application, the majority's reliance on *State of New York v Philip Morris, Inc.*, 308 AD2d 57 [1st Dept 2003], *lv denied* 1 NY3d 502 [2003]), is misplaced. In that action against

tobacco companies and related entities to recover the costs incurred by the state and local government for treating smoking-related illnesses, this Court held that a Commercial Division justice was not authorized to inquire, sua sponte, into an arbitration panel's award of legal fees payable by the tobacco companies to outside counsel under a settlement agreement, where the consent decree and final judgment precluded modifications or future applications to the court unless necessary or appropriate to implement or enforce the consent decree (*id.*). The judgments at issue here did not contain such preclusions.

I therefore turn to the crux of the presented issue, namely, whether plaintiff's trial counsel may be paid an additional fee for work performed in connection with an appeal, beyond the one third permitted by court rule.

Notably, the purpose of the rule setting a maximum allowable fee is to "protect unsophisticated personal injury and wrongful death plaintiffs from agreeing to unconscionable fee arrangements with unscrupulous lawyers" (*Rakower v Lavi*, 2009 NY Slip Op 31905[U] [Sup Ct NY County 2009]). Indeed, this Court has observed that the primary purpose of 22 NYCRR 603.7 "is protection of the public through monitoring of the fees charged by practitioners at the Bar" (*Rabinowitz v Cousins*, 219 AD2d 487, 488 [1st Dept 1995]). Since the purpose of the rule is to

protect clients from overreaching attorneys, it is not relevant to our analysis that plaintiff agreed to the additional 10% payment.

Although the rule does not specifically refer to whether the permitted fee covers appellate work, I believe that allowing counsel to accept a 43 $\frac{1}{3}$ % fee contravenes the spirit of, and policy behind, the court rule, which, in its essence, precludes a plaintiff's attorney in a personal injury case from accepting a fee greater than one third of the total award.

The majority cites *Albunio v City of New York* (23 NY3d 65 [2014]) in support of the proposition that counsel is entitled to be paid a separate fee for work performed in connection with an appeal, beyond the amount permitted for trial work. However, the Court of Appeals's approval in *Albunio* of "attorneys and clients . . . negotiat[ing] a different retainer agreement for work done on appeal" where the trial retainer "did not obligate [counsel] to [continue to] represent [the client] on appeal" (*id.* at 76), arose in the context of an action brought under the New York City Human Rights Law, to which 22 NYCRR 603.7 had no applicability. Unlike *Albunio*, here rule 603.7(e) is squarely applicable, and that rule establishes that a contingency fee beyond one third of the total award is excessive.

Indeed, the majority's interpretation of rule 603.7 leaves

appellate counsel in personal injury cases without any limitations or guidance on whether they may demand contingency fees, or how much they may demand, when handling appeals in personal injury matters, aside from the broad and general prohibition against excessive fees (see Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.5[a]). We should keep in mind that in personal injury litigation, the need for an appeal is virtually assured unless the judgment is the result of a settlement. Although clients may well accede to the terms of form retainer agreements proffered by their attorneys, specifying that the agreed-on counsel fee will not cover any necessary postjudgment work, the clients may not understand the probability that further legal work will be needed in the event they prevail at trial, or the extent to which an additional contingency fee for appellate work could reduce the amount they will ultimately receive.

Even assuming that the rule's permissible maximum contingency fee was not intended to include counsel fees for appellate work, I submit that the stated maximum *should* include those fees, at least where counsel who handled the trial also handles the appeal. It bears emphasis that where a law firm is defending on appeal an award it won for its client at trial, the law firm is defending its own fee as much as the client's award, and its interest in doing so may be as pressing as the client's

own interest in prevailing. Moreover, the work of preparing the appeal is far less burdensome for trial counsel than what would be required of an attorney with no prior familiarity with the case, because trial counsel possesses a uniquely intimate and thorough knowledge of the record and all the legal arguments. Indeed, appeals of personal injury verdicts are often largely challenges to the amount of the damages awarded, further limiting the scope of the necessary appellate representation. With these thoughts in mind, it makes sense that the maximum fee allowable to trial counsel under rule 603.7 should include the additional work of its representation of the client on appeal.

Another problem with the rule's failure to provide for the allowable contingency fee percentage for appellate work is that seemingly reasonable percentage amounts, like 10% or 20% or 33 $\frac{1}{3}$ %, can quickly bring the total of counsel fees to a major portion of the judgment awarded when added to trial counsel's one third.

For the present purposes, I am not suggesting that a new attorney taking on the task of representing the client for purposes of appeal could not be entitled to a separate fee. Nor am I suggesting that trial counsel has an obligation to undertake the appeal. My only concern here is that an additional

percentage should not be paid to the law firm that handled the trial, when the firm is already receiving the maximum allowable fee. In these circumstances, the rule's maximum allowable fee should also cover the work of representing the client on appeal.

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

ENTERED:


CLERK