

from asserting his innocence. The record establishes that defendant's plea was knowing, intelligent and voluntary, and that his claim of innocence was contradicted by his plea allocution.

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

ENTERED: JUNE 10, 2008



CLERK

Lippman, P.J., Williams, Moskowitz, Acosta, JJ.

3882-

3883 Francis Carling,
Plaintiff-Respondent,

Index 602747/06

-against-

205-69 Apartments, Inc.,
Defendant-Appellant.

Cantor, Epstein & Mazzola, LLP, New York (Robert I. Cantor of counsel), for appellant.

Francis Carling, New York, respondent pro se.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered November 8, 2007, awarding plaintiff the sum of \$108,000, plus interest, and bringing up for review an order, same court and J.H.O., entered October 17, 2007, which, inter alia, denied defendant's motion for summary judgment and granted plaintiff's cross motion for summary judgment awarding him the amount of the flip tax he paid in connection with the sale of his shares in defendant cooperative corporation, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's cross motion denied, and the matter remanded for further proceedings consistent herewith. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The operative fee structure created by a 1998 agreement violated Business Corporation Law § 501(c) because the provision

that established a disparate flip tax was not incorporated into a proprietary lease, occupancy agreement, offering plan, or properly approved amendment thereto (see *Wapnick v Seven Park Ave. Corp.*, 240 AD2d 245, 246 [1997]). However, since the sponsor "was a necessary party, and should have been joined in the proceeding at its inception" (*Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 457 [2005]), granting plaintiff relief was premature.

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

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

ENTERED: JUNE 10, 2008



CLERK

Lippman, P.J., Williams, Moskowitz, Acosta, JJ.

3884 Jawaun Craig Hall,
Plaintiff-Appellant,

Index 7212/06

-against-

Elrac, Inc., doing business as
Enterprise Rent A Car,
Defendant-Respondent,

Lucas Alvarez, et al.,
Defendants.

- - - - -
United States of America,
Intervenor-Respondent.

Ogen & Associates, P.C., New York (Eitan Ogen of counsel), for
appellant.

DeSimone, Aviles, Shorter & Oxamendi, LLP, New York (Michael J.
Aviles of counsel), for Elrac, Inc., respondent.

Michael J. Garcia, New York (Matthew L. Schwartz of counsel), for
United States of America, respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.),
entered January 24, 2007, which, in an action for personal
injuries sustained by plaintiff while a passenger in a car owned
by defendant-respondent car rental company, granted respondent's
motion for summary judgment dismissing the complaint as against
it to the extent of dismissing so much of the first cause of
action as seeks to hold respondent vicariously liable for
defendants driver's and lessee's negligence in the operation and
maintenance of the car, and dismissing the second cause of action
for negligent entrustment of the car in its entirety, unanimously

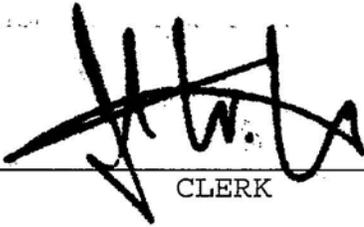
affirmed, without costs.

Plaintiff's vicarious liability claims against respondent are barred by 49 USC § 30106, the "Graves Amendment." We reject plaintiff's argument that the Graves Amendment violates the Commerce Clause of the US Constitution (*Graham v Dunkley*, 50 AD3d 55 [2d Dept 2008], *appeal dismissed* __ NY3d __, 2008 NY Slip Op 70255 [April 29, 2008] [no substantial constitutional question involved], *rev'd* 13 Misc 3d 790 [2006]; *see also Hernandez v Sanchez*, 40 AD3d 446, 447 [1st Dept 2007]). We also reject plaintiff's argument that the Graves Amendment violates equal protection by favoring car rental companies over other vehicle owners, such as taxi owners, repair shop owners who provide loaner vehicles to customers, and car dealerships that allow test drives, who also allow others to operate their vehicles. The renting of vehicles has a clear substantial effect on interstate commerce (*Graham*, 50 AD3d at 61-62), unlike these other activities, and the same rational basis for regulating the renting of vehicles under the Commerce Clause even in purely intrastate instances -- that elimination of vicarious liability will result in a reduction of insurance costs that will in turn result in a reduction of consumer prices and allow more lessors

to remain in business (see *id.* at 61) -- supports the classification for purposes of equal protection. We have considered and rejected plaintiff's other arguments.

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

ENTERED: JUNE 10, 2008



CLERK

Lippman, P.J., Williams, Moskowitz, Acosta, JJ.

3885 Charles Kamin, et al., Index 110401/05
Plaintiffs-Respondents, 591064/05

-against-

James G. Kennedy & Co., Inc.,
Defendant-Appellant,

New York Stock Exchange, Inc., et al.,
Defendants.

- - - - -

James G. Kennedy & Co., Inc.,
Third-Party Plaintiff-Appellant,

-against-

Interior Design Flooring Corporation,
Third-Party Defendant-Respondent.

Fabiani Cohen & Hall, LLP, New York (Lisa A. Sokoloff of
counsel), for appellant.

Diamond and Diamond, LLC, New York (Stuart Diamond of counsel),
for Kamin respondents.

Paganini, Gambeski, Cioci, Cusumano & Farole, Lake Success (Peter
A. Cusumano of counsel), for Interior Design Flooring
Corporation, respondent.

Order, Supreme Court, New York County (Leland G. DeGrasse,
J.), entered October 3, 2007, which, in an action for personal
injuries by a floor installer, insofar as appealed from, denied
the cross motion of defendant/third-party plaintiff general
contractor (Kennedy) for summary judgment dismissing the
complaint and all cross claims as against it, and for summary
judgment on its claim for contractual indemnification against
plaintiff's employer, third-party defendant flooring contractor

(Interior), unanimously affirmed, without costs.

Plaintiff testified that immediately after he fell he looked to see what caused him to fall, and observed crumpled, randomly taped, tan protection paper covering newly installed carpeting. While plaintiff did not see who had put the paper down, he believed it was Kennedy's employees, as he had not done so himself and it was almost always the general contractor who performed that job; further, plaintiff's testimony that the paper had been put down the night before, and that the tape holding it down was blue, was uncontroverted. While Interior's contract with Kennedy included "floor protection," Interior's principal testified that floor protection was usually performed by the general contractor, and he could not say whether Interior had delivered or installed any paper at this site. Kennedy's principal testified that Kennedy sometimes performed floor protection, using blue tape, that its workers' duties included housekeeping and correcting tripping hazards, which they were authorized to perform on their own, that its workers were the last to leave at night, and that he could not say who put down the paper over which plaintiff allegedly tripped or whether Kennedy's employees had been directed to do so. We reject Kennedy's argument that it should have been granted summary judgment since the crumpled condition of the paper could have been the result of plaintiff's fall rather than its cause, and

that there was no evidence, other than speculation, that it had put down the paper. Plaintiff's testimony concerning his post-accident observations and customs of the trade were enough to make it Kennedy's burden to show, in the first instance, that it did not create the alleged hazardous condition or that such condition was not the cause of plaintiff's fall (*Tiles v City of New York*, 262 AD2d 174 [1999]; *Bivins v Zeckendorf Realty*, 289 AD2d 123 [2001]). This Kennedy failed to do, making consideration of plaintiff's opposition papers unnecessary (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). This same failure to meet its initial burden also renders immaterial Kennedy's argument that the motion court improperly considered plaintiff's unserved opposition papers to its cross motion. The foregoing issues of fact as to whether plaintiff's fall was caused by Kennedy's negligence in putting down the paper also require denial of summary judgment in Kennedy's favor on its claim against Interior for contractual indemnification. We note that the subject indemnification provision, which limits indemnification "to the fullest extent permitted by law," is enforceable (see *Jackson v City of New York*, 38 AD3d 324, 324-325

[2007]). We have considered Kennedy's other arguments and find them unavailing.

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

ENTERED: JUNE 10, 2008



CLERK

Lippman, P.J., Williams, Moskowitz, Acosta, JJ.

3886 In re Kesierika H., etc.,

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

Rita T.,
Petitioner-Appellant,

-against-

Administration for Children's Services,
Respondent-Respondent.

Lisa H. Blitman, New York, for appellant.

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

Order, Family Court, Bronx County (Gayle P. Roberts, J.),
entered on or about September 23, 2004, which, after a hearing,
dismissed petitioner's application for custody of the subject
child with prejudice, unanimously affirmed, without costs.

The court's determination that it was in the best interests
of the child to deny custody to petitioner, her paternal
grandmother, was amply supported by the evidence (*see Matter of
Luz Maria V.*, 23 AD3d 192 [2005], *lv denied* 6 NY3d 710 [2006]).
The record shows that the foster mother has provided a positive
environment for the child, tends to her special needs, and has
expressed a desire to adopt the child, while petitioner visited
the child once since her placement. It is also noteworthy that
the Family Court previously made a finding of neglect against

petitioner with regard to her grandchildren, including the subject child, and denied petitioner's separate application to adopt her other grandchildren, which denial was affirmed by this Court (*see Matter of Rita T. v Commissioner of Admin. for Children's Servs. of City of N.Y.*, 49 AD3d 327 [2008]).

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

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

ENTERED: JUNE 10, 2008


CLERK

Lippman, P.J., Williams, Moskowitz, Acosta, JJ.

3887 Sigurd A. Sorenson,
Plaintiff-Appellant,

Index 601289/05

-against-

Bridge Capital Corp., et al.,
Defendants-Respondents.

Sigurd A. Sorenson, New York, appellant pro se.

Susman Godfrey LLP, New York (Tibor L. Nagy of counsel), for
respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 3, 2008, which granted defendants' motion for summary judgment dismissing the amended complaint, canceled the notice of pendency, and denied plaintiff's cross motion for summary judgment, unanimously modified, on the law, the first and fourth causes of action reinstated, and otherwise affirmed, without costs. The preliminary injunctive relief granted by this Court by order entered February 19, 2008 continued for 20 days from the date of service of the order on this appeal with notice of entry.

Plaintiff, a litigation partner at an international law firm, seeks specific enforcement of his rights under three agreements for the purchase of units in a building undergoing conversion to condominium ownership or, alternatively, damages for breach of the agreements. Plaintiff alleges that the sponsor's principal lured him into a relationship of trust and

confidence, and then tricked him into entering into revised contracts that gave the sponsor a right to terminate the agreements in the event the parties could not reach mutual understanding on the excess costs of building out the three units to include "significant additional and different" features from the specifications provided in the offering plan. After the parties executed the revised agreements, the sponsor purportedly terminated the agreements on the ground that the parties were unable to reach agreement on the cost of overages, and also on the ground, no longer pressed, that the sponsor itself had not timely complied with its obligation to file a second amendment to the offering plan with the Attorney General's office. Plaintiff alleges that the sponsor's motive was to be able to use the executed agreements to obtain financing, and then cancel them so the units could be sold at market prices, which had been rising dramatically.

Plaintiff alleged with specificity that the sponsor's agent engaged in fraud in connection with execution of the agreements by deleting the language to which plaintiff had objected in his presence, and then reinserting it without any notice. While such allegedly duplicitous conduct in the course of negotiations is improper, it is undisputed that plaintiff had a fair opportunity to read the final agreements, including the disputed language, before executing them, but re-read only those sections he was

told contained additional changes. The general rule is that in the absence of a confidential relationship, "A party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms" (*Sofio v Hughes*, 162 AD2d 518, 519 [1990], *lv denied* 76 NY2d 712 [1990]; see also *Pimpinello v Swift & Co.*, 253 NY 159, 162-163 [1930]; cf. *Wiesenthal v Krane*, 226 App Div 82, 85-86 [1929]). Plaintiff's negligent failure to read the agreements prevents him from establishing justifiable reliance, an essential element of fraud in the execution (see generally *Daniel Gale Assoc. v Hillcrest Estates*, 283 AD2d 386 [2001]). This claim was properly dismissed.

The fraud-in-the-inducement claim, based on allegations that plaintiff relied on the sponsor's representations in the offering plan that it had financing in place, when in fact the sponsor allegedly was unable to complete the project on schedule, was also properly dismissed. The offering plan expressly disclaimed any warranty concerning the sponsor's financial ability to perform its obligations. Moreover, plaintiff did not allege damages incurred as a result of such fraud.

Defendants failed to establish entitlement to summary dismissal of the fourth cause of action for breach of the duty of good faith and fair dealing. Implicit in every contract is a promise of good faith and fair dealing that is breached when a party acts in a manner that -- although not expressly forbidden

by any contractual provision -- would deprive the other party of receiving the benefits under their agreement (see *Ellenberg Morgan Corp. v Hard Rock Café Assoc.*, 116 AD2d 266, 271 [1986]). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; see also *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153-154 [2002]). There are material issues of fact here as to whether the sponsor intended to invoke the challenged contract termination provisions from the moment the revised agreements were signed. The record contains evidence that plaintiff substantially complied with his obligation to submit architectural plans for the build-out of his units, but that the sponsor failed to negotiate in good faith to reach agreement on the reasonable excess cost attributable to plaintiff's build-out specifications. Instead, when plaintiff offered to forgo his plans for individualized build-out of the units altogether, in favor of the build-out specifications provided in the offering plan, which should have eliminated any need to negotiate the amount of excess costs, the sponsor responded by terminating the agreements. While the sponsor contends that its demands were reasonable and that plaintiff wrongly relied on oral agreements that he would be provided with a credit, those contentions are disputed. The language of the

agreement is not inconsistent with plaintiff's understanding that some part of the cost of build-out would be borne by the sponsor, and that plaintiff could be required to contribute to overage costs attributable to his additional and different specifications.

Since plaintiff did not materially breach these agreements relating to unique properties, the equitable remedy of specific performance (first cause of action) may be available (see *EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45 [2004], lv denied 3 NY3d 607 [2004]).

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

M-2471 *Sorenson v Bridge Capital Corp., et al.*

Motion seeking leave to enlarge record granted.

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

ENTERED: JUNE 10, 2008


CLERK

Lippman, P.J., Williams, Moskowitz, Acosta, JJ.

3888 John Sanginito, et al.,
Plaintiffs-Appellants,

Index 23262/06

-against-

National Grange Mutual Insurance Company,
Defendant-Respondent.

Litchfield Cavo LLP, New York (Vincent J. Velardo of counsel),
for appellants.

Law Office of Eric N. Wolpin, New York (Thomas G. Connolly of
counsel), for respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.),
entered August 30, 2007, which denied plaintiffs' motion for
summary judgment, unanimously affirmed, without costs.

To negate coverage by virtue of an exclusion, an insurer
must establish that the exclusion is stated in clear and
unmistakable language, is subject to no other reasonable
interpretations, and applies in the particular case (*Continental
Cas. Co. v Rapid-Am. Corp.*, 80 NY2d 640, 652 [1993]).

We agree with the motion court that the exclusion is not
clear and unambiguous. Further, there are unresolved questions
of fact remaining as to whether or not the business purpose of

and work performed by plaintiffs excluded them from coverage under the policy.

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

ENTERED: JUNE 10, 2008



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(see *People v Blount*, 286 AD2d 649 [2001], lv denied 97 NY2d 701 [2002]). In particular, to the extent counsel sought to comment on the behavior of a spectator during the victim's testimony, that behavior did not constitute evidence under the circumstances of the case (see *People v Ferguson*, 82 NY2d 837 [1993]). The court did nothing to restrict counsel's ability to comment on the demeanor of the victim or any other witness.

The court correctly interpreted a note from the deliberating jury as an inquiry into whether a partial verdict was permissible. Moreover, the note specifically referred to the jury's inability to reach a verdict on one or more of the robbery counts. There was no reasonable possibility that the jury misunderstood, or was asking for further guidance on, the general requirement of unanimity. In any event, defendant could not have been prejudiced (see *People v Lourido*, 70 NY2d 428, 435 [1987]) by the court's failure to re-explain the need for a unanimous verdict, because the jury, which was polled, unanimously convicted him of assault and acquitted him of all other charges.

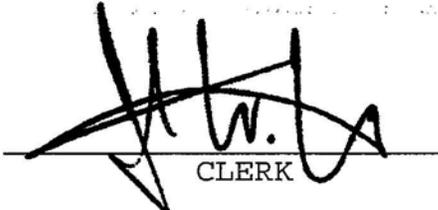
To the extent that defendant is raising constitutional claims relating to the summation and supplemental charge issues, such claims are unpreserved and we decline to review them in the

interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 10, 2008



CLERK

venue from Bronx County to New York County and (2) referring plaintiffs' cross motion to consolidate this action with another action pending in Bronx County to the New York County Supreme Court justice to be assigned the action upon transfer, and, upon reargument, (1) denied defendants' motions for a change of venue and (2) granted plaintiffs' cross motion for consolidation, unanimously modified, on the law, (1) to deny the motion to reargue insofar as addressed to the motion to change venue, and (2) upon reargument of the cross motion to consolidate, to deny consolidation, and otherwise affirmed, without costs.

The motion court granted reargument on the ground that it had erroneously considered a "supplemental" submission by defendants of documentary evidence bearing on the issue of residence after what should have been their final submission on their motion for a change of venue, and that it thereby "overlooked" the rules of motion practice. This was error. Plaintiffs waived any objection to the supplemental submission by not objecting to it at the time and by putting in their own "supplemental reply" in response. In addition, after oral argument, plaintiffs, and, thereafter, defendants, made additional submissions. So far as appears, all submissions were considered by the motion court, and plaintiffs sustained no prejudice as a result of this free-wheeling procedure adopted by the parties and accepted by the court until it changed its mind

on plaintiffs' motion to reargue.

With respect to plaintiffs' cross motion for consolidation, although the motion court's original decision to change venue was correct, the motion court's (unnecessarily separate) order referring the cross motion to the New York County justice to be assigned the action should not be reinstated, as there is no need for further duplicative argument. For present purposes, we accept plaintiffs' characterization of the two actions they seek to consolidate as involving patients who were treated at defendant hospital at about the same time and whose deaths were allegedly caused, at least in part, by exposure to Legionella bacteria in the hospital's water system. Thus, both actions will involve what defendants knew about the contamination and when, and what steps they took and should have taken to cleanse the water system or otherwise prevent it from causing infection. Nevertheless, "individual issues predominate, concerning particular circumstances applicable to each plaintiff" (*Bender v Underwood*, 93 AD2d 747, 748 [1983]; see also *Gittino v LCA Vision*, 301 AD2d 847 [2003]; *DeAngelis v New York Univ. Med. Ctr.*, 292 AD2d 237, 237-238 [2002]), including their respective illnesses, histories, treatments, physical locations in the hospital, the means, nature and extent of the exposure, and the extent to which any malpractice and any water contamination respectively contributed to their deaths. Indeed, this action

appears to claim that defendants' alleged acts of malpractice in treating the decedent's heart condition was the primary cause of death, whereas the other action appears to emphasize the exposure to and treatment of the Legionella. Consolidation might also confuse the jury (see *Bender*, 93 AD2d 748), where some but not all of the defendants are defendants in both actions, and some of the defendants appear to be sued for their role in treatment and others for their role in monitoring or maintaining the water supply.

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

ENTERED: JUNE 10, 2008



CLERK

Lippman, P.J., Williams, Moskowitz, Acosta, JJ.

3891 Elizabeth Garza, et al., Index 101238/06
Plaintiffs-Respondents-Appellants,

-against-

508 West 112th Street, Inc., et al.,
Defendants-Appellants-Respondents.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of
counsel), for appellants-respondents.

David E. Frazer, New York, for respondents-appellants.

Order, Supreme Court, New York County (Emily Jane Goodman,
J.), entered January 10, 2008, which denied defendants' motion
and plaintiffs' cross motion for summary judgment, unanimously
affirmed, without costs.

The court properly found that issues of fact exist as to
whether plaintiffs have a right to exclusive use of the roof,
ancillary to their tenancy in the penthouse apartment. Paragraph
31 of the lease for the penthouse apartment signed by plaintiff
Garza in 1982 provided in handwriting and initialed: "Usage of
roof terrace subject to landlord's approval." After that
apartment was combined with the other penthouse in 1989, a new
lease was executed, whose ¶ 20(2) provided: "No one is allowed on
the roof." However this lease, presently in force, also states
that the demised premises includes "Apartment (and terrace, if
any)" (emphasis in lease). Defendants assert that the roof does
not have a terrace, but only a roof covered with tar paper, which

would fall within the ¶ 20(2) preclusion of use of the roof.
This record clearly presents issues of fact as to whether a roof
terrace exists within the meaning of the lease.

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

ENTERED: JUNE 10, 2008



CLERK

nonconstitutional error (see *People v Crimmins*, 36 NY2d 230 [1975]). There was overwhelming evidence that the officer observed a drug transaction, and the proffered evidence had very little probative value.

Defendant's sentence, which was the minimum permitted by law for a drug offender with a predicate violent felony conviction, was not unconstitutionally severe (see *Rummel v Estelle*, 445 US 263, 271 [1980]; *People v Broadie*, 37 NY2d 100, 110-111 [1975], *cert denied* 423 US 950 [1975]).

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

ENTERED: JUNE 10, 2008


CLERK

Lippman, P.J., Williams, Moskowitz, Acosta, JJ.

3893 3657 Realty Co. LLC,
 Petitioner-Respondent,

Index 570263/06

-against-

Ida Mae Jones,
Respondent-Appellant.

José Luis Torres, New York, for appellant.

Horing Welikson & Rosen, P.C., Williston Park (Richard T. Walsh
of counsel), for respondent.

Order of the Appellate Term of the Supreme Court of the
State of New York, First Department, entered on or about December
19, 2007, affirming an order of the Civil Court, New York County
(John S. Lansden, J.), entered on or about February 23, 2006,
which, insofar as appealed from, after a nonjury trial, awarded
possession to petitioner landlord in a summary holdover
proceeding, unanimously affirmed, without costs.

The notice to cure and notice of termination, which plead
alternative grounds for eviction, were not jurisdictionally
defective. Although the notice to cure was based on an illegal
sublet and the notice of termination identified an additional
ground of non-primary residence, the allegations in both were
identical, and sufficiently apprised respondent of the grounds on
which she would have to defend the proceeding (*see Oxford Towers
Co., LLC v Leites*, 41 AD3d 144 [2007]; *190 Riverside Dr. v Nosei*,
185 Misc 2d 696, 697 [2000]).

The record shows that petitioner met its burden of establishing by a preponderance of the evidence that respondent did not occupy the apartment as her primary residence (see *Carmine Ltd. v Gordon*, 41 AD3d 196 [2007]), and there exists no basis to disturb the trial court's findings, which are based in large measure on credibility determinations (see *Claridge Gardens v Menotti*, 160 AD2d 544, 545 [1990]). Petitioner submitted overwhelming evidence, both documentary and testimonial, demonstrating that respondent permanently vacated the subject premises in 2002 and maintains her primary residence in Georgia, and respondent's submissions did little to show that she maintained the subject apartment as her primary residence.

Although the trial court erred in drawing an adverse inference based on respondent's failure to call two witnesses, having failed to rule on petitioner's untimely request made after the close of testimony (see *People v Gonzalez*, 68 NY2d 424, 427-428 [1986]; *Follett v Thompson*, 171 AD2d 777 [1991]), in light of the compelling evidence presented that respondent did not maintain the apartment as her primary residence, she was not prejudiced by the error.

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

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

ENTERED: JUNE 10, 2008



CLERK

Lippman, P.J., Williams, Moskowitz, Acosta, JJ.

3894 CN Funding, LLC,
Plaintiff-Appellant,

Index 119172/06

-against-

The Ensig Group, Ltd., et al.,
Defendants-Respondents.

Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP, New York (Steven D. Karlin of counsel), for appellant.

Richard L. Koral, New York, for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered December 14, 2007, which, in an action to recover sums due under an equipment lease, denied plaintiff's motion for summary judgment, and, upon a search of the record, awarded defendants summary judgment dismissing the complaint, unanimously modified, on the law, to vacate the award of summary judgment and to reinstate the complaint, and otherwise affirmed, without costs.

While the subject equipment lease did not qualify as a finance lease, the parties expressly agreed to treat it as such (see UCC § 2A-103[1][g] and Official Comment thereto). Further, because the lease required defendant Ensig Group, Ltd., as lessee, to pay the amounts due to plaintiff lessor, even if the vendor failed to deliver the equipment, the vendor's failure to deliver the equipment did not render the lease void for lack of consideration. Indeed, plaintiff's only obligation under the

lease was to advance funds to the vendor on Ensig's behalf (see *Wells Fargo Bank Minn., N.A. v CD Video, Inc.*, 22 AD3d 351 [2005]).

However, the record presents an issue of fact whether plaintiff was aware, before signing the equipment lease with Ensig, that the vendor had filed for bankruptcy, in which case Ensig may have a defense against plaintiff's claims.

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

ENTERED: JUNE 10, 2008


CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 10, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Milton L. Williams
Karla Moskowitz
Rolando T. Acosta, Justices.

The People of the State of New York,
Respondent,

Ind. 6080/02
SCI 4214/03

-against-

3895-
3895A

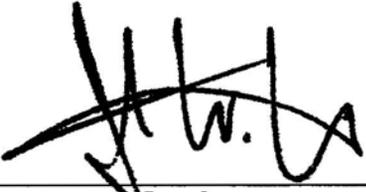
Keith Brown, also known as Kibwe Watson,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Alfred J. Lorenzo, J. at plea; Denis J. Boyle, J. at sentence), rendered on or about December 1, 2006,

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 judgments so appealed from be and the same are hereby affirmed.

ENTER:



clerk.

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

without merit because, in the circumstances presented, the court's acceptance of the minutes sufficed as an order of the court to reveal them (see *People ex rel. Ryan v Warden, N. Y. City House of Detention*, 113 AD2d 116, 119 [1985]).

The People established, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three adjudication. Defendant's challenges to the choice of risk factors made by the Legislature and the Board of Examiners of Sex Offenders are both waived and without merit (see *People v Bligen*, 33 AD3d 489 [2006]; *People v Joe*, 26 AD3d 300 [2006], *lv denied* 7 NY3d 703 [2006]).

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

ENTERED: JUNE 10, 2008


CLERK

Lippman, P.J., Williams, Moskowitz, Acosta, JJ.

3898 National Union Fire Insurance Index 600403/02
 Company of Pittsburgh, PA, et al.,
 Plaintiffs-Respondents,

-against-

The Connecticut Indemnity Company,
Defendant-Respondent,

Legion Insurance Company, et al.,
Defendants,

Lumbermens Mutual Casualty Company, et al.,
Defendants-Appellants.

Melito & Adolfsen, P.C., New York (John H. Somoza of counsel),
for Lumbermens Mutual Casualty Company, appellant.

Carroll, McNulty & Kull, L.L.C., New York (John P. De Filippis of
counsel), for United States Fire Insurance Company, appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Eric A. Portuguese of
counsel), for National Union Fire Insurance Company of
Pittsburgh, PA, Howard's Express, Inc. and Harold Bailey,
respondents.

Rivkin Radler LLP, Uniondale (Harris J. Zakarin of counsel), for
The Connecticut Indemnity Company, respondent.

Order, Supreme Court, New York County (Michael D. Stallman,
J.), entered April 27, 2007, which granted defendant Connecticut
Indemnity's cross motion for summary judgment; denied cross
motions for summary judgment by defendants Lumbermens and U.S.
Fire; adjudged and declared that Lumbermens and U.S. Fire were
primary insurers vis-à-vis the umbrella policy plaintiff National
Union Fire issued, thereby obligating Lumbermens and U.S. Fire to
defend and indemnify Howard Bailey in the underlying lawsuit; and

adjudged and declared National Union entitled to reimbursement from Lumbermens and U.S. Fire, on a pro-rata basis, for the \$1,454,640.15 it paid to settle said action, together with interest at the rate of 9% per annum from February 15, 2006, unanimously modified, on the law, the judgment in favor of Connecticut Indemnity vacated; National Union adjudged and declared entitled to reimbursement from Lumbermens in the amount of \$1 million, together with prejudgment interest from February 15, 2006, and from U.S. Fire in an amount to be determined after further proceedings consistent herewith, together with prejudgment interest from February 15, 2006; and otherwise affirmed, without costs.

This is an action for a declaratory judgment regarding insurance coverage responsibility among several insurance companies for a \$2.4 million dollar settlement in an underlying case. The underlying case involved an accident that occurred on May 3, 1999. That accident occurred when Howard Bailey, who was driving the insured tractor, collided with a disabled truck causing injury to Jon Honkala who had stopped to assist with the disabled truck. Associates Leasing, Inc. (Associates) owned the tractor that Bailey was driving. Associates insured the tractor with defendant Lumbermens. Associates had leased the tractor to Conway Beam Leasing, Inc., who subleased the vehicle to Lee E. Gibson Construction Co., d/b/a Sunrise Industries

(Gibson/Sunrise). Gibson/Sunrise, in turn, leased the vehicle and its driver Bailey, to Howard's Express, Inc. Each of these lessees/sublessees obtained insurance covering the tractor. It is the apportionment among these various insurance policies that is at issue in this case. This appeal primarily involves what part of the underlying settlement is the responsibility of Lumbermens and what part is the responsibility of United States Fire insurance Company (US Fire).

We reject Lumbermens' argument that Associates did not grant permission to Howard's Express to use the subject tractor, within the meaning of the insurance policy. In New York, proof of ownership of a motor vehicle creates a "very strong presumption" that the driver was using the vehicle with the owner's permission, express or implied, and this presumption continues "unless and until there is substantial evidence to the contrary" (*Tabares v Colin Serv. Sys.*, 197 AD2d 571 [1993]; see *Leotta v Plessinger*, 8 NY2d 449, 461 [1960]). There is no such substantial evidence here.

The Lumbermens policy stated that "[f]or any covered 'auto' you own, this Coverage Form provides primary insurance." However, the motion court held that a manuscript endorsement in the Lumbermens policy rendered its coverage excess. We do not agree. By its plain terms, the manuscript endorsement refers to a situation "[w]hen you have other insurance for an 'auto'

covered by this policy." You, in insurance parlance, refers to the insured (here, Associates) (see, e.g. *Jeanes v Nationwide Ins. Co.*, 532 A2d 595, 599 [Del. Ch. 1987]).

Thus, as a co-primary insurer, Lumbermens must reimburse National Union \$1 million of the settlement proceeds National Union funded because primary limits must be exhausted before excess coverage can apply.

We next address the allocation of the remaining \$454,640.15 among the excess insurers. We cannot take the Legion policy into account in making this allocation because Legion is in liquidation and therefore its limits are not "available coverage" within the meaning of the policies' respective "other insurance" provisions (*Matter of Midland Ins. Co.*, 269 AD2d 50, 67 [2000]).

National Union and Federal provided umbrella coverage. The terms of these policies indicate that they are excess to the excess coverage that Connecticut Indemnity Co., (Connecticut) and US Fire provided.

With regard to Connecticut's coverage, we disagree with the ruling that Gibson/Sunrise's notice was untimely as a matter of law. Under some circumstances, a five-month delay may be unreasonable, but here a question of fact exists as to whether the insured had a good-faith belief in nonliability. Where notice to an excess carrier such as Connecticut is in issue, the focus is on whether the insured reasonably should have known that

the claim against it would likely exhaust its primary insurance coverage and trigger its excess coverage, and whether any delay between acquiring that knowledge and giving notice to the excess carrier was reasonable under the circumstances (see *Morris Park Contr. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 763 [2006]).

The "bobtail" exclusion in Connecticut's policy is void as against public policy. We decline to enforce a "savings clause" in the policy, which provides coverage up to the minimum amounts the financial responsibility law requires, in the event the bobtail exclusion is held invalid (see *Connecticut Indem. Co. v 21st Century Transport Co.*, 186 F Supp 2d 264 (EDNY 2002)). We agree with the reasoning of those courts which hold that permitting an insurer to limit its liability even in cases where its policy exclusion is held to be invalid would render the finding on the issue of validity essentially meaningless (see *Connecticut Indem. Co. v 21st Century Transport Co., Inc.* 186 F Supp 2d 264, 278 [ED NY 2002]; *R.E. Turner, Inc. v Connecticut Indemn. Co.*, 925 F Supp 139, 149 [WD NY 1996]; *Connecticut Indem. Co. v Carela*, 2007 WL 2363123 (DNJ Aug 15, 2007) [applying New York law]; but see *Connecticut Indem. Co. v Hines*, 40 AD3d 903 [2d Dept 2007]). If the exclusion is void because it is against public policy, it can not be saved. Thus, the Connecticut policy must be read as affording liability up to its full limits.

Should the finder of fact ultimately determine that notice to Connecticut was timely, Connecticut and U.S. Fire, as excess carriers, should pro-rate the \$454,640.15 remainder of the settlement in accordance with the limits of their respective policies.

The award of prejudgment interest was proper (CPLR 5001[a], [b]).

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

ENTERED: JUNE 10, 2008



CLERK

Lippman, P.J. Williams, Moskowitz, Acosta, JJ.

3899 Hallmark Capital Corporation,
Plaintiff-Appellant,

Index 600897/01

-against-

Adrian H. Courtenay, III, et al.,
Defendants-Respondents.

Nimkoff Rosenfeld & Schechter, LLP, New York (Ronald A. Nimkoff
of counsel), for appellant.

Order, Supreme Court, New York County (Charles E. Ramos,
J.), entered July 8, 2005, which granted defendants' motion for
summary judgment dismissing the complaint, unanimously modified,
on the law, the motion denied with respect to the claim for
certain unpaid monthly retainer fees, and otherwise affirmed,
without costs.

Plaintiff, a provider of financial advisory services,
commenced this action against one of its clients, the publisher
of various print and online material, to recover monthly retainer
fees purportedly owed under the agreement between the parties, as
well as a transaction fee for the development of a certain
publication. The motion court appropriately dismissed so much of
the complaint as sought the transaction fee, inasmuch as the
activity was found not to constitute a transaction under the
agreement.

The agreement in question was for a minimum period of two
years, thereby obliging the corporate defendant to pay a monthly

retainer fee to plaintiff for the entire term of the transaction. Nevertheless, the court's decision in this matter did not address the corporate defendant's contractual duty to pay such a monthly retainer fee. Since the complaint seeks not only a transaction fee but also recovery of the amount owed for unpaid retainer fees, this matter must be remanded for a determination of that question.

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

ENTERED: JUNE 10, 2008



CLERK

arising from a multi-vehicle accident, granted the motions of plaintiff John Zeolla (Action No. 1, Index No. 17045/04) and plaintiff George Garcia (Action No. 2, Index No. 114250/04), pursuant to CPLR 3126, to strike the answers of defendants/third-party defendants Frank Inzano and Hilltop Service Station Co., Inc. for failure to comply with discovery orders, unanimously reversed, on the facts, without costs, the answers reinstated and the motions granted only to the extent of directing that the trial court give a negative inference charge against defendants.

Defendants proffered a reasonable excuse for their failure to provide color copies of all the photographs (*see Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215-216 [2002]). Affidavits by defendants' current attorneys and a paralegal in their office detailed the difficulty they experienced in obtaining the complete file from defendants' previous attorneys and the search they conducted for the missing photographs.

Further, the loss of the evidence does not deprive plaintiffs of the means of establishing their claims (*see Marro v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 294 AD2d 341 [2002]). Defendants provided plaintiffs with black and white copies of the missing photographs, and plaintiffs may offer direct testimony of

the location of defendants' tow truck at the time of the accident.

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

ENTERED: JUNE 10, 2008



A handwritten signature in black ink, appearing to be "J. W. La", is written over a horizontal line. Below the line, the word "CLERK" is printed in a simple, sans-serif font.

CLERK

the \$25,000 respondent has already recovered for this same injury. Respondent's demand for arbitration clearly refers to the policy issued to driver Chambers. However, the only policy included in the record, in this proceeding to stay arbitration, is a separate policy issued by petitioner to the injured respondent passenger himself, in which respondent purchased supplemental uninsured/underinsured (SUM) coverage, and the court appears to have denied the petition to stay arbitration on the ground that petitioner failed to make a sufficient showing that recovery under the Chambers policy precludes recovery under the SUM provision of the policy issued to respondent.

Since respondent received \$25,000 in settlement of his claimed injuries, any potential UM claim under either the Chambers policy or a SUM claim under respondent's own policy was offset by the prior settlement payment (*see Matter of Metropolitan Prop. & Cas. Co. v Barriga*, 281 AD2d 200 [2001]). Sufficient evidence was presented to the court to make such

determination, inasmuch as there was no dispute as to the existence and terms of the Chambers policy or the amount of payment of the settlement in the underlying action.

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

ENTERED: JUNE 10, 2008



CLERK

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

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

McGUIRE, J. (dissenting in part)

This appeal involves a recurring problem in personal injury actions: the failure of the City of New York to comply timely with disclosure orders (see e.g. *Martin v City of New York*, 46 AD3d 635 [2007]; *Maiorino v City of New York*, 39 AD3d 601 [2007]; *Nunez v City of New York*, 37 AD3d 434 [2007]; *Figdor v City of New York*, 33 AD3d 560 [2006]; *Kryzhanovskaya v City of New York*, 31 AD3d 717 [2006]; see also *Attard v City of New York*, 2008 WL 1991107 [ED NY 2008]). While I agree with the majority that Supreme Court did not improvidently exercise its discretion in vacating its prior order striking defendant's answer, I believe that the penalty it imposed in place of striking the answer -- a \$2500 sanction -- is not commensurate with defendant's conduct and should be increased.

Plaintiff alleges that on December 30, 2002 he slipped and fell on "a broken and cracked sidewalk with ice" on the northwest corner of 184th Street and Broadway. Plaintiff served a notice of claim on defendant in March 2003 and commenced this action in January 2004. The theory of liability plaintiff asserts is that defendant was negligent in failing to maintain the sidewalk and clean it of ice.

On March 28, 2005, a case scheduling order was signed by Supreme Court. The order required defendant, within 90 days of the order, to provide plaintiff with, among other things, a copy

of the Department of Sanitation District Operation Log (the carting book) for the two-week period prior to and including the date of the accident and a copy of the District Snow Operation Book (the snow operation book) for the same period. At a compliance conference held on December 1, 2005, defendant was ordered to search for a photograph of the accident location that was marked at plaintiff's General Municipal Law § 50-h hearing and, within 45 days, provide plaintiff with a copy of the photograph or, if the photograph was not found, an affidavit regarding the efforts made to locate it. Defendant did not comply with this directive and the court reiterated it in a February 23, 2006 so-ordered stipulation.

On April 13, 2006, another so-ordered stipulation was executed following a compliance conference. This order required defendant to provide plaintiff, for the relevant time period, i.e., two weeks prior to and including the date of the accident, with copies of both the carting and snow operation books, which defendant should have provided to plaintiff within 90 days of the March 28, 2005 case scheduling order. The April 2006 order stated that defendant was to provide copies of both books within 45 days of the order, prior to the deposition of defendant's Department of Sanitation employee. The order also directed defendant to provide plaintiff with a copy of the photograph marked at plaintiff's General Municipal Law § 50-h hearing.

On June 15, 2006, Supreme Court signed an order again directing defendant to provide plaintiff with copies of both books. The order stressed that the books were to be provided "prior to defendant's EBT, not at the deposition itself." Defendant was also directed -- for the fourth time in six months -- to provide plaintiff with a copy of the photograph marked at the General Municipal Law § 50-h hearing. The order stated that if defendant failed to comply with the directives requiring it to provide plaintiff with a copy of the photograph marked at the General Municipal Law § 50-h hearing and copies of the books prior to the deposition, defendant's answer would be struck. The order also stated that it was "self[-]executing."

A few days prior to the July 7, 2006 deposition of an employee of defendant's Department of Sanitation, defendant provided plaintiff's counsel with copies of a carting book and a snow operation book. During the deposition, however, the employee informed the attorneys that defendant had provided plaintiff's counsel with copies of the books for the wrong location. While the employee brought with him the books for the correct location, the snow operation book contained no entries for the relevant time period, which the employee indicated was unusual.

At an August 10, 2006 compliance conference, plaintiff argued that defendant had failed to comply with the June 15, 2006

self-executing order since defendant failed to provide plaintiff with copies of the books for the location of the accident prior to the employee's deposition. The court directed plaintiff to provide it with a copy of the transcript of the employee's deposition testimony and adjourned the conference to September 28, 2006. Plaintiff did so and in a cover letter to the court accompanying the transcript asserted that defendant's answer was automatically stricken pursuant to the self-executing order. By an order dated September 28, 2006, the court stated that defendant's answer was struck "based on noncompliance with prior court orders" and ordered an inquest.

By an order to show cause signed by the court on October 26, 2006, defendant moved to reargue the September 28, 2006 order, asserting that its failure to comply with the court's disclosure orders was not willful, contumacious or the result of bad faith, and that the penalty of striking its answer was too severe. One week later, defendant sent to plaintiff's counsel copies of the books for the relevant location and time period. Along with the copies, defendant provided an affidavit from the employee who had been deposed in which the employee averred that, following his deposition, the Department of Sanitation made a further search for and located the relevant snow operation book. Plaintiff opposed the motion, arguing that defendant failed to demonstrate that the court overlooked or misapprehended the facts or law in

striking defendant's answer. Plaintiff also argued that the court properly struck the answer in light of defendant's failure to comply with multiple disclosure orders.

Supreme Court granted defendant's motion and vacated the September 28, 2006 order striking the answer on the condition that defendant pay plaintiff's counsel \$2500.¹ The court reasoned that both parties agreed that defendant had provided plaintiff with all outstanding disclosure, albeit after the deadlines imposed by the court, and that matters should, whenever possible, be resolved on the merits. This appeal by plaintiff ensued.

Supreme Court's June 15, 2006 order was a self-executing conditional order dismissing the answer, and defendant's failure to provide plaintiff with a copy of the photograph marked at plaintiff's General Municipal Law § 50-h hearing and copies of the relevant carting and snow operation books prior to the deposition of defendant's employee would ordinarily render that order "absolute" (see *Wilson v Galicia Contr. & Restoration Corp.*, __ NY3d __, 2008 NY Slip Op 03949 [April 29, 2008]). To be relieved of the consequences of a conditional order that, due

¹Defendant issued a check to plaintiff's counsel for \$2500, which plaintiff's counsel apparently accepted and deposited. While there is some authority for the proposition that by accepting and depositing the check plaintiff's counsel waived plaintiff's right to appeal (see *Schlossberg v Varjabedian*, 19 AD3d 171 [2005], citing *Schulman v Levy Sonet & Siegel*, 276 AD2d 384 [2000]), defendant has not asserted that argument.

to the defendant's failure to comply with the order, becomes absolute and strikes its answer, the defendant must demonstrate a reasonable excuse for its failure to comply with the conditional order and the existence of a meritorious defense (see *Zouev v City of New York*, 32 AD3d 850 [2006]; see also *Seven Acre Wood St. Assoc. v Petruccelli Eng'g*, 3 AD3d 396 [2004]; *Tejeda v 750 Gerard Props. Corp.*, 272 AD2d 124 [2000]; *Becerril v Skate Way Roller Rink*, 184 AD2d 365 [1992]).

Plaintiff, however, in opposition to defendant's motion to reargue the September 28, 2006 order striking the answer did not assert that the June 15, 2006 conditional order became absolute and that defendant was required to demonstrate both a reasonable excuse for its failure to comply with the conditional order and a meritorious defense. Rather, plaintiff argued that the court did not overlook or misapprehend the facts or law in striking defendant's answer and that the court properly struck the answer because defendant failed to comply with multiple disclosure orders. In his brief on appeal, plaintiff repeats the arguments he advanced before Supreme Court. Thus, plaintiff has essentially framed the issue on appeal as whether defendant's failure to provide disclosure was willful, contumacious or the result of bad faith and, concomitantly, whether Supreme Court improvidently exercised its discretion in granting defendant's motion to reargue and vacating the order striking defendant's

answer. Similarly, defendant has treated the issue on appeal as whether its failure to comply timely with disclosure orders was willful, contumacious or the result of bad faith.

Supreme Court is afforded broad discretion in supervising disclosure (*Matter of DataSafe, Inc. v American Express*, 2 AD3d 224 [2003]), and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 based upon a party's failure to comply with disclosure orders is committed to the sound discretion of that court (*Palmenta v Columbia Univ.*, 266 AD2d 90 [1999]). The public policy of this State, however, favors resolution of actions on the merits (*Corsini v U-Haul Intl.*, 212 AD2d 288 [1995], *lv dismissed in part and denied in part* 87 NY2d 964 [1996]). Accordingly, the drastic sanction of striking an answer is inappropriate absent a clear showing that the defendant's failure to comply with disclosure obligations was willful, contumacious or the result of bad faith (*Delgado v City of New York*, 47 AD3d 550 [2008]; see *Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [2003]; *Palmenta, supra*).

Defendant first provided plaintiff with copies of carting and snow operation books a few days prior to its employee's deposition, approximately one year and three months after it was originally directed to do so in the case scheduling order. In the interim, two additional orders, including the self-executing conditional order, had been issued by Supreme Court requiring

defendant to provide plaintiff with copies of those books. The copies of the books provided to plaintiff's counsel before defendant's employee's deposition were for the wrong location, and while the employee brought with him to the deposition the books for the right location, the snow operation book inexplicably did not contain any entries. Approximately four months after the employee's deposition, defendant sent to plaintiff copies of the relevant carting and snow operation books along with an affidavit from the employee explaining why he mistakenly brought to the deposition a snow operation book that contained no entries and that upon further search the correct snow operation book was located.

Defendant offered no reasonable explanation² why it took approximately one year and three months before it attempted to provide plaintiff with copies of the books. Moreover, on its initial attempt to comply with its obligation to provide copies of the books, defendant mistakenly gave plaintiff's counsel copies of the books for the wrong location and was unable to produce the correct snow operation book at the employee's

²Defendant offered no excuse for its failure to provide plaintiff with copies of the books between March 28, 2005, the date the case scheduling order was signed by the court, and the April 13, 2006 compliance conference. With respect to its failure to provide plaintiff with the copies by the deadline set in the April 13, 2006 order, i.e., within 45 days of the order, defendant merely stated that it encountered "a problem in obtaining the records."

deposition. Nevertheless, defendant ultimately did comply with its obligation to provide plaintiff with copies of the correct books. Thus, while defendant's delayed efforts to comply with Supreme Court's disclosure orders leave much to be desired, plaintiff failed to make a clear showing that defendant's failure to comply with those orders was willful, contumacious or the result of bad faith (see *Cambry v Lincoln Gardens*, __ AD3d __, __, 2008 NY Slip Op 04047 *2 [2d Dept 2008] ["Belated but substantial compliance with a discovery order undermines the position that the delay was a product of willful or contumacious conduct"]).

While defendant's failure to comply with the disclosure orders was not willful, contumacious or the result of bad faith, a substantial penalty should be imposed on defendant for its recalcitrance. Supreme Court imposed the modest penalty of requiring defendant to pay plaintiff's counsel \$2500. In my view, this penalty is not commensurate with the nature and extent of defendant's disobedience (see *Christian v City of New York*, 269 AD2d 135, 137 [2000]; Connors, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 7B, C3126:8, at 462 [2005 ed]).

The deposition of defendant's employee had to be repeatedly adjourned because copies of the books were not timely provided to plaintiff. Then, when it first attempted to provide plaintiff with the copies, defendant provided copies of the books for the

wrong location, causing plaintiff's counsel to waste time reviewing irrelevant records in preparation for the deposition. Defendant's error in providing copies of the wrong books deprived plaintiff's counsel of the opportunity to prepare properly for the deposition, an opportunity several disclosure orders had attempted to preserve. . . Moreover, while defendant's employee brought to the deposition the books for the relevant location, the snow operation book contained no entries. Ultimately, four months after the employee's deposition and one year and seven months after the initial case scheduling order, defendant provided plaintiff with copies of the relevant books.

In light of defendant's repeated failures to comply with its disclosure obligations, failures which needlessly delayed this action, wasted plaintiff's counsel's time and hindered plaintiff's preparation of his case, I would modify the order appealed to increase the monetary penalty to an amount far more substantial than the \$2500 imposed by Supreme Court and permit plaintiff, upon his request, to depose defendant's employee again (*see generally Figdor v City of New York*, 33 AD3d at 560-61 [defendant ordered by this Court to pay plaintiffs' counsel \$10,000 because "[d]efendant's response to the myriad discovery orders entered in th[e] action over the course of some two years [was] inexcusably lax . . . [and] [w]hile discovery . . . trickled in with the passage of each compliance conference, the

cavalier attitude of defendant, resulting . . . in substantial and gratuitous delay and expense, should not escape adverse consequence"]). Additionally, since it is unclear whether defendant ever provided plaintiff with a copy of the photograph marked at his General Municipal Law § 50-h hearing, I would allow plaintiff to seek additional disclosure sanctions from Supreme Court if the court were to find that defendant failed to provide plaintiff with a copy of the photograph (*see generally Quinn v City Univ. of N.Y.*, 43 AD3d 679 [2007]).

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

ENTERED: JUNE 10, 2008



CLERK

Nardelli, J.P., Williams, Sweeny, Catterson, JJ.

2972 Joel Owusu,
Plaintiff-Respondent,

Index 18198/05

-against-

Hearst Communications, Inc., et al.,
Defendants-Appellants,

Turner Development Corporation,
Defendant.

London Fischer LLP, New York (John E. Sparling of counsel), for appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about December 26, 2006, which granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1) and denied the cross motion of defendants Hearst Communications, Inc., Turner Construction Co., s/h/a Turner Construction Corp., and Fresh Meadow Mechanical Corp. for summary judgment dismissing the Labor Law § 200 and § 240(1) claims and the common-law negligence claim as against all of them and the Labor Law § 241(6) claim as against Fresh Meadow, unanimously modified, on the law, to deny plaintiff's motion and to grant defendants' cross motion to the extent of dismissing the Labor Law § 200 and common-law negligence claims as against Hearst and all claims as against Fresh Meadow, and otherwise affirmed, without costs.

Plaintiff's motion for summary judgment on the issue of defendants' liability under Labor Law § 240(1) should have been denied, because there is a triable issue of fact whether the "ship ladder" from which plaintiff fell was a device within the meaning of Labor Law § 240(1) or "a permanent staircase not designed as a safety device to afford protection from an elevation-related risk and therefore outside the coverage of the statute" (*Griffin v New York City Tr. Auth.*, 16 AD3d 202, 203 [2005]).

The Labor Law § 200 and common-law negligence claims should have been dismissed as against Hearst, because there was no evidence that it had actual knowledge that a tread was missing from the ship ladder and no evidence of the length of time the tread was missing, as is required for a finding of constructive notice (*see Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 255 [2005]). However, plaintiff's deposition testimony about a radio transmission that he overheard shows that Turner had actual knowledge of the missing step.

All plaintiff's claims should have been dismissed as against Fresh Meadow, because it neither controlled nor supervised plaintiff, who worked for a different subcontractor (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). The Labor Law § 200 and common-law negligence claims should also have been dismissed as against Fresh Meadow because plaintiff submitted

only hearsay and surmise in support of his contention that Fresh Meadow removed the tread from the ladder, and did not "demonstrate acceptable excuse" for his failure to tender evidence in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

ENTERED: JUNE 10, 2008



CLERK

Mazzarelli, J.P., Andrias, Friedman, Sweeney, JJ.

3386 Eric Johnson, etc., et al.,
Plaintiffs-Appellants,

Index 20564/02

-against-

St. Barnabas Hospital,
Defendant,

Dr. Norma B. Milanes-Roberts, et al.,
Defendants-Respondents.

Alexander J. Wulwick, New York, for appellants.

Bartlett McDonough Bastone & Monaghan LLP, White Plains (Gina Bernardi Di Folco of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about March 12, 2007, dismissing the complaint as against defendants-respondents in the midst of a jury trial, unanimously affirmed, without costs.

The trial court properly directed a verdict in favor of respondents at the close of plaintiffs' case in this medical malpractice action where the infant plaintiff was injured during delivery. Trial testimony established that during the delivery, at which respondent obstetrician Dr. Milanes-Roberts was not present, respondent DeMaggio, a midwife, encountered a shoulder dystocia, and with assistance, she completed a series of obstetrical maneuvers on plaintiff mother to dislodge the infant's shoulder, resulting in the delivery of the infant. However, the infant sustained injury to his brachial plexus,

which resulted in Erb's palsy, a syndrome that causes the affected arm to lose motor function.

Plaintiffs' expert, Dr. Stuart Edelberg, testified there are four recognized maneuvers to relieve a shoulder dystocia. According to Dr. Edelberg, respondent DeMaggio appropriately used two of those maneuvers to deliver the infant. The Apgar scores were within normal ranges. However, he opined that DeMaggio used "excessive downward lateral [traction] to the baby's spine . . . , and directly caused the brachial plexus injury." He further opined that "since this baby does have an injury, I know that excessive traction was used."

On cross-examination, Dr. Edelberg stated that DeMaggio recognized the condition of the shoulder dystocia promptly, that she responded appropriately and that the baby delivered immediately after her response with no difficulty. He reiterated that he based his opinion that excessive traction was used on the fact that the infant had a brachial plexus injury following delivery as well as "what's stated in our literature. What we presented to in some of our letters to the editor" as well as "what the standard textbooks in our field say." Neither the texts nor letters were offered into evidence. Dr. Edelberg stated that he was not present during delivery and did not remember the medical records he reviewed disclosing any other bruises on the infant.

Dr. Edelberg admitted it was very well known that brachial plexus injury could occur even when the appropriate maneuvers are correctly used to resolve shoulder dystocia, and that the occurrence of a brachial plexus injury does not mean incorrect procedures or techniques were used.

The record establishes that plaintiffs failed to demonstrate a departure from good and accepted medical practice. The opinion of plaintiffs' expert that a departure existed because there was an injury is not sufficient because evidence of injury alone does not mean that there was negligence on the part of respondents (see *Landau v Rappaport*, 306 AD2d 446, 447 [2003]; compare *Sutherland v County of Nassau*, 151 AD2d 468, 469 [1989], *lv dismissed* 76 NY2d 1017 [1990]). Nor did the court err in refusing to submit the case to the jury on the theory of *res ipsa loquitur*, where plaintiffs failed to establish that the injuries at issue would not occur in the absence of negligence (see *Abbott v New Rochelle Hosp. Med. Ctr.*, 141 AD2d 589, 590-591 [1988], *lv denied* 72 NY2d 808 [1988]). Dr. Edelberg testified on cross-examination that there are causes for a brachial plexus injury other than excessive traction. The first element of *res ipsa loquitur*, i.e., that negligence may be inferred from the mere

happening of the event, was not established. The testimony of plaintiffs' expert only provided possible explanations for the injury sustained by the infant plaintiff.

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

ENTERED: JUNE 10, 2008



CLERK

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

3857 Robert Lenti, et al.,
Plaintiffs-Respondents,

Index 109370/05

-against-

Initial Cleaning Services, Inc.,
Defendant-Appellant,

American Building Maintenance Co. of
New York, Inc.,
Defendant.

Gallo Vitucci Klar Pinter & Cogan, New York (Kimberly A. Ricciardi of counsel), for appellant.

Soffey & Soffey LLC, Garden City (Douglas M. Soffey of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered February 27, 2008, which, to the extent appealed from as limited by the briefs, denied defendant Initial Cleaning Services, Inc.'s motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant Initial Cleaning Services, Inc. dismissing the complaint as against it.

Plaintiff Robert Lenti alleges that at about 7:45 A.M. on Monday, January 12, 2004, while walking from the parking lot toward the school in which he works, he slipped on a patch of ice on the sidewalk, approximately 8 to 10 inches long and 2 inches wide, which, like the sidewalk and parking lot, was covered with

a thin layer of recently fallen snow. Defendant Initial Cleaning Services made a prima facie showing of entitlement to summary judgment by establishing (1) that defendant, which is not the property owner but an independent contractor that provided janitorial services at the school, owed plaintiff no duty, and (2) that defendant neither created nor had actual or constructive notice of the patch of ice on which plaintiff slipped. In response, plaintiff failed to submit evidentiary materials establishing the existence of a question of fact on these points.

The mere presence of ice does not establish negligence on the part of the entity responsible for maintaining the property. Rather, plaintiff must present evidence from which it may be inferred that the ice on which he slipped was present on the sidewalk for a long enough period of time before the accident that the party responsible for the sidewalk would have had time to discover and remedy the dangerous condition (*see Simmons v Metropolitan Life Ins. Co.* 84 NY2d 972 [1994]). Speculation that the ice patch on which he slipped had remained there from the snowfall of the week before will not suffice (*see Bernstein v City of New York*, 69 NY2d 1020, 1022 [1987]).

Actual or constructive notice is not established merely by Robert Lenti's assertion that he had observed isolated patches of ice around the property on the Friday afternoon three days before the accident; nor is it established by the evidence of a snowfall

one week earlier. Indeed, the submitted climatological data for the date of the accident tends to support the conclusion that the ice could have formed in the nighttime hours before plaintiff's early-morning accident, since it indicates that temperatures on the date of his accident ranged from 26° to 37°, and that some snow fell at 2:00 A.M. on that date, with additional trace amounts of snow falling in the two hours before 6:00 A.M. If the ice formed from the snow that fell at 2:00 A.M., there would not have been sufficient time to discover and remedy the icy condition prior to the accident. In *Gonzalez v American Oil Co.* (42 AD3d 253 [2007]), where the plaintiff slipped on a large patch of ice near the front door of a gas station convenience store, the icy condition would have been discovered if reasonable snow and ice clearing had taken place after the earlier snowfall. In contrast, here it cannot be reasonably inferred from the surrounding circumstances that the patch of ice in question was present "for a considerable period of time prior to the accident" (*id.* at 255) such as would justify imposing on the responsible party the obligation to remedy it.

In any event, plaintiff also failed to offer evidence sufficient to establish that Initial Cleaning Services was under the type of comprehensive and exclusive maintenance contract with the property owner such that its duties would entirely displace those of the property owner to maintain the property in a safe

condition (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140-141 [2002]). The mere supposition that its snow-clearing activities one week before plaintiff's accident must have left behind the patches of ice that plaintiff claims to have observed is insufficient to establish the exception to *Espinal's* general rule that applies where the defendant "launched a force or instrument of harm" (*id.* at 141, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). Indeed, a similar claim was made in *Espinal*, and the Court rejected the plaintiff's reasoning that snow plowing can leave residual snow or ice; it remarked that "by merely plowing the snow, Melville cannot be said to have created or exacerbated a dangerous condition" (*id.* at 142). Plaintiff here has a similar lack of particular information as to how defendant "launched a force or instrument of harm" beyond the supposition that it left patches behind when it cleared the earlier snowfall.

The other two exceptions to the general rule explained in *Espinal* are similarly lacking in evidentiary support. Plaintiff offers no support for a claim that he detrimentally relied on defendant's continued performance of its contractual obligation. As to the assertion that defendant "completely absorbed the duties of the landowner and entirely displaced the owner's duties

to maintain the premises," the relied-upon testimony by defendant's facilities manager at Holy Trinity High School is insufficient to establish that which plaintiff asserts.

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

ENTERED: JUNE 10, 2008



CLERK

Saxe, J.P., Nardelli, Catterson, McGuire; JJ.

3860N Robert Luzzi,
Plaintiff-Respondent,

Index 107881/06

-against-

Bridge Tower Place Condominium,
Defendant-Appellant.

Stroock & Stroock & Lavan LLP, New York (Dale J. Degenshein of counsel), for appellant.

Kantor, Davidoff, Wolfe, Mandelker & Kass, P.C., New York (Matthew C. Kesten of counsel), for respondent.

Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered May 24, 2007, which, to the extent appealed from as limited by the briefs, denied defendant's motion to enforce a stipulation of settlement without the permanent injunction contained therein, unanimously affirmed, without costs.

Plaintiff unit owner commenced an action seeking declaratory and injunctive relief so as to prevent defendant from accessing his unit and hanging scaffolding from his wraparound terrace to facilitate washing the building's exterior windows, on the ground that such action was not authorized by defendant's declaration and bylaws. The action was resolved by a "so ordered" stipulation which provided, inter alia, that "[d]efendant is permanently enjoined from erecting scaffolding or any other form of access to the [p]remises utilizing, obstructing or interfering with plaintiff's [u]nit, including the terrace surrounding

plaintiff's [u]nit, for purposes of exterior window washing in or about the [p]remises." Defendant subsequently amended its bylaws to allow itself access to plaintiff's premises for the window-cleaning purposes that had been enjoined by the stipulation.

We agree with the motion court that the unambiguous stipulation is valid and enforceable according to its plain meaning, and consequently construe the stipulation's permanent injunction as surviving defendant's subsequent amendment to its bylaws (see *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]; *Sharp v Stavisky*, 221 AD2d 216 [1995], *lv dismissed* 87 NY2d 968 [1996]).

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

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

ENTERED: JUNE 10, 2008


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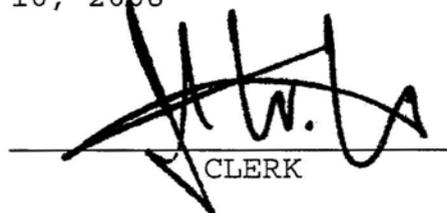
merits. The evidence supports a reasonable inference that defendant followed the victim home and entered his building as part of a preconceived plan to rob him.

Defendant did not preserve any of his arguments, including constitutional claims, concerning the prosecutor's opening statement and summation and the court's main and supplementary jury charges, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We find that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Even if we were to find that trial counsel should have made the objections and arguments suggested by defendant on appeal, we would find that her failure to do so did not deprive defendant of a fair trial or cause him any prejudice (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]; *compare People v Turner*, 5 NY3d 476 [2005]).

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

ENTERED: JUNE 10, 2008


CLERK

Tom, J.P., Mazzarelli, Gonzalez, Sweeny, DeGrasse, JJ.

3863 David Velez, Index 127095/02
Plaintiff, 590996/03
-against- 590596/04
591139/05

Division Nine Holding Corp.,
Defendant.

- - - - -
[And Third Party Actions]
- - - - -

Division Nine Holding Corp.,
Third Third-Party Plaintiff-Respondent,

-against-

Tully Construction Co., Inc.,
Third Third-Party Defendant-Appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Louis A. Carotenuto of counsel), for appellant.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered January 22, 2008, which denied third third-party defendant's motion for summary judgment dismissing that third-party complaint, unanimously affirmed, without costs.

The motion sought to avoid third-party liability by defeating plaintiff's claim against defendant/third third-party plaintiff. In order to obtain dismissal of the third third-party complaint by this means, third third-party defendant should have moved for summary judgment on both the third third-party complaint and the main complaint by putting all interested

parties on notice that it was seeking dismissal of both. In the absence of a motion properly seeking dismissal of the main action by third third-party defendant or any other party, the court properly declined to search the record for that purpose (see *Dunham v Hilco Constr. Co.*, 89 NY2d 425 [1996]; *Bridgehampton Natl. Bank v Schaffner*, 247 AD2d 351 [1998]).

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

ENTERED: JUNE 10, 2008


CLERK

Tom, J.P., Mazzarelli, Gonzalez, Sweeny, DeGrasse, JJ.

3864 233rd Street Partnership, L.P., et al., Index 105640/06
 Plaintiffs-Appellants,

-against-

Twin City Fire Insurance Company,
Defendant-Respondent.

Max W. Gershweir, New York, for appellants.

Churbuck Calabria Jones & Materazo, P.C., Hicksville (Nicholas P. Calabria of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered January 8, 2008, which, insofar as appealed from, upon granting defendant's motion to renew, declared that the coverage provided by plaintiff State National Insurance Company to plaintiff 233rd Street Partnership in the underlying personal injury action was primary to the coverage under the policy provided by defendant, and that defendant was not obligated to reimburse plaintiffs for their defense expenses, unanimously reversed, on the law, with costs, to declare that State National and defendant are co-primary insurers and must share in the defense of the underlying action, and expenses thereof.

The court erred in basing its determination that defendant's policy was excess solely on the wording of that policy. We find that since, among other things, there is no primary insurance underlying defendant's policy, and its coverage is subject only to the payment of a deductible, the policy is not a true excess

policy, but rather is a primary policy that, under certain circumstances, purports to shift losses to other available insurance (see *Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, __ AD3d __, 2008 NY Slip Op 3150, *9-10 [1st Dept 2008]; *Cheektowaga Cent. School Dist. v Burlington Ins. Co.*, 32 AD3d 1265 [2006]). Since we find that both State National's and defendant's policies are primary, their other insurance clauses cancel each other out, and both insurers are rendered co-primary (see *State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 373-374 [1985]; *Lumbermens Mut. Cas. Co. v Allstate Ins. Co.*, 51 NY2d 651, 655 [1980]).

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

ENTERED: JUNE 10, 2008


CLERK

Tom, J.P., Mazzarelli, Gonzalez, Sweeny, DeGrasse, JJ.

3865-

3866 In re Lashina P.,

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

Anderson J.,
Respondent-Appellant,

Loren P.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Elisa Barnes, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for ACS, respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about May 24, 2007, which, insofar as appealed from, upon a fact-finding determination that respondent father neglected the subject child, placed the child in the custody of the Commissioner of Social Services pending the completion of the next permanency hearing scheduled for October 10, 2007, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal otherwise dismissed as moot, without costs.

The challenge to the disposition is moot, where the terms of the order have expired and the child has since been discharged to

respondent and her mother (see *Matter of Clifford J.*, 238 AD2d 244 [1997]).

The finding that respondent neglected his daughter was supported by a preponderance of the evidence (see Family Court Act § 1046[b][I]). The record shows that the mother was diagnosed with mild mental retardation and could not care for the child on her own, and that, despite being made aware of the mother's limitations, respondent believed that she could care for the child and expressed his intention to leave the child alone with her. Under the circumstances, the court properly determined that the child was at imminent risk of harm (see Family Court Act § 1012 [f][I]; see *Matter of Anna X.*, 148 AD2d 890 [1989], lv denied 74 NY2d 608 [1989]; see also *Matter of James C.*, 47 AD3d 712 [2008]).

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

M-762 *In re Lashina P., etc.*

Motion seeking leave to withdraw Loren P.'s appeal and relieve counsel granted.

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

ENTERED: JUNE 10, 2008


CLERK

Tom, J.P., Mazzarelli, Gonzalez, Sweeny, DeGrasse, JJ.

3867 In re Gevalia Vega, etc., et al., Index 105502/05
 Plaintiffs-Appellants,

-against-

New York City Housing Authority,
Defendant-Respondent.

Charles R. Strugatz, Hicksville, for appellants.

Landman Corsi Ballaine & Ford P.C., New York (Melanie K. Suhrada
of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.),
entered May 14, 2007, which, in an action for injuries allegedly
sustained by the infant plaintiff as a result of exposure to
lead-based paint, granted defendant's motion for summary judgment
dismissing the complaint, unanimously affirmed, without costs.

Defendant met its prima facie burden of establishing lack of
notice that a child under seven years of age resided in the
subject apartment (*see Juarez v Wavecrest Mgt. Team*, 88 NY2d 628,
646 [1996]; *Worthy v New York City Hous. Auth.*, 18 AD3d 352
[2005]). The record shows that plaintiff Raymond Vega's mother
was the lawful occupant of the apartment and the income
affidavits and window guard surveys from her failed to identify
plaintiffs as residing within the apartment, and applications by
and on behalf of Raymond for permanent residency during the
relevant time period were denied. Furthermore, even assuming
defendant had notice of plaintiffs' residency and the hazardous

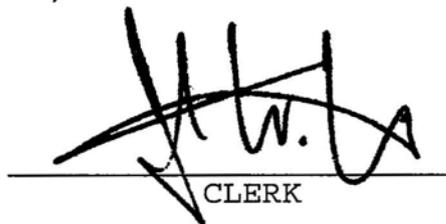
condition identified by the Department of Health, it exercised due care by abating such hazardous condition within the mandated compliance period (see *Juarez*, 88 NY2d at 644; *Rivas v 1340 Hudson Realty Corp.*, 234 AD2d 132, 136 [1996]).

Plaintiffs' opposition failed to raise a triable issue since the evidence submitted was comprised of conclusory and vague statements, and an affidavit from Raymond conflicted with his deposition testimony (see *Concepcion v Walsh*, 38 AD3d 317, 318 [2007]).

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: JUNE 10, 2008



CLERK

Tom, J.P., Mazzarelli, Gonzalez, DeGrasse, JJ.

3868-

3869-

3869A

Certain Underwriters at Lloyds,
London,
Plaintiffs,

Index 600626/06

-against-

Millennium Holdings LLC, et al.,
Defendants-Respondents,

AIU Insurance Company, et al.,
Defendants-Appellants,

American Home Assurance Company, et al.,
Defendants,

Certain London Market Insurance Companies,
Nominal Defendants.

- - - - -

Certain Underwriters at Lloyds, London,
Plaintiffs-Appellants,

-against-

Millenium Holdings LLC, et al.,
Defendants,

Certain London Market Insurance Companies,
Nominal Defendants,

NL Industries Inc.,
Defendant-Respondent,

Employers Mutual Casualty Company, et al.,
Defendants-Appellants.

Simpson Thacher & Bartlett LLP, New York (Bryce L. Friedman of counsel), for AIU Insurance Company, Granite State Insurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, New Hampshire Insurance Company, Travelers Casualty & Surety Company and The Travelers Indemnity Company, appellants.

Zuckerman Spaeder LLP, Washington, DC (Carl S. Kravitz of counsel), for Certain Underwriters at Lloyds, London, appellants.

Rivkin Radler LLP, Uniondale (David M. Cassidy of counsel), for Government Employees Insurance Company, OneBeacon America Insurance Company, Republic Insurance Company and Riunione Adriatica DiSicurta, appellants.

Kelley Drye & Warren LLP, New York (Neil Merkl, and John E. Heintz of the District of Columbia Bar, admitted pro hac vice, of counsel), for Millennium Holdings LLC, Millennium Chemicals Inc. and Millennium Inorganic Chemicals, Inc., respondents.

Dickstein Shapiro LLP, Washington, DC (Leon B. Kellner of counsel), for NL Industries Inc., respondent.

Judgment, Supreme Court, New York County (Helen E. Freedman, J.), entered December 3, 2007, dismissing the cross claims of defendants Travelers and the remaining defendants-appellants (collectively, the AIG defendants) in favor of an Ohio action, based on an order, entered November 8, 2007, which also denied Travelers' motion for summary judgment, unanimously affirmed, with costs. Appeal from the underlying order unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered December 26, 2007, which denied the cross motion of defendants OneBeacon

America, Republic, Government Employees and Riunione Adriatica to enjoin NL Industries from maintaining actions in Texas, unanimously reversed, on the law and the facts, with costs, and the cross motion granted.

Deference to the long-pending comprehensive Ohio action was warranted, as we ruled in this case in October 2007 (44 AD3d 536, 537); the first-filed rule does not govern here (see *ACE Fire Underwriters Ins. Co. v ITT Indus., Inc.*, 44 AD3d 404, 405 [2007]). Travelers was not entitled to summary judgment on its defense of release; the interpretation of the settlement agreement at issue presented an issue for the Ohio court, which ruled in favor of resorting to extrinsic evidence.

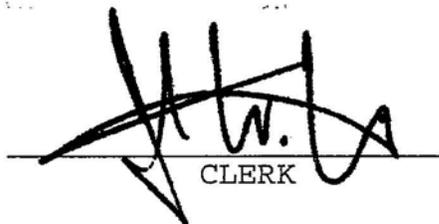
In view of NL's forum-shopping in commencing parallel Texas actions just after the insurers had brought suit in New York, this Court's clear indication in our October 2007 ruling that the dispute has a greater nexus to New York, and the possibility of conflicting rulings, NL should have been enjoined from maintaining its Texas action (see *Jay Franco & Sons Inc. v G Studios, LLC*, 34 AD3d 297 [2006]; *Interested Underwriters at Lloyd's v H.D.I. III Assoc.*, 213 AD2d 246 [1995]). Under the circumstances, our deference to the Texas courts as a matter of comity is not warranted.

M-2186 *Certain Underwriters at Lloyds, London v
Millennium Holdings, LLC, et al.*

Motion seeking leave for an order taking
judicial notice of a complaint denied.

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

ENTERED: JUNE 10, 2008

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CLERK

DOB's enforcement of the residential certificate of occupancy against a licensed group family day care facility did not violate and was not preempted by state law. Social Services Law § 390(12)(b) restrains a local government from prohibiting regulated group family day care facilities in fireproof multiple dwellings, and in ground-floor units of a multiple dwelling that is not classified as fireproof, clearly implying that there is no such immunity for facilities above the ground floor in a multiple dwelling that is not fireproof. Paragraph a of subdivision 12 more generally restrains a local government from imposing additional "standards for sanitation, health, fire safety or building construction on a . . . multiple dwelling used to provide group family day care . . . than would be applicable were such child day care not provided on the premises." Petitioner's position is that these two paragraphs of subdivision 12 are contradictory, and that paragraph a, which postdates the passage of paragraph b, implicitly overrules the earlier enactment. We reject this argument. Even though paragraph b is of prior vintage (formerly § 390[13][d]; see L 1986, ch 875, § 4), it was renumbered as paragraph b of subdivision 12 (L 1990, ch 750, § 2) at the same time as the Legislature added paragraph a of that subdivision (L 1990, ch 750, § 1). We must assume that in juxtaposing these two paragraphs in the same subdivision, the Legislature intended that they be read consistently, with effect

given to both (see McKinney's Statutes § 144; *Iazzetti v City of New York*, 94 NY2d 183, 189 [1999]); *Foley v Bratton*, 92 NY2d 781, 787 [1999]).

ECB's denial of petitioner's request to intervene in connection with the NOV was rationally based. As ECB found, petitioner did not qualify as one "directly and adversely affected" by ECB's order; the NOV involved only the imposition of a monetary penalty against the named respondent, the landlord (see ECB Adjudication Procedures in 15 RCNY 31-35[a][1]). Moreover, regardless of whether considered as of right or discretionary, petitioner's request to intervene was untimely (§ 31-35[a][2],[b]). Therefore, ECB's denial of petitioner's request was neither arbitrary nor capricious, and no grounds exist upon which to vacate its determination (see *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]). DOB's enforcement of the violation was not preempted by state law, and ECB would have acted properly within its discretion to deny the request to intervene had it been timely made.

Having failed to avail herself of the available forms of intervention in a timely fashion, petitioner has no claim for a violation of due process of law (see *Matter of Goldman v New York State Div. of Hous. & Community Renewal, Off. Of Rent Admin.*, 228 AD2d 192 [1996], *lv denied* 89 NY2d 805 [1996]).

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

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

ENTERED: JUNE 10, 2008



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evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence, along with reasonable inferences to be drawn therefrom, established beyond a reasonable doubt every element of the welfare fraud crime of which defendants were convicted.

The court properly denied defendants' speedy trial motions. The court properly excluded the time now challenged by defendants. The People's affirmation in opposition, which defendants did not contest below, established facts sufficient to demonstrate that both defendants were "attempting to avoid apprehension or prosecution" and that their whereabouts were unknown (CPL 30.30[4][c][I]). Under these circumstances, the People were not required to demonstrate that they exercised due diligence in attempting to locate defendants (*see People v Flagg*, 30 AD3d 889, 891 [2006], *lv denied* 7 NY3d 848 [2006]). In any event, the People satisfied their burden of establishing due diligence (*see People v Marrin*, 187 AD2d 284 [1992], *lv denied* 81 NY2d 843 [1993]). Defendants' argument that their absence or unavailability did not prevent the People from obtaining an indictment is unpreserved and without merit.

The People improperly argued that defendants' refusal to speak to the HRA investigator was evidence of their guilty intent. While such a refusal may raise a negative inference in a civil or administrative action or proceeding, raising such an inference against a criminal defendant violates the right against

self-incrimination (see *Republic of Haiti v Duvalier*, 211 AD2d 379, 386 [1995]).

Furthermore, we find that the People improperly introduced into evidence the recertification form for February 1999, arguing that it contained false information, when it is now conceded that it did not. Although the prosecutor informed the court that the inclusion of this recertification form in the indictment was an error, and the court struck those counts related to it, this was done without explanation to the jury, and only after the prosecutor had strenuously argued the falsity of this document, after the jury had begun deliberations, and apparently after the jury had already indicated on the verdict sheet that defendants were guilty of offering this "false" instrument for filing. A recertification form for February 2001 was also introduced, and while it allegedly does contain false information, it was not charged in the indictment, and the People never sought to amend the indictment to include it. Thus, this document constituted an uncharged crime, which may have been admissible to show intent or absence of mistake, but about which there was no limiting instruction informing the jury that they could not consider it on the issue of propensity. The only recertification document forming the basis of defendants' convictions was for January, 2000. We find that the improper introduction of the two recertification forms, one before and one after the subject form,

clearly prejudiced defendants, as it severely undermined any assertion that the incorrect information in the January, 2000 form was a mere error, with no intent to defraud. This is especially so, as it the verdict sheet reflects that the jury incorrectly found defendants guilty of the alleged "falsity" in the February 1999 form, as well. While this issue is not preserved, we reach it in the interest of justice.

Each defendant is entitled to a new trial, based on the cumulative effect of these errors. However, we decline to dismiss the indictment, notwithstanding that defendants have served their sentences.

M-2366 *People v Marilyn Walwyn Council*

M-2368 *People v Roosevelt Council*

Motions seeking leave to reargue and for other related relief denied.

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

ENTERED: JUNE 10, 2008


CLERK

Tom, J.P., Mazzarelli, Gonzalez, Sweeny, DeGrasse, JJ.

3873 Maria Rodriguez,
Plaintiff-Appellant,

Index 105259/05

-against-

New York City Housing Authority,
Defendant-Respondent.

Robert G. Goodman, P.C., New York (Robert G. Goodman of counsel),
for appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for
respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.),
entered April 16, 2007, which, in an action for personal
injuries, granted defendant's motion for summary judgment
dismissing the complaint, unanimously affirmed, without costs.

Plaintiff testified that on January 17, 2005, at
approximately 8:20 A.M., she slipped and fell on snow and ice on
the sidewalk in front of defendant's premises, and that at the
time of the accident it was not snowing, but it had snowed the
night before. Climatological data showed trace amounts of snow
fell between 2 A.M. and 10 A.M. on January 17, and that the
average temperature was well below freezing. Moreover, a grounds
supervisor for defendant testified that snow removal operations
began at 7 A.M. on January 17, which consisted of the sidewalks
first being cleared of snow and ice, and then salt and sand being
spread on the ground. According to the grounds supervisor, snow

removal operations were completed by 10 A.M.

"[A] municipality is not liable in negligence for injuries sustained by a pedestrian who slips and falls on an icy sidewalk unless a reasonable time has elapsed between the end of the storm giving rise to the icy condition and the occurrence of the accident" (*Valentine v City of New York*, 86 AD2d 381, 383 [1982], *affd* 57 NY2d 932 [1982]). In addition, pursuant to Administrative Code of the City of New York § 16-123(a), building owners have four hours after a snowfall stops to remove snow and ice from abutting sidewalks, excluding the hours between 9 P.M. and 7 A.M. Accordingly, summary judgment was properly granted because accepting plaintiff's testimony that snowfall had ceased, defendant had until 11 A.M. at the earliest to complete snow removal, if the snow had stopped falling by 7 A.M., and the record is uncontroverted that at the time of plaintiff's fall, defendant was in the midst of snow removal operations (see *Nayman v New York City Tr. Auth.*, 25 AD3d 376 [2006]; *Prince v New York City Hous. Auth.*, 302 AD2d 285 [2003]). Furthermore, contrary to plaintiff's contention, the record is bereft of evidence that

defendant's snow removal efforts made the sidewalk more dangerous
(see *Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462 [2007]).

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

ENTERED: JUNE 10, 2008


CLERK

Tom, J.P., Mazzarelli, Gonzalez, Sweeny, DeGrasse, JJ.

3874 Judith A. Listopad, Index 107059/05
Plaintiff-Appellant,

-against-

Sherwood Equities, Inc., et al.,
Defendants-Respondents,

C.P. Construction Corp.,
Defendant.

Smiley & Smiley, LLP, New York (Andrew J. Smiley of counsel), for
appellant.

Fiedelman & McGaw, Jericho (Dawn C. DeSimone of counsel), for
respondents.

Order, Supreme Court, New York County (Louis B. York, J.),
entered May 14, 2007, which, in this personal injury action,
granted defendants' motion for summary judgment dismissing the
complaint, unanimously affirmed, without costs.

As there is no evidence linking defendants to the plastic
sheeting that allegedly caused plaintiff's fall, a jury would be
left to base its verdict on speculation, rather than logical
inferences (*Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743,
744 [1986]).

The court properly declined to consider plaintiff's
supplemental bill of particulars alleging for the first time that

her fall was caused by poor lighting (*see Boland v Koppelman*, 251 AD2d 176 [1998]).

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

ENTERED: JUNE 10, 2008



CLERK

Tom, J.P., Mazzarelli, Gonzalez, Sweeny, DeGrasse, JJ.

3875 In re: New York County Asbestos Litigation

Robert F. Perdicaro, et al.,
Plaintiffs-Respondents,

Index 106604/07

-against-

A.O. Smith Water Products, et al.,
Defendants,

Treadwell Corporation,
Defendant-Appellant.

McGivney & Kluger, P.C., New York (Kerryann M. Cook of counsel),
for appellant.

Belluck & Fox, LLP, New York (Seth A. Dymond of counsel), for
respondents.

Order, Supreme Court, New York County (Helen E. Freedman,
J.), entered February 25, 2008, which denied defendant
Treadwell's motion for summary judgment dismissing the complaint
and all cross claims as against it, unanimously reversed, on the
law, without costs, and the motion granted. The Clerk is
directed to enter judgment dismissing the complaint and all cross
claims as against Treadwell.

In opposition to Treadwell's prima facie showing of
entitlement to summary judgment, plaintiffs' evidence failed to
raise a factual issue whether plaintiff worker (a Con Edison
employee) was present at various Con Edison powerhouses at the
same time Treadwell workers or its subcontractors were installing
alleged asbestos-based insulation on new equipment. Plaintiff

worker's evidence was insufficient to raise a triable issue of fact whether he was exposed to asbestos-based insulation at any given time at the powerhouses. He admittedly lacked training in insulating work, and offered no factual support that would reasonably suggest that the insulation he saw in use at the time he was purportedly present at the Con Ed powerhouses was asbestos-based; the evidence indicated that insulation utilized at these powerhouses often contained fire/heat-resistant components other than asbestos. Although the record indicated Treadwell had ordered asbestos-content paper, glass-cloth and millboard in connection with Con Edison's Arthur Kill contract, there was no testimony from plaintiff worker that he ever observed the use of such materials at the Arthur Kill construction site. It would be purely speculation to assume that such insulating materials were used during his sporadic and limited presence at the Arthur Kill powerhouse. We find, as matter of law, that plaintiffs' evidence in opposition to the motion was insufficient to raise a factual issue whether Treadwell's acts constituted a substantial factor in causing

plaintiff worker's alleged lung disease (see *Diel v Flintkote Co.*, 204 AD2d 53 [1994]).

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

ENTERED: JUNE 10, 2008


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very favorable disposition of his case had he completed a treatment program, but defendant failed to do so, and was convicted of a new crime. Furthermore, there was no factual dispute requiring a hearing, or any further inquiry, as to whether defendant violated the terms of his plea agreement (see *People v Valencia*, 3 NY3d 714 [2004]).

We perceive no basis for reducing the sentence.

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defendant. We do not find this testimony to be inflammatory or unduly prejudicial, particularly since defendant had also introduced evidence of his brother's gang involvement. Defendant did not preserve his hearsay, Confrontation Clause, or improper-opinion claims regarding the detective's testimony, or his challenge to testimony about the meaning of certain gang body markings, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

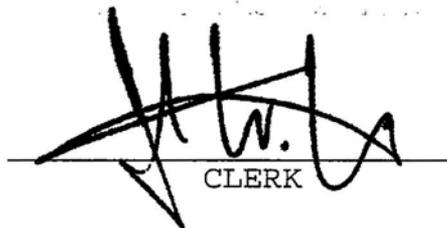
The court properly denied defendant's motion to suppress physical evidence and statements. The police had reasonable suspicion upon which to detain defendant, based on a combination of a description that was at least sufficient under the circumstances to warrant a common-law inquiry, and defendant's unprovoked flight (*see People v Montilla*, 268 AD2d 270 [2000], *lv dismissed* 95 NY2d 830 [2000]). Defendant's statement was attenuated from a suppressed statement he had made many hours

before (see *People v Paulman*, 5 NY3d 122, 130-134 [2005]), and was otherwise voluntary in all respects.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 10, 2008



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Tom, J.P., Mazzarelli, Gonzalez, Sweeny, DeGrasse, JJ.

3878 Susan Salvador-Pajaro, et al., Index 111508/05
Plaintiffs-Respondents,

-against-

The Port Authority of New York and New Jersey,
Defendant-Appellant.

Office of Milton Pachter, New York (Arnold D. Kolikoff of
counsel), for appellant.

Christopher S. Olson, Huntington (Mary Ellen O'Brien of counsel),
for respondents.

Order, Supreme Court, New York County (Louis B. York, J.),
entered October 12, 2007, which, in an action by a Port Authority
police officer against the Port Authority for personal injuries
allegedly caused by an unsafe workplace, in New Jersey, denied
the Port Authority's motion for summary judgment dismissing the
complaint, unanimously reversed, on the law, without costs, and
the motion granted. The Clerk is directed to enter judgment in
favor of defendant dismissing the complaint.

While Workers' Compensation Law § 11 does not preclude
plaintiff's cause of action under General Municipal Law § 205-e
(see *Gonzalez v Iocovello*, 93 NY2d 539, 549-550 [1999]), the
action must be dismissed for two reasons. First, Labor Law § 27-
a ("Safety and health standards of public employees"), on which
plaintiff's General Municipal Law § 205-e cause of action is
predicated, does not apply to the Port Authority, an Interstate

Compact agency. Such an agency is not subject to New York legislation governing "internal operations," e.g., employer/employee relations (see *Matter of Agesen v Catherwood*, 26 NY2d 521, 525-526 [1970] ["the (Port) Authority, albeit bistate, is subject to New York's laws involving health and safety, insofar as its activities may externally affect the public"]), absent concurring legislation by New Jersey, and absent any reference to the agency in the statute or its legislative history (see *Matter of Malverty v Waterfront Commn. of N.Y. Harbor*, 71 NY2d 977, 980 [1988]). Second, New York Labor Law provisions regulating workplace safety, such as section 27-a, do not apply to workplaces located outside of New York, even though the injured worker and workplace owner are both New York domiciliaries (see *Padula v Lilarn Props. Corp.*, 84 NY2d 519 [1994]; *Grivas v Port Auth. of N.Y & N.J.*, 229 AD2d 301, 1v dismissed 89 NY2d 1029 [1996]).

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

ENTERED: JUNE 10, 2008


CLERK

Tom, J.P., Mazzarelli, Gonzalez, Sweeny, DeGrasse, JJ.

3879 In re Stephanie Stafford,
Petitioner,

Index 108908/07

-against-

Tino Hernanadez, as Chairman and
Member of the New York City
Housing Authority, et al.,
Respondents.

Patterson Belknap Webb & Tyler LLP, New York (Joseph M. Abraham
of counsel), for petitioner.

Ricardo Elias Morales, New York (Menachem Mendel Simon of
counsel), for respondents.

Determination of respondent New York City Housing Authority
(NYCHA), dated March 21, 2007, terminating petitioner's public
housing tenancy on the grounds of nondesirability and breach of
NYCHA's rules and regulations, unanimously confirmed, the
petition denied, and the proceeding brought pursuant to CPLR
article 78 (transferred to this Court by order of Supreme Court,
New York County [Sheila Abdus-Salaam, J.], entered January 16,
2008), dismissed, without costs.

The determination was supported by substantial evidence (see
300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d
176, 180 [1978]). There exists no basis to disturb the
credibility findings of the hearing officer (see *Matter of*
Berenhaus v Ward, 70 NY2d 436, 443-444 [1987]), in this matter
where the victim, an employee of NYCHA, testified that petitioner

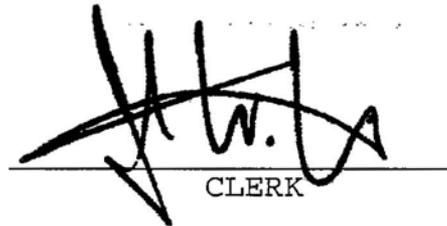
punched her in the face causing injuries during a meeting to review petitioner's annual income certification documents. Such testimony was corroborated by another testifying NYCHA employee, who assisted in separating petitioner from the victim, and petitioner herself acknowledged that she struck the victim, although she maintained she was justified in doing so after the victim initiated contact; petitioner pled guilty to disorderly conduct as a result of the incident. Contrary to petitioner's contention that this was an isolated incident, the record supports the hearing officer's finding that petitioner's conduct toward the victim "escalated from two prior incidents of verbal abuse." The victim testified that in 2004, petitioner menacingly approached her after a late rent notice had been placed under petitioner's door, and in 2005, petitioner used foul language and repeatedly threatened the victim during a telephone call in which petitioner attempted to hold the victim responsible for her failure to receive mail after she transferred apartments.

The termination of petitioner's tenancy does not shock our sense of fairness (*see Matter of Featherstone v Franco*, 95 NY2d 550, 555 [2000]; *Matter of Shaw v Franco*, 251 AD2d 156 [1998]), and we reject petitioner's requests for a lesser penalty or to reopen the hearing to address her claims that the complained of conduct was attributable to the medication she was taking for her

asthma. Petitioner fails to offer expert evidence that the dosage and types of steroids she was allegedly taking caused her to act in the manner in which she did.

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

ENTERED: JUNE 10, 2008



CLERK

Tom, J.P., Mazzairelli, Gonzalez, Sweeny, DeGrasse, JJ.

3880N-

3881NA Karen Kosovsky,
Plaintiff-Respondent,

Index 310418/93

-against-

Kenneth Zahl,
Defendant-Appellant.

Kenneth Zahl, appellant pro se.

Dobrish Zeif Gross & Wrubel LLP, New York (Robert Z. Dobrish of counsel), for respondent.

Jo Ann Douglas, New York, Law Guardian.

Order, Supreme Court, New York County (Laura Visitación-Lewis, J.), entered December 3, 2007, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to consolidate this action and the Family Court action *Kenneth Zahl v Karen Ann Kosovsky* (V10746-07), and order, same court and Justice, entered December 12, 2007, which, to the extent appealed from as limited by the briefs, granted Jo Ann Douglas, Esq.'s motion for reappointment as attorney for the parties' child, unanimously affirmed, without costs.

Given the extensive prior proceedings in the Supreme Court regarding visitation, child support and disqualification of the child's attorney, the Supreme Court properly determined to exercise its concurrent jurisdiction with the Family Court (see NY Const, art VI, § 7[a]) by transferring defendant's Family

Court petition for, inter alia, visitation and disqualification of the child's attorney to the Supreme Court and consolidating it with plaintiff's related child support and visitation action (see CPLR 602[b]; *Schneider v Schneider*, 127 AD2d 491, 494-495 [1987], *affd* 70 NY2d 739 [1987]).

The court properly reappointed Jo Ann Douglas, Esq. as the child's attorney. The record indicates that Douglas "properly acted as the child's advocate . . . rather than as [a neutral] aide to the court in determining the child's best interests" (*Rogovin v Rogovin*, 27 AD3d 233, 235 [2006]; see Family Court Act § 249[b]). There was no indication of a conflict of interest or hostility toward defendant (see *Kaye v Kaye*, 11 AD3d 392, 393-394 [2004]). Nor was there any indication that Douglas would be called as a witness or that her testimony was necessary (see *Rogovin* at 235).

The court properly ordered a *Lincoln* hearing to obtain "an honest expression of the child's desires and attitudes" with respect to reestablishing contact or visitation with defendant (*Matter of Lincoln v Lincoln*, 24 NY2d 270, 271-272 [1969]). Given the child's previous accusations of inappropriate conduct by defendant and the fact that she was soon to take important

examinations, the court properly scheduled the hearing for after the examinations and precluded defendant from contacting the child until after the hearing.

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

ENTERED: JUNE 10, 2008



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JUN 10 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe,
John W. Sweeny, Jr.
James M. McGuire
Rolando T. Acosta,

J.P.

JJ.

3264
Index 602176/06

x

Steven Littman,
Plaintiff-Appellant,

-against-

John W. Magee, et al.,
Defendants-Respondents,

Herrick Feinstein, LLP, et al.,
Defendants.

x

Plaintiff appeals from a judgment of the Supreme Court,
New York County (Bernard J. Fried, J.),
entered March 1, 2007, dismissing the
complaint in its entirety.

Kennedy Johnson Gallagher LLC, New York
(James W. Kennedy of counsel), and Shapiro
Forman Allen Sava & McPherson LLP, New York,
(Stuart L. Shapiro and Yoram Miller of
counsel), for appellant.

Quinn Emanuel Urquhart Oliver & Hedges, LLP,
New York (Sanford I. Weisburst, Michael B.
Carlinsky, David L. Elsberg, Manny J.
Caixeiro and William B. Adams of counsel),
for respondents.

SAXE, J.P.

Plaintiff alleges that defendants wrongfully prevailed upon him to sell his minority interest in defendants' closely held corporation, and to execute in that context a broad release, by making assertions that he understood to mean that no material financial information was available beyond the limited materials already supplied to him. Since on a motion pursuant to CPLR 3211 the court must accept as true the allegations of the complaint, and give the plaintiff the benefit of any reasonable inference to be drawn from them (see *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]), and particularly since defendants owed plaintiff a fiduciary duty (see *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [2006], lv denied 8 NY3d 804 [2007]), the motion court erred in concluding that as a matter of law plaintiff's claims are barred by the terms of the release he signed.

The facts as alleged are as follows: Plaintiff was a founding member, with an 18.7% interest, in Rockwood Realty Associates LLC (Rockwood), a closely held New York real estate investment banking LLC formed in 1996 to provide transactional and advisory services to financial institutions and public and private owners. It is asserted that over the intervening years, the two owners with the majority interest in Rockwood

increasingly arranged financial transactions for their benefit and to plaintiff's detriment. In this vein, in 2003 the company sold an interest in real estate and allocated \$3.6 million to plaintiff in his K-1 for that year as his share of the earnings, creating a personal tax obligation for plaintiff of over \$900,000, without paying him any cash distributions from the company to cover them, as had been the understanding of the members when the company was formed. So, in 2004, when plaintiff was approached about selling his interest back to the company, he responded positively, and negotiations began.

Plaintiff asserts that he repeatedly asked defendants to provide him with all the information he and his accountants believed necessary in order to determine the value of his interest. Initially, the information provided was limited to a Rockwood-generated balance sheet and income statement for the nine months ending in December 2004. Later, in response to plaintiff's request for further information regarding the value of Rockwood, its affiliates, and its projected value on a going forward basis, he was provided with tax returns and the combined financial statements for Rockwood and its affiliates for the years ended 2002 and 2003. The provided statements disclosed that Rockwood had eight affiliates of which it was the sole member and managing member; however, they were insufficient to

analyze the value of the affiliates or their future prospects.

When plaintiff requested further information, including future financial projections, Rockwood's CFO allegedly instructed plaintiff that "no other information was or would be made available" and any further discussion was rebuffed. Further, Rockwood's CFO threatened that if plaintiff did not agree to the proposed sale, approximately \$1 million in income would be allocated to him for the year 2004, while no distribution would be made to him to cover the taxes resulting from that allocation. Plaintiff emphasizes that defendants were actually in possession of financial projections but failed and refused to provide them, in order to induce and, essentially, compel him to agree to the proposed deal in the absence of the sought information.

On April 15, 2005, plaintiff entered into a Membership Interest Transfer Agreement with Rockwood, selling his interest back to the company for \$2.125 million. As part of the agreement, plaintiff represented and warranted that he had "such knowledge and experience in financial and business matters such that [he] is capable of evaluating the terms and provisions of this Agreement and the other Transaction Documents." He also executed a broad omnibus general release of all claims between them.

In May 2006, Rockwood announced that DTZ Holdings, PLC had

purchased a 50% interest in Rockwood for \$45 million. Plaintiff commenced the instant action shortly thereafter, asserting that defendants had concealed information concerning the true value and prospects of Rockwood. Plaintiff asserted claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, constructive trust and an accounting, and sought a declaratory judgment declaring the general release void ab initio. Defendants moved to dismiss the complaint, asserting that it failed to state a cause of action and that it was barred by the release. The motion was granted, and this appeal ensued.

"[A] valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Global Mins.*, 35 AD3d at 98). But, "a general release will not insulate a tortfeasor from allegations of breach of fiduciary duty, where he has not fully disclosed alleged wrongdoing" (*H.W. Collections, Inc. v Kolber*, 256 AD2d 240, 241 [1998]). And, "a release may be set aside on the traditional bases of fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake or duress" (*Global Mins.*, 35 AD3d at 98, citing *Hack v United Capital Corp.*, 247 AD2d 300, 301 [1998]). Of course, even where there is a fiduciary relationship, a plaintiff with such a claim must establish justifiable reliance on the misrepresentations or omissions at issue (see *Global Mins.*, at 98). So, if he was

aware of information that rendered his reliance unreasonable, or if he had enough information to create a duty to investigate further, the requisite reliance cannot be established (*id.* at 98-101; see also *Permasteelisa, S.p.A. v Lincolnshire Mgt. Inc.*, 16 AD3d 352 [2005]). However, in this instance, and at this juncture, it was erroneous to conclude as a matter of law that plaintiff could not establish the requisite justifiable reliance to set aside the release.

Initially, defendants, as shareholders, and particularly as active managing shareholders in a closely held corporation, owed a fiduciary duty to plaintiff, a minority shareholder (*Global Mins.*, at 98). Plaintiff was therefore entitled to expect defendants to disclose any information in their possession that could reasonably bear on his consideration of defendants' offer, since "when a fiduciary, in furtherance of its individual interests, deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make full disclosure of all material facts" (*Blue Chip Emerald v Allied Partners*, 299 AD2d 278, 279 [2002], citing *Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989] [internal quotation marks omitted]; see *Global Mins.*, at 98, quoting *Dubbs v Stribling & Assoc.*, 96 NY2d 337, 341 [2001]). In *Blue Chip Emerald*, this Court reinstated a complaint claiming fraud and

breach of fiduciary duty brought by 50% partners in a joint venture which owned a commercial building in Manhattan, whose co-venturers bought out their share of the company based on an \$80 million valuation, without informing the plaintiffs that they had received offers for the property at a price of \$200 million. Despite the plaintiffs' disclaimer in the buyout agreement that the defendants had not made any representations to plaintiffs as to the value of the property, and their acknowledgment that the defendants had disclosed that they had discussed with 16 listed third parties a possible sale or lease of the building, this Court held that because the defendants owed a fiduciary duty of loyalty to the plaintiffs, they had an affirmative duty to disclose any information that could reasonably bear on the plaintiffs' consideration of the defendants' offer, such as the prices prospective purchasers had offered to pay (299 AD2d at 279-280).

The complaint here, giving plaintiff "the benefit of every possible favorable inference" (see *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], quoting *Leon v Martinez*, 84 NY2d 83, 87 [1994]), alleges that defendants intentionally kept from plaintiff financial information vital to plaintiff's decision, information that he had demanded and that they had a duty to provide, while they

falsely asserted that no other information was available, and pressured him to accept their terms by threatening to otherwise report the company's earnings in such a way that he would be saddled with "phantom" earnings creating an enormous personal tax liability. These assertions are sufficient to support the claim that the release should be set aside, so as to allow plaintiff to proceed with his claims for breach of fiduciary duty and fraudulent concealment.

The present matter is distinguishable from *Global Minerals*. There, this Court upheld the summary judgment dismissal of a closely held corporation's claim against one of its four shareholders, despite the fiduciary duty the defendant owed the plaintiff, because the plaintiff corporation had sufficient knowledge of questionable dealings by the former officer and shareholder, before it entered into a severance agreement with him, to put it on notice that additional inquiry was necessary. Here, the allegations are insufficient to warrant imposition of that duty of additional inquiry as a matter of law. Unlike *Global Minerals*, where the corporate plaintiff had been voluntarily provided with relevant information regarding the defendant and had the means and ability to investigate further into it, plaintiff here had only his own suppositions and no ready means to force defendants to turn over documents he only

supposed them to have in their possession.

Defendants also argue that since plaintiff *acknowledged* that the information they provided to him was insufficient for him to properly value his interest in the company, he cannot have relied on the information they provided to establish the value of his interest in the company. However, the crux of plaintiff's claim is that they misinformed him that there were no other financial documents, forcing him to proceed with the evaluation with the limited information they made available, when they possessed other vital information. The allegations here have much in common with those in *Blue Chip*, where the managing members of a joint venture failed to inform the co-venturers of information in their possession as to the true market value of the property owned by the joint venture, and purchased the plaintiffs' interest in the venture for a fraction of its value.

In order to hold that as a matter of law, plaintiff had, and failed to satisfy, a duty of additional inquiry, the motion court seems to have relied entirely upon plaintiff's assertion in the complaint that defendant's CFO told him "no other information was or would be made available." The court apparently understood these alleged words to indisputably mean "we will not make any other information available to you," indicating that defendants were in possession of additional financial information but were

choosing not to reveal it to plaintiff. In contrast, however, plaintiff seems to have interpreted the CFO's quoted language as meaning that no additional information was available, and therefore that nothing else would be made available to him. In view of the court's obligation on a 3211 motion to view the allegations in the light most favorable to plaintiff and give him every favorable inference (see *AG Capital Funding Partners*, 5 NY3d at 591), it was error for the court to impose its understanding of the words at issue as it did. Moreover, to the extent the quoted language connotes the existence of some additional financial information, it would not be unreasonable to conclude, given that defendants owed a fiduciary duty to plaintiff, that such information was not material.

The sentence attributed to defendants' CFO simply does not in itself constitute sufficient grounds upon which to eliminate any possible claim to set aside the release on grounds of fraudulent concealment. The question of whether plaintiff can establish reasonable reliance must remain for determination at a later point in this litigation.

Nor was dismissal of the action proper based on the holding of *Danann Realty Corp v Harris* (5 NY2d 317, 323 [1959]), where a contract's merger clause disclaiming reliance on any representations as to operating expenses and profits was held to

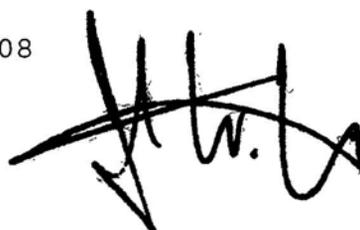
negate the plaintiff's claim of misrepresentations as to those very subjects (see also *Rodas v Manitaras*, 159 AD2d 341, 342 [1990]), or based on *Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc.* (16 AD3d 352 [2005], *supra*). Importantly, *Danann* involved an arm's length business transaction, and there was no fiduciary duty between the parties, so no obligation on the defendant in that matter to disclose all material facts bearing on the transaction.

Accordingly, the judgment of the Supreme Court, New York County (Bernard J. Fried, J.), entered March 1, 2007, dismissing the complaint in its entirety, should be reversed, on the law, with costs, the complaint reinstated, and the matter remanded for further proceedings consistent herewith.

All concur.

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

ENTERED: JUNE 10, 2008

A handwritten signature in black ink, appearing to be 'J. W. L.', written over a horizontal line.

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