

Brazilian court with respect to marital assets held or controlled in New York.

Plaintiff's residency here, which is of a temporary nature, "is but one factor to be considered in determining whether an action should be dismissed pursuant to CPLR 327" (*Westwood Assoc. v Deluxe Gen.*, 53 NY2d 618, 619 [1981]). In dismissing, the court properly considered the burden on the New York courts, the potential hardship to defendant Ezequiel, the availability of an alternative forum and the fact that the causes of action, for the most part, arose in Brazil (see *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], cert denied 469 US 1108 [1985]). Moreover, litigating the matter here would involve the applicability of foreign law (see *Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 178 [2004]).

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

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

Plaintiff Joelle Nasser and defendant Ezequiel Nasser were married in Belgium in 1979. Shortly before the marriage Joelle and Ezequiel entered into a prenuptial agreement in Belgium pursuant to which, among other things, they adopted, with certain modifications, the community property regime of the Belgian Civil Code. Joelle and Ezequiel subsequently moved to and established their marital residence in Brazil and both are citizens of that country.

In December 2003 Ezequiel commenced a matrimonial action against Joelle in the Brazilian courts. The Brazilian courts have issued several orders in that action, including orders regarding the custody of Joelle and Ezequiel's daughter and awarding Joelle temporary maintenance. Another order was issued by a Brazilian court concerning the marital assets, the effect of which is sharply disputed by Joelle and Ezequiel. Joelle contends that this order restrained Ezequiel from selling, transferring, encumbering or otherwise disposing of marital assets in his possession or control; Ezequiel maintains that the order merely required the parties to inventory the assets in their possession and made them the trustees of the assets in their respective control.

In July 2004 Joelle commenced this action in Supreme Court,

New York County, asserting numerous causes of action against Ezequiel,¹ claiming that, through fraud, breach of fiduciary duty, conversion and trespass, he is concealing, selling, transferring and wasting marital assets located in New York. According to her complaint, Joelle commenced the action, which seeks both damages and permanent injunctive relief, "to assist her in enforcing orders and decrees of the Brazilian Court[s] in . . . New York with respect to . . . [a]ssets [located in New York]." Similarly, Joelle's brief states that the action was brought "to identify, restrain and account for the assets in which she has a present property interest but which are held or controlled by Ezequiel." Ezequiel moved to dismiss the action for lack of personal jurisdiction or, alternatively, under the doctrine of forum non conveniens. After Ezequiel withdrew that aspect of his motion challenging personal jurisdiction, Supreme Court granted that aspect of the motion seeking dismissal on the ground of forum non conveniens, and this appeal by Joelle ensued.

"When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in

¹Joelle also commenced this action against Raymond and Daniel Nasser, Joelle and Ezequiel's sons. Raymond never appeared in the action and the action was dismissed as to Daniel by stipulation.

whole or in part on any conditions that may be just" (CPLR 327[a]). "The doctrine [of forum non conveniens] rests, in large part, on considerations of public policy and . . . our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York" (*Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 [1972] [internal quotation marks and citation omitted]).

Supreme Court providently exercised its discretion in dismissing this action. Joelle's action is an adjunct of the matrimonial action pending in Brazil and is premised upon orders and decrees of Brazilian courts. As is evident from the proceedings before Supreme Court and the briefs before this Court, the parties do not agree upon the meaning and effect of one such order regarding the parties' assets. The appropriate forum in which to resolve that dispute is Brazil since one of its courts issued that order. Without question, a suitable alternative forum is available to Joelle (*see Morley v Morley*, 191 AD2d 372 [1993]; *see also IFS Intl. v SLM Software, Inc.*, 224 AD2d 810 [1996]). Additionally, requiring the parties to litigate in the context of the Brazilian action the claims asserted by Joelle in her New York action avoids the possibility that the Brazilian and New York courts will issue inconsistent

findings (see *World Point Trading PTE v Credito Italiano*, 225 AD2d 153 [1996]). While Joelle correctly notes that Supreme Court and the parties have spent considerable time and effort on her action, the lion's share of that time and effort was dedicated to the issue of whether Supreme Court had personal jurisdiction over Ezequiel. Conversely, the Brazilian courts have been addressing substantive issues (e.g., custody of the parties' daughter and maintenance) between the parties in the matrimonial action for several years and that action is more comprehensive than Joelle's New York action (see *Certain Underwriters at Lloyds, London v Millennium Holdings*, 44 AD3d 536 [2007]).

Lastly, I note that dismissal of Joelle's action on the ground of forum non conveniens will not deprive Joelle of access to our courts for the purpose of seeking disclosure (see CPLR 3102[e]; Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3102:9; Siegel, NY Prac § 352 [4th ed]) or

enforcing a judgment of the Brazilian courts (see CPLR article 53; *Downs v Yuen*, 298 AD2d 177 [2002]; Siegel, NY Prac § 472 [4th ed]).

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

ENTERED: JUNE 12, 2008



CLERK

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

3389N-

3389NA Lauren Scott Miller,
Plaintiff-Appellant,

Index 112236/04

-against-

Staples the Office Superstore East,
Inc., etc., et al.,

Defendants-Respondents.

[And A Third-Party Action]

Alpert & Kaufman, LLP, New York (Norman A. Olch of counsel), for appellant.

Rubin Fiorella & Friedman, LLP, New York (Stewart B. Greenspan of counsel), for respondents.

Order and partial judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered April 10, 2007, which, to the extent appealed from as limited by the briefs, granted defendants' motion for leave to amend the answer to assert a counterclaim for a declaratory judgment that apportionment pursuant to CPLR 1601 applies to this action, unanimously modified, on the law, to deny such a declaration, and otherwise affirmed, without costs. Order, same court and Justice, entered September 12, 2007, which, to the extent appealable, denied plaintiff's motion to amend the complaint to allege the application of the exception to CPLR 1601 under CPLR 1602(10), unanimously reversed, on the law, without costs, and the motion

granted.

Plaintiff was injured when a bungee cord attached to a luggage cart snapped, recoiled and struck her in the eye. She commenced this action against Staples the Office Superstore East, Inc. (Staples), which sold the cart to plaintiff, and TJC Inc. (TJC), the domestic distributor of the cart. During discovery it became apparent that the cart was manufactured in China by a company called Fortune Touch or its affiliate, Formost Plastic and Metal Works (Formost). However, defendants Staples and TJC were unable to identify precisely which of those companies actually manufactured the cart. It was also learned that the bungee cord was manufactured in China by Fujian Changtai Zhidai Youxian Gongsi (Fujian). Plaintiff did not name any of the Chinese companies as a party defendant. Defendants impleaded Fujian, but not Fortune Touch or Formost, and were unsuccessful in their efforts to serve process on Fujian.

In their initial answers to the complaint, Staples and TJC each pleaded CPLR article 16 apportionment as an affirmative defense. CPLR 1601 provides generally that defendants found to bear no more than 50% of the overall liability for a plaintiff's injuries are only responsible for their proportionate shares of the plaintiff's non-economic loss. After discovery was complete, defendants moved to amend their respective answers to add a

counterclaim for a declaration that the exception to the apportionment rule found in CPLR 1602(10) did not apply. CPLR 1602(10) provides that apportionment:

"shall not apply to any person held liable in a product liability action where the manufacturer of the product is not a party to the action and the claimant establishes by a preponderance of the evidence that jurisdiction over the manufacturer could not with due diligence be obtained and that if the manufacturer were a party to the action, liability for claimant's injury would have been imposed upon said manufacturer by reason of the doctrine of strict liability, to the extent of the equitable share of such manufacturer."

The motion further sought judgment on the counterclaim should leave to amend be granted. Defendants stated that they sought such a declaration at this stage of the litigation because "[t]he bottom line is that this case stands a much greater chance of settling if, before trial, the parties can ascertain the Court's ruling with respect to Article 16 and adjust their evaluation accordingly."

As to the merits of their claim, defendants argued that plaintiff could have obtained jurisdiction over the manufacturers of the luggage cart and the bungee cord because she knew their identities and they had sufficient contacts with the State of New York to be amenable to its jurisdiction. They further argued that the location of the entities in China was not in itself a

bar to serving process. They asserted that service could have been accomplished through the Hague Convention (The International Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters).

Plaintiff opposed the motion primarily on the grounds that the facts did not support a finding that long-arm jurisdiction was available over the Chinese entities. To the contrary, plaintiff argued that the court should declare that long-arm jurisdiction over the Chinese companies did not exist as a matter of law.

The motion court granted defendants' motion in its entirety. Sua sponte, the court, relying on *Cole v Mandell Food Stores* (93 NY2d 34 [1999]), held that plaintiff had waived any argument that an exception to CPLR article 16 applied because she had not alleged the exception in her complaint. The court further found that plaintiff had the burden of proof to show that article 16 apportionment did not apply. Indeed, the court held, plaintiff had failed to prove that jurisdiction over the Chinese entities could not have been obtained.

Eight days after the decision was issued, plaintiff moved to reargue and to amend her complaint to assert CPLR 1602(10) as an exception to apportionment. The court denied the motion in its entirety. It found that there was no authority for a party to

amend a pleading and thereby revive a matter that had already been determined against that party. The court further held that plaintiff did not establish that the Chinese entities were not amenable to suit via long arm jurisdiction.

The court's findings are erroneous. First, on the original motion, the court placed the burden of persuasion on plaintiff, when it should have been placed on defendants. While CPLR 1603 places the burden on plaintiff of proving an exception to the apportionment rule, defendants, by asserting it as a counterclaim and seeking an early determination on the issue, for present purposes, shifted the burden of proof to themselves (see *Latha Rest. Corp. v Tower Ins. Co.*, 285 AD2d 437 [2001] [defendant bears burden of proof on counterclaims]). Moreover, the part of defendants' motion which sought a declaration that article 16 apportionment among all culpable parties was appropriate as a matter of law was effectively one for summary judgment. The court failed to recognize the fundamental principle that a party moving for affirmative relief has the initial burden on the motion. In this matter defendants had the obligation to show their entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material

issues of fact (see e.g. *Alvarez v Prospect Hosp.*, 68 NY 320, 324 [1986]). Accordingly, it was defendants who were required to demonstrate in their moving papers that plaintiff could obtain jurisdiction over those entities with due diligence.

Defendants clearly failed to meet their burden. In their moving papers they asserted that Fujian and the manufacturer of the luggage cart had sufficient contacts with New York for long-arm jurisdiction. However, they did not even attempt to argue that plaintiff would have been successful had she attempted to effectuate service on them, via the Hague Convention or otherwise. Indeed, defendants themselves were unable to serve their third-party complaint on Fujian. In any case, defendants did not satisfy their burden and it never shifted to plaintiff to submit any evidence to create an issue of fact as to the possibility of serving those parties (*id*).

Further, the court committed error when it acted prematurely. *Cole v Mandell Food Stores* (93 NY2d 34 [1999], *supra*), on which it relied in finding that plaintiff waived the CPLR 1602(10) exception, dealt with a case in a dramatically different procedural posture. There, the plaintiff did not attempt to invoke an exception until well after the trial was over. Indeed, he did so for the first time on the defendants' appeal from the trial court's denial of their joint motion for

apportionment. The Court of Appeals held that the plaintiff's failure to allege an exception at any time before the jury rendered its verdict deprived the defendants of the notice necessary to prepare their defenses or adjust their trial strategies so as to defeat the applicability of the exception (93 NY2d at 40). Significantly, the Court also emphasized that an exception may be pleaded at virtually any stage of an action, so long as adequate notice is afforded (*id* at 39-40).

Here, none of the concerns that were present in *Cole* exists. Defendants were never at risk of being caught off guard by plaintiff's failure to invoke an exception to apportionment. To the contrary, they demonstrated their awareness of a possible issue concerning apportionment by affirmatively moving to have the issue finally determined well prior to trial. Furthermore, they demonstrated, by making a summary judgment motion on that claim, that they believed they had sufficient evidence at hand to challenge plaintiff's invocation of CPLR 1602(10). Finally, the court's reliance on *Cole* when the case was at this particular posture contravened the holding in *Cole*.

Given that defendants' motion should never have been granted in the first place, it was error for the court to deny plaintiff's motion to amend to plead CPLR 1602(10) as an exception to the apportionment rule. As discussed, the Court of

Appeals recognized in *Cole* that, "in keeping with the liberal rules of CPLR 3025, courts have generally permitted plaintiffs to amend the pleadings at various points throughout an action to comply with CPLR 1603" (*Cole*, 93 NY2d at 39, citing *Detrinca v De Fillippo*, 165 AD2d 505 [1991]). Indeed, defendants do not argue that plaintiff made her motion late. Rather, they claim that the proposed amendment failed on the merits, because plaintiff did not prove on the motion that she could not obtain jurisdiction over the manufacturers. However, this argument misstates what is required on a motion to amend to allege a CPLR 1602 exception.

As this Court has held, the standard on a motion to amend to allege a CPLR 1602 exception is no different than on any motion to amend pursuant to CPLR 3025. The proposed amendment should be sustained unless its "alleged insufficiency or lack of merit is clear and free from doubt" (*Detrinca* 165 AD2d at 509). Here, plaintiff's proposed amendment satisfied that standard. At the time plaintiff made her motion, even defendants were not certain of the true identity of the cart's manufacturer. Moreover, plaintiff knew that the manufacturer was located in China, and that service of process would not be routine. Indeed, plaintiff knew that defendants themselves had not been able to serve a third-party summons on the manufacturer of the bungee cord. Under such circumstances, an allegation that jurisdiction could

not be obtained over the manufacturers could hardly be said to have been lacking in merit as a matter of law. To the contrary, it served the purpose of placing defendants on notice of plaintiff's intention to prove at trial that CPLR 1602(10) applied to this action, and that she would seek to hold defendants jointly and severally liable for her injuries (*Cole*, 93 NY2d 34 [1999], *supra*).

M-1366 - *Miller v Staples, etc., et al.*

Motion seeking to enlarge record denied.

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

ENTERED: JUNE 12, 2008


CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3517 Anna-Sophia L.,
Petitioner-Appellant,

-against-

Paul H.,
Respondent-Respondent.

Lansner & Kubitschek, New York (Barbara J. Schaffer of counsel),
for appellant.

Law Offices of Sandford F. Young, P.C., New York (Sandford F.
Young of counsel), for respondent.

Order, Family Court, New York County (Jody Adams, J.),
entered on or about June 30, 2006, which denied petitioner's
objections to the Support Magistrate's order denying her
application for counsel and expert fees, unanimously modified, on
the law and the facts, to remand the matter for a hearing to
determine the amount of counsel fees to which petitioner is
entitled, and otherwise affirmed, without costs.

Petitioner sought child support after it was determined in
this filiation proceeding that respondent is the father of her
child, who was born in 2000 and has characteristics placing her
on the autism spectrum. Petitioner is a college graduate and
earns a salary of approximately \$96,000. Respondent is an
investor who holds an undergraduate degree from Harvard and J.D.
and M.B.A. degrees from Columbia. He earned \$6.5 million in 2000

but claimed to have earned virtually no income thereafter due to the collapse of the Internet bubble. However, he testified that in 2003 he spent approximately \$155,700 on business and personal expenses. Notwithstanding this, respondent argued that he should not have to pay any child support until his financial situation improved. At most, he asserted that he should be required to pay child support of no more than the statutory minimum of \$25 per month.

The Support Magistrate did not credit respondent's testimony concerning his financial position. To the contrary, based on the evidence of respondent's expenses in 2003, she imputed income to him of \$156,000, the amount petitioner had argued should be imputed. The Support Magistrate applied the statutory percentage of 17% on the parties' combined income up to \$80,000, as well as the combined income over \$80,000. Respondent's pro rata share was found to be 62%, and he was ordered to pay petitioner \$2,213.46 per month.

Petitioner moved for an award of counsel and expert fees pursuant to Family Court Act § 536. That section provides, in pertinent part, that:

"Once an order of filiation is made, the court in its discretion may allow counsel fees to the attorney for the prevailing party, if he or she is unable to pay such counsel fees."

The Support Magistrate denied the application. She found that "the fees charged by counsel in this matter...[were] appropriate to the experience, abilities and reputation of the attorneys involved." However, she criticized the number of hours it took to prosecute what she considered a "fairly straightforward" case. She further found that "the expenditure of time and money for the prosecution and presentation of petitioner's prima facie case and the determination of respondent's income for child support purposes was unreasonable considering the totality of the circumstances and the results achieved; i.e., the final order of child support." Finally, the Support Magistrate found that an award of fees was unwarranted as "petitioner has demonstrated to this court that she does have the wherewithal to contribute toward her own counsel fees."

We find that petitioner is entitled to an award of counsel fees and modify to remand for a hearing to determine the amount of such fees. First, while the Support Magistrate may have been correct that the expenditure of fees was disproportionate to the result achieved, there is nothing in the record to suggest that petitioner or her counsel were at fault for that. To the contrary, the court rejected respondent's position that he was impoverished and imputed to him a significant income. To the extent that petitioner's attorneys were forced to litigate what

would have been an easily resolved issue but for respondent's less than forthright position concerning his true financial state, respondent should reimburse petitioner for the fees incurred (see *Stern v Stern*, 67 AD2d 253, 254 [1979] [counsel fees awarded to wife in divorce proceeding because "(i)t would be unjust to have her, in effect, extinguish (assets) to pay counsel fees incurred in reaching a settlement which might just as easily have been attained much earlier, but for, what appears to be, in retrospect, a lack of good faith by the husband"]).

Even if, as the Support Magistrate found, petitioner had the funds to pay her attorneys, that is not in itself a bar to an award of counsel fees. "Indigency is not a prerequisite to an award of counsel fees" (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]), nor should that "oft-repeated rule...be understood to imply that a spouse's assets must be spent down to near-indigency before a counsel fee application will be entertained" (*Charpié v Charpié*, 271 AD2d 169, 172 [2000]). Furthermore, a court should not permit a party to a support proceeding "to drive [the other party] to the brink of indigency by needless, time-wasting legal maneuvering, and then raising [the other party's] pre-[proceeding] solvency as a defense to a claim for counsel fees" (*Stern*, 67 AD2d at 256).

There is no indication that the Support Magistrate gave any

consideration to petitioner's statement in her affidavit that she was able to fund the litigation only by depleting her savings and liquidating stock, and that she is on the brink of running out of money altogether. Moreover, respondent did not challenge petitioner on this point. Rather, he claimed in his own affidavit that "[t]he record shows that she depleted her savings financing this irrational and vengeful proceeding." However, the fact that the Support Magistrate imputed income to respondent and awarded support well above the statutory minimum establishes that the proceeding was eminently rational. We note that respondent's characterization of the proceeding as "vengeful" is offensive, considering that petitioner was merely seeking to compel him to do what he should have done voluntarily; that is, support his daughter. Finally, to the extent that respondent argues that petitioner's attorneys engaged in abusive and excessive billing practices, he can raise those issues at a hearing to determine the amount of fees which should be awarded to petitioner.

Notwithstanding the foregoing, the Support Magistrate was correct in denying that part of petitioner's application which sought expert fees. It is questionable whether expert fees are even available in a Family Court Act article 5 proceeding, since Family Court Act § 536 only mentions counsel fees. In any event, the Support Magistrate expressly stated in her decision and order

awarding petitioner child support that the expert's testimony was not dispositive of her decision to impute income to respondent.

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

ENTERED: JUNE 12, 2008



CLERK

discretion or contrary to law, so we are obliged to affirm (see *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of New York Div. of Hous. & Community Renewal*, 46 AD3d 425, 428-429 [2007]).

Inasmuch as the applicable rules allow the Commission to alter a referee's in-ring determination, the Commission's review of videotape evidence was an application of already existing rules rather than a promulgation of a new one that might implicate the procedures outlined in the State Administrative Procedure Act (see e.g. *Matter of Alca Indus. v Delaney*, 92 NY2d 775 [1999]).

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

ENTERED: JUNE 12, 2008


CLERK

Tom, J.P., Saxe, Friedman, Buckley, Catterson, JJ.

3906-

3906A In re Amin Enrique M. Jr. and Another,

Dependant Children Under The Age of
Eighteen Years, etc.,

Amin M.,
Respondent-Appellant,

Leake and Watts Services, Inc.,
Petitioner-Respondent.

Randall S. Carmel, Syosset, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti
of counsel), for respondent.

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

Orders, Family Court, New York County (Jody Adams, J.),
entered on or about April 5, 2007, which, upon a fact-finding
determination that respondent father had abandoned the children,
terminated his parental rights and committed custody and
guardianship to petitioner agency and the New York City
Commissioner of Social Services for the purpose of adoption,
unanimously affirmed, without costs.

The findings of abandonment are supported by clear and
convincing evidence. Respondent failed to communicate with the
children or the agency during the six months immediately
preceding the filing of the amended petitions, and admittedly had

not contacted them since the children came into petitioner's care in 2004. This gave rise to a presumption of abandonment (Social Services Law § 384-b[5][a]), which respondent failed to rebut (*Matter of Julius P.*, 63 NY2d 477, 481-482 [1984]; *Matter of Kristian U. F.-K.*, 283 AD2d 199 [2001]). Respondent claimed he did contact the children's foster mother through letters, but his vague and uncorroborated testimony was rejected by the court, whose credibility determination is entitled to deference (see *Matter of Annette B.*, 4 NY3d 509, 514 [2005]; *Matter of Emil Elvis J.C.*, 43 AD3d 710 [2007], *lv denied* 9 NY3d 814 [2007]). Even if respondent's claim were to be credited, these contacts were unsubstantial and insufficient to defeat petitioner's evidence of abandonment (see *Matter of Elizabeth Amanda T.*, 44 AD3d 507 [2007]; *Matter of Kerry J.*, 288 AD2d 221 [2001]).

Respondent's claim that he was denied due process because the court's finding was based on an abandonment period that differed from that specified in the amended petitions is unpreserved for review (see *Matter of Gina Rachel L.*, 44 AD3d 367 [2007]; *Matter of Jessica J.*, 44 AD3d 1132 [2007]). In any event, respondent was not prejudiced by the apparent mistake in the amended petitions identifying the abandonment period as the six months preceding the filing date of the original petitions. All parties agreed that the relevant period was the six months

preceding the filing of the amended petitions, and respondent's testimony specifically addressed that period. His vague and unsubstantiated claim that he contacted the foster mother would not have defeated the abandonment claim for the period stated in the petitions (see *Matter of Annette B.*, 4 NY3d 509 [*supra*]).

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

ENTERED: JUNE 12, 2008



CLERK

Tom, J.P., Saxe, Friedman, Buckley, Catterson, JJ.

3907-

3907A Joseph Malewich, et al.,
Plaintiffs-Appellants,

Index 600324/07

-against-

Rutherford Estates, LLC, also
known as 305 Second Avenue Associates, et al.,
Defendants-Respondents.

Tuan & Cho, LLP, Oyster Bay, (Dean T. Cho of counsel), for
appellants.

Katsky Korins LLP, New York (Joshua S. Margolin of counsel), for
respondents.

Order, Supreme Court, New York County (Rolando T. Acosta,
J.), entered December 26, 2007, which, upon granting plaintiffs'
motion for reargument, adhered to the original determination
denying their motion for summary judgment, unanimously affirmed,
without costs. Appeal from the prior order, entered August 2,
2007, unanimously dismissed, without costs, as superseded by
appeal from the later order.

In 2006, plaintiffs entered into an agreement with defendant
Rutherford for the purchase of a condominium apartment in
Manhattan. Plaintiffs put down a 10% deposit on the apartment,
and later a "second" deposit (both of which were held in escrow
by defendant Katsky Korins), but were unable to close on the
transaction due to failure to obtain necessary financing. The

agreement provided that upon a default by the purchaser, the seller would be entitled to "retain, as and for liquidated damages, the Deposit (but not the Additional Deposit) and any interest earned on the Deposit." A default by the purchaser included, inter alia, the "failure to pay the balance of the Purchase Price . . . on the Closing Date."

We reject plaintiffs' contention that the court committed reversible error by failing to address their argument that defendants repudiated the purchase agreement as a matter of law by refusing to return the "second" deposit tendered by plaintiffs immediately after they had notified Rutherford of their inability to close on the transaction. Plaintiffs do not make a prima facie showing that the term "Additional Deposit" referred to in the purchase agreement is unambiguous as a matter of law, or that the "second" deposit is in fact the "Additional Deposit." Hence, they are not entitled to summary judgment.

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 12, 2008


CLERK

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 12, 2008



CLERK

testimony that an officer smelled and observed marijuana during a lawful traffic stop. There is no basis for disturbing the court's credibility determinations, which are supported by the record (see *People v Prochilo*, 41 NY2d 759, 761 [1977]).

The trial court properly exercised its discretion in accepting a partial verdict as to the first-degree possession count (based on weight) and dismissing the third-degree possession count (based on intent to sell) without inquiring as to whether further deliberations on the latter charge would be fruitful (see *People v Mendez*, 221 AD2d 162, 163 [1995], *lv denied* 87 NY2d 923 [1996]). Nothing in the jury's communications with the court suggested any lack of unanimity, or need for further deliberations or guidance, regarding the first-degree count. Since the court dismissed the third-degree count (which was, in any event, a noninclusory concurrent count), defendants were not prejudiced by the court's termination of deliberations on that count (see *People v Stewart*, 210 AD2d 161 [1994], *lv denied* 85 NY2d 980 [1995]). Defendants' argument that further deliberations on the entire case might have resulted in a different verdict as to first-degree possession is speculative.

We perceive no basis for reducing the sentence of either defendant.

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

ENTERED: JUNE 12, 2008



CLERK

Tom, J.P., Saxe, Friedman, Buckley, Catterson, JJ.

3914 Maria Infante,
Plaintiff-Appellant,

Index 24346/04

-against-

Jerome Car Wash, et al.,
Defendants-Respondents.

Peña & Kahn, PLLC, Bronx (Steven L. Kahn of counsel), for
appellant.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis &
Fishlinger, Uniondale (Kathleen D. Foley of counsel), for
respondents.

Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.),
entered March 28, 2007, which granted defendants' motion for
summary judgment dismissing the complaint, unanimously reversed,
on the law, without costs, the motion denied and the complaint
reinstated.

Plaintiff alleges she fell on a soapy sidewalk while exiting
her vehicle at defendants' car wash. Defendants failed to make a
prima facie showing that they neither created the hazardous
condition nor had actual or constructive notice of its existence
(see *Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 436
[2005]). Plaintiff was under no obligation to rebut defendants'
expert's conclusions with an expert of her own, since expert
testimony is not required where the question of whether there is

an unsafe condition is within the common knowledge and experience of jurors (see *Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 211 [1988]). In view of the foregoing, there is no necessity to pass on the merits of defendants' expert testimony.

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

ENTERED: JUNE 12, 2008



CLERK

clear that the court based its verdict on its finding that defendant, a police officer, pursued and repeatedly shot the victim without justification.

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

ENTERED: JUNE 12, 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 12, 2008.

Present - Hon. Peter Tom, Justice Presiding
David B. Saxe
David Friedman
John T. Buckley
James M. Catterson, Justices.

The People of the State of New York, Ind. 929/04
Respondent,

-against- 3918

Wilbert Whittington, etc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named
appellant from a judgment of the Supreme Court, Bronx County
(Joseph Dawson, J.), rendered on or about May 26, 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 judgment so appealed from
be and the same is hereby affirmed.

ENTER:


Clerk.

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

Tom, J.P., Saxe, Friedman, Buckley, Catterson, JJ.

3919 The People of the State of
New York ex rel. Scott Kato,
Petitioner-Appellant,

Index 75071/07

-against-

Warden, Rikers Island Correctional
Facility, et al.,
Respondents-Respondents.

Law Office of Kenneth M. Tuccillo, Hastings-On-Hudson (Kenneth M. Tuccillo of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Justin R. Long of counsel), for respondents.

Appeal from order, Supreme Court, Bronx County (Darcel D. Clark, J.), entered July 31, 2007, which denied the petition for a writ of habeas corpus, unanimously dismissed as moot, without costs.

The Attorney General has informed the Court that petitioner has been discharged from state custody upon the maximum expiration date of his sentence, thus rendering the appeal and underlying proceeding moot.

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

ENTERED: JUNE 12, 2008


CLERK

to the paralegal. The lack of a reasonable excuse for the default is sufficient by itself to mandate affirmance (see *Matter of Saunders v City of New York*, 283 AD2d 213 [2001]).

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

ENTERED: JUNE 12, 2008



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Tom, J.P., Saxe, Friedman, Buckley, Catterson, JJ.

3921N-

3921NA-

3921NB Timothy Albino, etc., et al.,
Plaintiffs,

Index 27774/03
42123/05
42169/05
86034/07

-against-

New York City Housing Authority,
Defendant.

- - - -

[And A Third-Party Action]

- - - -

New York City Housing Authority,
Second Third-Party Plaintiff-Respondent,

-against-

Dimension Mechanical Corporation.
Second Third Party Defendant-Appellant.

- - - -

[And A Fourth-Party Action]

Goodman & Jacobs LLP, New York (Thomas J. Cirone of counsel), for
appellant.

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

Orders, Supreme Court, Bronx County (Alison Y. Tuitt, J.),
entered on or about November 30, 2007 and February 28, 2008, to
the extent they limited discovery by second third-party defendant
Dimension after in camera review of evidentiary materials,
unanimously affirmed, without costs. Appeal from order, same
court and Justice, entered on or about September 25, 2007, which
directed in camera review, unanimously dismissed, without costs.

The court correctly limited discovery to post-accident repairs. Evidence of such repairs to the hot water system is discoverable under the limited circumstances before us to show that a particular condition was dangerous (see *Longo v Armor El. Co.*, 278 AD2d 127, 129 [2000]; *Kaplan v Einy*, 209 AD2d 248, 252 [1994]), and to identify where Dimension stands in the chain of causation.

No appeal lies as of right from an order deferring determination of a motion to compel discovery until after in camera review, because such an order does not affect a substantial right within the meaning of CPLR 5701(a)(2)(v) (*Marriott Intl. v Lonny's Hacking Corp.*, 262 AD2d 10 [1999]). Were we to consider that order, we would affirm.

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

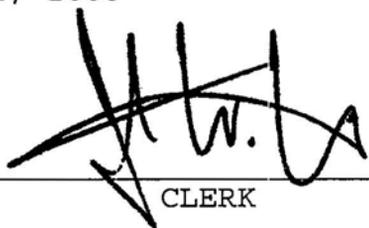
ENTERED: JUNE 12, 2008


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in an aggregate term of 22 years to life, equal to the term imposed on the murder conviction.

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

ENTERED: JUNE 12, 2008



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per month, but the court awarded only \$6,000. Temporary awards are often "based on conflicting affidavits, offering differing versions of the parties' finances and the standard of living they enjoyed during the marriage" (*Konecky v Kronfeld*, 2 AD3d 371 [2003]).

The IAS court did not improvidently exercise its discretion in refusing to impute income to plaintiff. There is no evidence that plaintiff deliberately reduced her income (*cf. Hickland v Hickland*, 39 NY2d 1 [1976]); on the contrary, it was higher at the time of her application for pendente lite maintenance than it was in 2005.

"The purpose of temporary maintenance . . . is . . . to assure that the reasonable needs of a dependent spouse are met during the pendency of a divorce proceeding" (*Ritter v Ritter*, 135 AD2d 421, 422 [1987]). It is "plaintiff's burden to demonstrate the need for the award she sought" (*id.* at 423).

"[T]he standard of living previously enjoyed by the parties is a relevant consideration in assessing the reasonable needs of a temporary maintenance applicant" (*id.* at 422).

It is conceded that the parties' beach house had been sold, so plaintiff is not entitled to \$1,100 per month as expenses therefor.

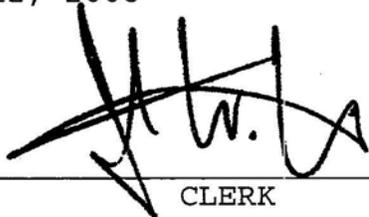
We have considered defendant's remaining arguments for

affirmative relief and find them unavailing.

Since plaintiff did not cross appeal, she may not ask us to overturn the portion of the court's order that denied her request for interim counsel fees (see *Hecht v City of New York*, 60 NY2d 57 [1983]). However, this request is not so egregious as to warrant sanctions (cf. *Derderian v Derderian*, 178 AD2d 374 [1991]).

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

ENTERED: JUNE 12, 2008



CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Acosta, JJ.

3924 In re Alfred R.,

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

The Legal Aid Society, New York (Tamara A. Steckler of counsel),
and Davis Polk & Wardwell, New York (Antoinette G. Ellison of
counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Clark V.
Richardson, J.), entered on or about November 9, 2007, which
adjudicated appellant a juvenile delinquent, upon his admission
that he had committed an act which, if committed by an adult,
would constitute the crime of sexual abuse in the second degree,
and imposed a conditional discharge for a period of 12 months,
unanimously affirmed, without costs.

The court properly denied appellant's motion to dismiss the
petition, made on the ground that he was denied his
constitutional right to a speedy trial (*see Matter of Benjamin
L.*, 92 NY2d 660 [1999]). The Presentment Agency provided a
sufficient excuse for its delay in filing the petition, and
appellant was not prejudiced in any manner.

The court providently exercised its discretion when it denied appellant's request for an adjournment in contemplation of a dismissal, and instead adjudicated him a juvenile delinquent and imposed a conditional discharge. Given the gravity of the underlying criminal conduct, which resulted in the pregnancy of a 13-year-old, along with appellant's poor school performance, the court adopted the least restrictive dispositional alternative consistent with appellant's needs and the need for protection of the community (see e.g. *Matter of Jonaivy Q.*, 286 AD2d 645 [2001]).

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

ENTERED: JUNE 12, 2008



CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Acosta, JJ.

3925 Andrew Forrester,
Plaintiff-Appellant,

Index 20217/05

-against-

Carol A. Luisa, et al.,
Defendants,

Elizabeth M. Obee,
Defendant-Respondent.

Jonathan Irons, Bronx, for appellant.

McCabe, Collins, McGeough & Fowler, LLP, Carle Place (Patrick M. Murphy of counsel), for respondent.

Order, Supreme Court, Bronx County (Betty Ower. Stinson, J.), entered May 11, 2007, which, after a traverse hearing, granted defendant Obee's motion to dismiss the complaint as against her for lack of personal jurisdiction, unanimously affirmed, without costs.

Plaintiff failed to carry his burden of demonstrating, by a preponderance of the evidence (*see Persaud v Teaneck Nursing Ctr.*, 290 AD2d 350 [2002]), that service was properly made upon Obee, a New Jersey resident, in accordance with Vehicle and Traffic Law § 253. Any presumption raised by the affidavit of service that Obee was personally served was overcome by her testimony to the contrary, which was supported in the traverse court's finding of significant discrepancies between her physical

characteristics and the description of her in the process server's affidavit of service. The testimony of plaintiff's process server failed to rebut Obee's testimony with "convincing additional details of the facts and circumstances surrounding the alleged service" (*Holtzer v Stepper*, 268 AD2d 372 [2000]).

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

ENTERED: JUNE 12, 2008



CLERK

Mazzarelli, J.P., Catterson, Acosta, Renwick, JJ.

3926-

3927-

3928-

3929 Humphreys & Harding, Inc.,
 Plaintiff-Respondent,

Index 601297/02

-against-

Universal Bonding Insurance Company,
Defendant/Third-Party Plaintiff-Respondent,

-against-

Welch Construction Corp., et al.,
Third-Party Defendants-Appellants.

Felton & Associates, Brooklyn (Regina Felton of counsel), for appellants.

Peckar & Abramson, P.C., New York (Lorraine D'Angelo of counsel), for Humphreys & Harding, Inc., respondent.

Gottesman, Wolgel, Malamy, Flynn & Weinberg, P.C., New York (Kenneth W. Malamy of counsel), for Universal Bonding Insurance Company, respondent.

Judgment, Supreme Court, New York County (Karla Moskowitz, J.), entered August 17, 2007, in an action by a general contractor (Humphreys) on a performance bond and a third-party action by the bonding company (Universal) against the subcontractor (Welch), in favor of Universal against Welch in the principal amount of \$285,284.28, plus interest, costs and disbursements, pursuant to an order, same court and Justice, entered July 11, 2007, which, insofar as appealed from as limited

by the briefs, granted Universal's motion for summary judgment declaring that Welch is liable to Universal for its losses, costs and expenses pursuant to an indemnity agreement, and severed the remainder of the third-party action, unanimously affirmed, without costs. Order, same court and Justice, entered January 25, 2007, which, insofar as appealed from as limited by the briefs, denied Welch's cross motion for summary judgment on its cross claim against Humphreys for breach of contract, unanimously affirmed, without costs. Order, same court and Justice, entered October 31, 2007, which granted Welch's motion to amend its pleadings but only to the extent of eliminating a counterclaim and adding a cross claim as against Humphreys, unanimously affirmed, without costs. Appeal from July 11, 2007 order unanimously dismissed, without costs, as subsumed in the appeal from the August 17, 2007 judgment.

Humphreys contracted with a nursing home for the renovation of its existing facility as well as the construction of a new wing. Humphreys entered into a subcontract with Welch to perform the drywall and rough carpentry work, and at the same time, Universal, as surety, issued a performance bond guaranteeing Welch's performance. Welch and Universal had also entered into a general indemnity agreement whereby Welch agreed to indemnify Universal for any losses it incurred in its role as surety on the

project. Welch subsequently expressed that it was unable to complete its work on the project due to financial difficulties, and Universal contracted with another contractor to complete Welch's work.

Humphreys commenced an action against Universal on the performance bond alleging that it suffered damages as a result of Universal's delay in obtaining the completion contractor, and Universal commenced a third-party action against Welch for, inter alia, a judgment directing that Welch was liable for Universal's losses, costs and expenses pursuant to the general indemnity agreement. Welch asserted a cross claim against Humphreys and Universal and alleged, inter alia, that its failure to perform was due to delays on the project attributable to others, including Humphreys, and because of Humphreys' failure to make timely payments.

The court properly denied summary judgment to Welch on its cross claim against Humphreys, as triable issues of fact were raised in the conflicting reports submitted by their experts. Although Welch's expert stated that at the time Welch stopped working on the project it had substantially completed its work and that no delays were caused by Welch, Humphreys submitted evidence that the vast majority of delays on the project were attributable to Welch and that all required payments were timely

made.

Summary judgment was properly granted to Universal upon its prima facie showing of entitlement to relief from Welch, which did not raise issues of fact (see *BIB Constr. Co. v Fireman's Ins. Co. of Newark, N.J.*, 214 AD2d 521, 523-524 [1995]). Once Welch announced that it was unable to complete its work under the project, Universal was required to fulfill Welch's obligations and Universal provided proof of payment to the completion contractor (see *Prestige Decorating & Wallcovering, Inc. v United States Fire Ins. Co.*, 49 AD3d 406 [2008]; *Frontier Ins. Co. v Renewal Arts Contr. Corp.*, 12 AD3d 891 [2004]). Contrary to Welch's contention, Universal, as surety, was entitled to indemnification under the indemnity agreement "regardless of whether the principal was actually in default or liable under its contract with the obligee" (*id.* at 892).

Welch's motion to amend its pleadings to the extent it sought to add a counterclaim against Universal was properly denied, due to Welch's failure to timely submit an affidavit of merit (see *Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404 [2006]), and because the proposed counterclaim against Universal is not viable (see *Morgan v Prospect Park Assoc. Holdings*, 251 AD2d 306 [1998]).

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

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

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any failure on her part to "work something out" with the immigration authorities would not be a ground for withdrawing her pleas. The record demonstrates that she proposed the condition of leaving the country as a method of avoiding incarceration; and that if she violated the condition relating to buying a ticket to Spain, she would receive the enhanced sentence. Defendant appeared for sentencing without the required plane ticket, repudiated the agreement to leave the country and instead made a plea withdrawal motion, raising a series of meritless issues. The court denied the motion and imposed an enhanced sentence. We find no basis for overturning that sentence or refusal to vacate the plea.

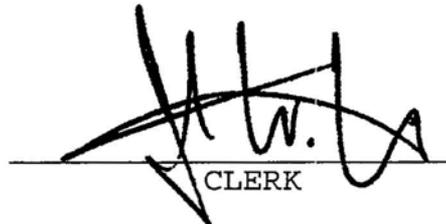
Defendant's remaining challenges to her pleas are without merit.

M-2616 - *People v Carmen Tancredi*

Motion seeking to expedite appeal and related relief denied.

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

ENTERED: JUNE 12, 2008


CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Acosta, JJ.

3932 Adl Johnson and Andre Johnson, Index 107288/04
infants by their mother and
natural guardian, Robin
Rickett El-Hanefi,
Plaintiffs-Appellants,

-against-

CAC Business Ventures, Inc., et al.,
Defendants,

142 South St. Corp., et al.,
Defendants-Respondents.

The Jacob D. Fuchsberg Law Firm, LLP, New York (Robert F. Garnsey of counsel), for appellants.

Law Offices of Craig P. Curcio, Middletown (Timothy P. Blum of counsel), for 142 South Street Corp. and Glory Bee Realty Management Corp., respondents.

Galvano & Xanthakis, P.C., New York (Steven F. Granville of counsel), for Janice Williams, respondent.

O'Connor, McGuinness, Conte, Doyle & Oleson, White Plains (Elizabeth Holmes of counsel), for Carmine Cannatello, respondent.

Thomas M. Bona, P.C., White Plains (Kimberly C. Sheehan of counsel), for Kanjiramala George, Sosamma George and George Management Corp., respondents.

Order, Supreme Court, New York County (Rosalyn Richter, J.), entered April 10, 2007, which granted the motions of defendants-respondents for summary judgment dismissing the complaint against them, unanimously modified, on the law, the motion on behalf of defendants Cannatello and CAC Business Ventures denied, and

otherwise affirmed, without costs.

The infant plaintiffs allegedly sustained serious injuries from exposure to lead paint at each of the five separate residences where they lived at one time or another. However, since the premises involved in this appeal -- 197 First Street, 43 Johnson Street, 145 Washington Street and 142 South Street -- are all located in Newburgh, the statutory obligation imposed on landlords by the New York City Administrative Code (§ 27-2056.3) to abate certain lead paint hazards is not applicable. Instead, the pertinent legal standard is that prescribed in *Chapman v Silber* (97 NY2d 9, 15 [2001]), which requires that in order to raise a triable question of fact, a plaintiff must show that the landlord "(1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment."

Plaintiffs failed to create an issue of fact as to whether the responding defendants had the requisite notice about any young children residing in the subject premises, and actual or constructive notice of any lead paint condition prior to receiving official notice of the violations, or knew of the

hazards of lead-based paint to young children. However, the court erred in affording summary judgment to Cannatello/CAC Business Ventures, inasmuch as Cannatello's conclusory denial of knowledge that the apartment had been constructed at a time before lead-based interior paint was banned is insufficient to meet his initial prima facie burden. It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citations omitted). Certainly, an individual or entity purchasing rental property is presumed to acquire sufficient documentation as to the age of the property. Something more than Cannatello's self-serving denial of knowledge of when the premises in question were constructed is required to demonstrate, prima facie, that he was not cognizant the apartment in which plaintiffs were living had been erected before lead-

based interior paint was outlawed. There is also a triable question of fact as to whether Cannatello knew young children were living in the apartment.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JUNE 12, 2008



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decedent's family, and the Surrogate's Court Procedure Act (§ 1001[1][f][ii]) requires that in such instances letters must be issued to the Public Administrator. Within six days of the issuance of letters to respondent, petitioners moved to revoke them on the grounds that they now had a list of 14 purported paternal first cousins of the decedent, obviating the necessity for any further interest by the Public Administrator, and because the estate had allegedly suffered irreparable harm from lack of proper attention by the Public Administrator with regard to four specific matters.

With regard to petitioners' claims of mismanagement, letters of administration were issued to respondent on June 6, 2007, and the petition to revoke those letters was sworn to only five days later. There is no viable claim that the estate was mismanaged by the respondent during that short period of time. They cite an incident that took place on May 26, 2007 at one of the decedent's properties, which pre-dated the issuance of letters. Respondent was thus without power to prevent that incident, and there is no indication she was ever alerted to any situation that would have warranted her seeking temporary letters. In any event, no harm occurred to the estate as a result of the incident, since the repairs were timely made, and apparently at no greater cost than if respondent had arranged for them. The remaining instances

cited by petitioners involved situations where the estate could be exposed to future harm, and not where the estate had already suffered irreparable harm as alleged in the petition.

Under SCPA 711(2), in order to revoke respondent's letters, petitioners were required to show not only that the estate suffered harm, but that respondent's alleged misconduct was such that it established her unfitness for administering the estate. Petitioners offered no such evidence.

Petitioners also failed to offer proof sufficient to establish their superior entitlement to letters of administration over respondent. Only a person who is a distributee of the decedent is entitled to receive letters of administration (see SCPA 1001[1][f][ii]). In order to establish their interest as distributees, petitioners, who claimed to be first cousins, were required to exclude the existence of closer surviving relatives, prove their bona fides as first cousins, and limit the class of possible distributees, i.e., establish the maximum number of potential distributees in their class (*Matter of Morrow*, 187 Misc 2d 742, 743 [2001]). They failed to carry this burden. The only evidence they offered was a family tree affidavit executed by their counsel, who claims to have also been decedent's counsel and to have known her for five years prior to her death. The circumstances show, however, that petitioners' counsel apparently

did not have personal knowledge of decedent's maternal or paternal first cousins, and only received such information from interested parties (see 22 NYCRR 207.16 [b] [2], [c]). Moreover, the family tree affidavit contained critical omissions regarding the dates of death of three paternal aunts and uncles, and listed someone as a paternal first cousin who, in later documentation submitted by petitioners, was shown not to be such. Accordingly, the family tree affidavit, standing alone, was insufficient to support petitioners' claim.

Even assuming petitioners had sufficient proof of their status as maternal cousins and the status of the paternal cousins, they are nonetheless legally ineligible to supersede the Public Administrator, since they failed to provide notice of their petition to revoke to the alleged paternal cousins. Petitioners had notice of -- and were parties to -- the original appointment proceeding, and are thus ineligible to supersede the Public Administrator in this matter (see SCPA 1121; *cf. Matter of Williams*, 245 AD2d 126 [1997]).

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

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

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defendant in the bylaws in carrying out the affairs of the condominium, its act of entering into the Letter Agreement with plaintiff as a condition for waiving its right of first refusal was well within the scope of its authority and did not deviate from the procedures contained in the bylaws regarding the exercise or waiver of its first right of refusal (*compare Lisenenkov v Kasziner*, 41 AD3d 282, 283 [2007]). Furthermore, defendant's action of entering into the Letter Agreement is entitled to the protections of the business judgment rule inasmuch as the action furthered a corporate purpose and was not taken in bad faith (see *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]).

Contrary to plaintiff's contention, the Letter Agreement did not constitute an unreasonable restraint on his ability to sell the unit, and plaintiff has not alleged any claim that the Letter Agreement was imposed upon him on the basis of "race, creed, color or national origin" (Real Property Law § 339-v[2][a]). Plaintiff is a sophisticated businessman, and the record is devoid of evidence, other than plaintiff's self-serving statements, to support his allegation that he was compelled to execute the Letter Agreement.

We have considered plaintiff's remaining arguments,

including that the Letter Agreement constituted an unauthorized flip tax, and find them unavailing.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 12, 2008



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Mazzarelli, J.P., Catterson, Moskowitz, Acosta, JJ.

3935 Michael P. Brady, et al., Index 106079/04
Plaintiffs-Appellants,

-against-

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

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

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Helmut Beron of counsel), for respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered March 22, 2007, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the causes of action under Labor Law § 200 and § 241(6), unanimously reversed, on the law, without costs, the motion denied and those two causes of action reinstated.

Plaintiff relies on 12 NYCRR 23-1.25(d) as the predicate for liability under Labor Law § 241(6). That section requires that all persons engaged in welding and flame cutting operations "be provided with approved eye protection suitable for the work involved and appropriate protective apparel." We find that it is sufficiently concrete to support a section 241(6) claim and is applicable to plaintiff's claim. Plaintiff contends that he should have been given a face shield in addition to the burning

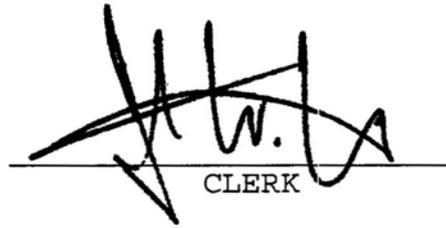
goggles he was provided. Had a face shield been provided, the injury to his ear would have been avoided. Virtually all the testimony and affidavits show that a face shield does protect a worker's ears and is sometimes provided to workers engaged in welding and burning steel; in addition, on this record, it certainly cannot be said as a matter of law that a face shield is not a form of approved eye protection considered suitable for the type of work plaintiff was performing (*cf. McByrne v Ambassador Constr. Co.*, 290 AD2d 243, 243-244 [2002] [sustaining a section 241(6) claim predicated on similar language requiring "approved eye protection equipment suitable for the hazard involved" contained in 12 NYCRR 23-1.8(a)]). With respect to "appropriate protective apparel," the context of the regulation makes it clear that what is appropriate necessarily depends on the task involved. We hold that the requirement is concrete even though it does not set forth any particular items of apparel that are appropriate. To the extent that *Winkelman v Alcan Aluminum Corp.* (256 AD2d 1126 [4th Dept 1998] holds to the contrary, we decline to follow it.

Similarly, plaintiff's Labor Law § 200 claim should not have been dismissed as against the site owner given the testimony of the latter's resident engineer that he not only inspected the

site several times a day but also had authority to stop the work if he observed an unsafe condition such as burning steel without protection.

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judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 12, 2008

A handwritten signature in black ink, appearing to be "J.W. La", is written over a horizontal line. The signature is stylized and somewhat illegible.

CLERK

David P. Kownacki, P.C., New York (David P. Kownacki of counsel), for McCarthy respondents.

Law Office of John P. Humphreys, New York (Eric P. Tosca of counsel), for Boston Properties, Inc. and Times Square Tower Associates, LLC, respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered May 24, 2007, which, to the extent appealed from, granted plaintiffs' motion for summary judgment on the issue of liability under Labor Law § 240(1), denied defendants' motions for summary judgment dismissing the Labor Law § 240(1) claim, granted conditional summary judgment to defendant/third-party plaintiff John Gallin & Son, Inc. on its claim for contractual indemnification against third-party defendant/second third-party plaintiff Linear Technologies, Inc., granted summary judgment to Linear on its claim for contractual indemnification against second third-party defendant Samuels Datacom, LLC, and denied Samuels' motion for summary judgment dismissing Linear's claims against it for contractual indemnification and breach of contract, unanimously affirmed, without costs.

Plaintiff was injured when the unsecured ladder he was standing on to drill holes in a ceiling tipped over and he fell to the floor (see *Rieger v 303 E. 37 Owners Corp.*, 49 AD3d 347 [2008]; *Peralta v American Tel. & Tel. Co.*, 29 AD3d 493 [2006]). Plaintiff was not required to show that the ladder was defective

in some way as part of his prima facie case for summary judgment. "It is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [2002]). As the failure to provide such safety devices was a proximate cause of plaintiff's accident, the arguments that plaintiff was the sole proximate cause of the accident and that he was a recalcitrant worker are without merit (see *id.* at 291; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). The apprentice electrician working with plaintiff is not a safety device contemplated by the statute. Nor, even if plaintiff had disobeyed an instruction to have the apprentice hold the ladder steady for him, would the owners' and general contractor's liability for failing to provide adequate safety devices be reduced (see *Stolt v General Foods Corp.*, 81 NY2d 918 [1993]).

The contractual provision by which Linear agreed to indemnify Gallin plainly contemplates a showing of negligence by Linear or its agents or subcontractors. However, it has not been established that either Linear or its subcontractor, Samuels, was negligent.

The provision in the purchase order by which Samuels agreed to indemnify Linear unambiguously provides for indemnification

from all liability arising from the work (see *Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 432 [2005]).

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

M-2108 - *McCarthy v Turner Construction Inc., et al.*

Motion seeking leave to strike brief denied.

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

ENTERED: JUNE 12, 2008


CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Acosta, JJ.

3939 Frank Callan, et al., Index 108305/05
Plaintiffs-Appellants-Respondents,

-against-

Structure Tone, Inc.,
Defendant/Third-Party Plaintiff-
Respondent-Appellant,

-against-

Atlas-Acon Electric Services Corp.,
Third-Party Defendant-Respondent.

Arye, Lustig & Sassower, P.C., New York (D. Carl Lustig, III of
counsel), for appellants-respondents.

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

Morris Duffy Alonso & Faley, LLP, New York (Pauline E. Glaser of
counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman,
J.), entered May 30, 2007, which denied so much of defendant's
motion for summary judgment dismissing claims under Labor Law §
200 and for common-law negligence, and on its claims for
contractual indemnification and breach of contract as against
third-party defendant; granted defendant's motion and third-party
defendant's cross motion for summary judgment dismissing
plaintiffs' § 240(1) claim; and denied plaintiffs' cross motion
for partial summary judgment on the § 240(1) claim, unanimously

modified, on the law, so much of defendant's motion and third-party defendant's cross motion for summary judgment on the § 240(1) claim denied, plaintiffs' cross motion for summary judgment on that claim granted, and otherwise affirmed, without costs.

Plaintiff worker, an electrician employed by third-party defendant subcontractor, was injured while installing ceiling lights over a weekend in an unventilated room where the temperature was estimated at over 100 degrees; he became dizzy from the heat, then nauseous, and fell from near the top of a 10-foot ladder. The worker recalled that as he attempted to reach down to grab hold of the ladder to stabilize himself, the ladder wobbled, he passed out, and both he and the ladder toppled over. Defendant was the general contractor at the work site, and deposition testimony of its project foreman corroborated the worker's testimony that prior complaints of excessive heat during weekend duty had gone unheeded. The unrefuted evidence of excessively hot work conditions, of which defendant had notice and control; the foreseeable consequence to workers who might suffer heat-related physical symptoms under such circumstances; and the lack of proper safety equipment afforded to elevated workers in light of these conditions, provided a basis for

finding defendant strictly liable under Labor Law § 240(1) (*Arce v 1133 Bldg. Corp.*, 257 AD2d 515 [1999]; see also *Cruz v Turner Constr. Co.*, 279 AD2d 322 [2001]). As evidence existed to raise triable issues whether defendant maintained a safe workplace as the general contractor, it was properly denied summary judgment on plaintiffs' claims under § 200 and common-law negligence (see generally *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]).

Triable issues of fact also preclude summary judgment on defendant's third-party claim for contractual indemnification as against plaintiff worker's employer. While the parties incorporated saving language in the indemnification clause to permit partial indemnification in the event defendant were found partly negligent for causing the worker's injury, there are issues of fact as to the extent of defendant's liability for causing the worker's injury (see e.g. *Barraco v First Lenox Terrace Assoc.*, 25 AD3d 427 [2006]). Since defendant could be found 100% liable for the worker's injury, there is no basis for granting summary judgment on its claim for full or partial contractual indemnification at this juncture. Third-party defendant's cross motion for summary judgment on the contractual indemnification claim was also properly denied, as there was evidence of its possible negligence in not providing fans that were requested; furthermore, even absent negligence on its part,

the broad language of the indemnification clause subjected it to liability (see *Correia v Professional Data Mgt.*, 259 AD2d 60 [1999]). Issues as to the subcontractor's alleged duty to defend any claims arising out of the subcontract, and whether it procured the insurance coverage required thereunder, are now pending in a separate declaratory judgment action, and need not be reached at this juncture.

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the risk factors at issue (see Correction Law § 168-n [3]; *People v Dort*, 18 AD3d 23, 25 [2005], *lv denied* 4 NY3d 885 [2005]; *People v Roland*, 292 AD2d 271 [2002], *lv denied* 98 NY2d 614 [2002]), and we have considered and rejected defendant's arguments as to each factor. We also reject defendant's challenges to the choice of risk factors made by the Legislature and the Board of Examiners of Sex Offenders (see *People v Bligen*, 33 AD3d 489 [2006]; *People v Joe*, 26 AD3d 300 [2006], *lv denied* 7 NY3d 703 [2006]).

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and that defendant, the victim's home health care aide, knew that fact. The evidence was likewise overwhelming that, in any event, the victim neither participated in nor authorized any of the transactions whereby defendant appropriated over \$1.5 million of the victim's funds. The evidence of defendant's larcenous intent was also overwhelming.

Although defendant's scheme employed the device of creating a purported joint account with the victim, defendant never became a lawful joint owner of the funds in that account within the meaning of Penal Law § 155.00(5), and thus she was properly convicted of appropriating those funds (see *People v Antilla*, 77 NY2d 853, 855 [1991]). To the extent defendant is arguing that she could not have made the transactions at issue except through the misconduct or carelessness of bank employees, that, unfortunately, appears to be the case, but it is no defense to the charges. Contrary to defendant's unpreserved argument, there was no requirement that her conduct in creating a joint account without the victim's consent be set forth in the indictment (which charged defendant with larceny and possession of stolen property as of the date she withdrew the funds), and there was no variation between the indictment and the proof. Under the circumstances of the case, the creation of the joint account was simply part of the evidence of guilt, and "allegations of an

evidentiary nature" need not be contained in an indictment (CPL 200.50[7]).

Defendant failed to preserve her claim that the court was required to charge the jury that if it found that the joint account was lawful, it could not find that she committed larceny when she withdrew funds from that account. The court never declined to provide such a charge. Defendant did not sufficiently articulate her request, did not submit a proposed charge to the court despite being repeatedly invited to do so, and did not object to the court's instructions as given. Under these circumstances, the issue is unpreserved or abandoned (see *People v Walls*, 91 NY2d 987 [1998]; *People v Martinez*, 18 AD3d 343 [2005], *lv denied* 5 NY3d 808 [2005]; *People v Torres*, 8 AD3d 123 [2004], *lv denied* 3 NY3d 712 [2004]), and we decline to review it in the interest of justice. As an alternative holding, we find any error in this regard to be harmless in light of the overwhelming evidence of guilt.

The court properly exercised its discretion in receiving limited background evidence about police efforts to apprehend defendant, as well as an incriminating document for which there was adequate proof of defendant's authorship.

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]). While defendant faults her trial counsel for failing to make certain arguments, applications and objections, she has not shown that any of these devices would have succeeded (see *People v Stultz*, 2 NY3d 277, 287 [2004]), or that the absence of those actions had any adverse impact on her defense (see *People v Hobot*, 84 NY2d 1021, 1024 [1995]; compare *People v Turner*, 5 NY3d 476 [2005]).

We perceive no basis for reducing the sentence.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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Mazzarelli, J.P., Catterson, Moskowitz, Acosta, JJ.

3943N Wilfredo Montanez,
Plaintiff-Respondent,

Index 106200/02

-against-

The New York City Housing Authority,
Defendant-Appellant.

Ricardo Elias Morales, New York (Donna M. Murphy of counsel), for
appellant.

Lazarowitz & Manganillo, L.L.P., Brooklyn (Philip M. Hines of
counsel), for respondent.

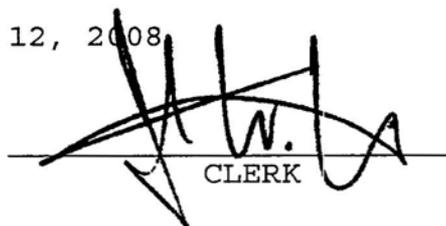
Order, Supreme Court, New York County (Emily Jane Goodman,
J.), entered October 3, 2007, which, in an action that was sent
to arbitration pursuant to stipulation, granted plaintiff's
motion pursuant to CPLR 7511(b)(1)(iii) to vacate the arbitration
award to the extent of remanding the matter to the arbitrator
"for re-opened arbitration to make a complete record, findings
and decision" on plaintiff's discrimination claim, unanimously
reversed, on the law, without costs, the motion denied and the
award confirmed.

Contrary to the motion court's conclusion, the arbitrator's
award, which expressly identified plaintiff's claims for
discrimination and constructive discharge, evaluated the hearing
evidence submitted in support of both claims, and denied them,
was final and definite. An award that is final and definite will

not be vacated "unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power" (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [2004], quoting *Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]). Even assuming, as plaintiff argues, that the arbitrator overlooked facts indicating harassment and failed to consider a purported admission by a supervisor at her deposition that she "forced" plaintiff "to retire," rejection of the discrimination claim was plausibly based (see *Brown & Williamson, id.*) on credited evidence showing that plaintiff had excessive absences; that defendant's policy is to verify medical condition where, as here, an employee has sought to renew a medical accommodation; that the supervisor who directed plaintiff to submit to an in-house physical exam was at the time unaware of plaintiff's medical status; and that plaintiff, in order to avoid disclosure of his medical status, chose to retire on disability rather than submit to the in-house physical exam.

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the additional payments were discretionary bonuses, based on performance and profitability. Defendant also argues that the alleged agreement to make the additional payments is not enforceable under General Obligations Law § 5-1105 in the absence of a writing clearly describing the past consideration.

As a general rule, an employee has no enforceable right to payment under a discretionary compensation or bonus plan (see *Namad v Salomon Inc.*, 147 AD2d 385 [1989], *affd* 74 NY2d 751 [1989]). However, there is a long-standing policy against forfeiture of earned wages. Whether unpaid incentive compensation under a bonus plan constitutes a discretionary bonus or earned wages not subject to forfeiture is an issue of fact (see *Mirchel v RMJ Sec. Corp.*, 205 AD2d 388 [1994]).

Plaintiff's affidavit and testimony are at odds with the affidavit and testimony of defendant concerning whether the additional payments were discretionary and based on performance and profitability or whether they were an integral part of her total compensation package, the consideration for which was her agreement to remain at the company for the year. If plaintiff's version of events is accepted, defendant may be found liable for the additional compensation despite § 5-1105 because the

consideration was not for plaintiff's past performance, but for her agreement to stay with the company in the future. Triable issues of fact preclude summary disposition here.

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JUN 12 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez,
Eugene Nardelli
John T. Buckley
James M. Catterson,

J.P.

JJ.

3359-
3360-
3361
Ind. 2691/01

_____ x
The People of the State of New York,
Respondent,

-against-

Dion McIntosh,
Defendant-Appellant.

_____ x
Defendant appeals from a judgment of the Supreme Court, Bronx County (Martin Marcus, J.), rendered July 8, 2002, convicting him, after a jury trial, of kidnapping in the first degree, attempted murder in the first degree, attempted assault in the second degree, and criminal possession of a weapon in the second degree, and imposing sentence. Defendant also appeals from orders of the same court and Justice, entered on or about September 8, 2005 and March 13, 2006, which, respectively, denied his CPL 440.30(1-a) motion to compel forensic testing and CPL 440.10(1) motion to vacate the judgment of conviction.

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

Dion McIntosh, appellant pro se.

Robert T. Johnson, District Attorney, Bronx
(Christopher J. Blira-Koessler and Joseph N.
Ferdenzi of counsel), for respondent.

BUCKLEY, J.

On May 19, 2001, at around 8:30 p.m., in Connecticut, defendant lured the sixteen-year-old victim into his automobile, and over the course of the next three hours drove to various locations in that state, raped her at gunpoint three times and forced her to orally copulate him. They remained in a parking lot until 6:00 a.m. the next day, then drove to a gas station and a store in Westchester, and eventually went to defendant's mother's house in the Bronx. The victim begged to be set free, promising that she would not tell the police what had happened because she herself was a parole absconder, but defendant refused. That night, defendant directed the victim to get back into his SUV; inside, he struck her in the head with his gun, causing her to lose consciousness. When she awoke, defendant was strangling her with a cord around her neck, and she passed out again. At approximately 10:40 p.m., a police sergeant saw a vehicle in a parking lot in the Bronx with its lights flashing and horn beeping. As the sergeant approached, defendant, who was standing next to the car, fired a shot at him and ran. During the ensuing chase, defendant fired four or five more times, but was soon apprehended in a creek. Police officers returned to defendant's vehicle, where they found the victim, unconscious and with a sweatshirt string tied around her neck.

Defendant testified that he had had consensual intercourse

with the victim, and that she had asked him to choke her with a string in order to enhance her sexual experience, but he had inadvertently caused her to lose consciousness and panicked. He claimed that the first gunshot was accidental and that he had fired the subsequent shots into the air merely to deter the police from chasing him.

New York had jurisdiction to prosecute defendant for first-degree kidnapping for the purpose of sexual assault (Penal Law § 135.25[2][a]), notwithstanding that the sexual assaults occurred in Connecticut, because an element of the offense occurred in New York, where defendant continued to restrain the victim (see CPL 20.20[1][a]; *People v Yong Lin*, 278 AD2d 114 [2000], lv denied 96 NY2d 808 [2001]; *People v Moon*, 219 AD2d 817, 818 [1995], lv denied 87 NY2d 905 [1995]). The statute conferring jurisdiction contains no requirement that more than one element of a crime occur in New York, or that any elements occur simultaneously. In any event, the evidence supports the inference that defendant restrained the victim in New York with an intent to sexually abuse her.

Defendant's challenge to the sufficiency of the evidence as to the first-degree attempted murder conviction pursuant to Penal Law § 125.27(1)(a)(v), witness elimination murder, is unpreserved for review (see *People v Gray*, 86 NY2d 10, 19 [1995]; *People v Santos*, 49 AD3d 470 [2008]; CPL 470.05[2]), and we decline to

review it in the interest of justice. As an alternative holding, we find there was sufficient evidence based on the jury charge as given without exception (see *People v Sala*, 95 NY2d 254, 260 [2000]; *People v Jean-Baptiste*, 38 AD3d 418, 420 [2007], *lv denied* 9 NY3d 877 [2007]).

A person is guilty of attempted witness elimination murder when "the intended victim was a witness to a crime committed on a prior occasion and the [attempted] death was caused for the purpose of preventing the intended victim's testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced" (Penal Law § 125.27[1][a][v]). Under the statute, the same person can be the victim of the prior crime and the witness intended to be eliminated; thus, a defendant can be convicted for committing a crime against a person and subsequently attempting to eliminate that same person as a witness to the original crime (see *People v Cahill*, 2 NY3d 14 [2003]). Moreover, the motivation of preventing a person's testimony need not be the sole purpose of the attempted killing, but only a substantial factor (see *id.* at 56-57).

The statute does not define "prior occasion" or specify any degree of temporal or spatial separation, although the phrase differs from other sections of the first-degree murder statute, such as Penal Law § 125.27(1)(a)(vii) ("the victim was killed while the defendant was *in the course* of committing or attempting

to commit and in furtherance of [certain specified felonies]..., or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime" [emphasis added]), and Penal Law § 125.27(1)(a)(viii) ("as part of the same criminal transaction, the defendant, with intent to cause serious physical injury to or the death of an additional person or persons, causes the death of an additional person or persons" [emphasis added]).¹

Supreme Court gave the jury a charge on "prior occasion" that approximated the definition of "criminal transaction" set forth in CPL 40.10(2)(a).² Specifically, the court instructed:

"a person who is murdered is not a witness to a crime committed on an occasion prior to the murder if the crime to which the person was a witness and the murder of that person are so closely related and connected in point of time or circumstance [of] commission as to be part of the same criminal incident."

The People presented the attempted first-degree murder charge under the theory that defendant tried to kill the victim in New York in order to prevent her from testifying as a witness to the

¹The Court of Appeals has held that the phrase "criminal transaction" in Penal Law § 125.27(a)(viii) is a "statutory term of art...[that] should be construed as incorporating the technical definition given the phrase in CPL 40.10(2)" (*People v Duggins*, 3 NY3d 522, 524 [2004]).

²CPL 40.10(2) defines "criminal transaction" as "conduct which establishes at least one offense, and which is comprised of two or more or a group of acts ... (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident."

sexual assaults committed in Connecticut the previous day. Relying on *People v Adamson* (47 AD3d 318, 323 [2007], lv denied 10 NY3d 807 [2008]), defendant argues that the kidnapping, rapes, and attempted murder were all part of one, uninterrupted criminal incident.

Notwithstanding the Third Department's expansive language in *Adamson* that "the victim of crimes during an uninterrupted period of captivity is not the type of 'witness' intended to be protected under [Penal Law § 125.27(1)(a)(v)]" (47 AD3d at 323), that case is distinguishable because there the defendant and his cohorts continuously brutalized the victim throughout the entire 24-hour captivity, all of which took place at one location; moreover, it is unclear whether the victim's death resulted from the cumulative effect of relentless beatings and a lack of medical care or from a coup de grace. In the instant case, by contrast, defendant abducted the victim in Connecticut for the purpose of sexually abusing her and committed the last sexual assault about three hours later; he subsequently drove to Westchester and then the Bronx, where he tried to kill her at least 20 hours after the last sexual attack. Thus, the sexual attacks and the attempted murder were separated by a prolonged break in time, a change of localities, and the formation of distinct criminal intentions.

The case at bar is more similar to *People v Hopkins* (95 AD2d 870 [1983]), in which the defendant abducted the victim in Fulton County, at around 2:30 p.m., took her to a house where he raped and sodomized her, and the next morning brought her to a wooded area in Montgomery County, where he hit her over the head and stabbed her in the back. The Third Department held that the attempted murder was a separate criminal transaction from the rape and kidnapping (*see id.* at 871).

In the case at hand, a rational jury could have found that the sexual assaults in Connecticut and the attempted murder in New York were not "so closely related and connected in point of time or circumstance [of] commission as to be part of the same criminal incident," and therefore that defendant committed the sexual attacks on an occasion prior to the attempted murder. The verdict on the attempted first-degree murder conviction was based on legally sufficient evidence and was not against the weight of the evidence.

Defendant's sufficiency arguments concerning the attempted first-degree murder elements that he tried to kill the victim "for the purpose of" preventing her from being a witness (Penal Law § 125.27[1][a][v]; *see Cahill*, 2 NY3d at 56-57) and that he came "dangerously near" completion of the crime (*People v Kassebaum*, 95 NY2d 611, 618 [2001], *cert denied* 532 US 1069 [2001]; *see* Penal Law § 110.00) are also unpreserved for review.

In any event, we find that the evidence was sufficient, and the verdict was not against the weight of the evidence, as to those elements as well as to the remaining charges on which defendant was convicted (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]).

With respect to defendant's ineffective assistance claims, we find that the trial record, as supplemented by the extensive record on the motion to vacate the judgment of conviction, establishes that defendant received effective assistance of counsel (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; see also *Strickland v Washington*, 466 US 668 [1984]). The actions of counsel challenged by defendant on appeal constituted reasonable strategic decisions. Furthermore, even assuming that counsel should have taken each of the steps set forth by defendant in his present arguments, counsel's failure to do so did not prejudice defendant or deprive him of a fair trial (see *People v Hobot*, 84 NY2d 1021, 1024 [1995]).

The court properly concluded that the results of certain forensic testing were not subject to disclosure under *Brady v Maryland* (373 US 83 [1963]). In any event, there is not even a reasonable possibility, under the totality of the circumstances of the case, that the nondisclosure could have affected the verdict. Similarly, we conclude that the court properly denied defendant's CPL 440.30(1-a) motion to compel forensic testing of

evidence, since there was no reasonable probability that DNA testing could have led to a more favorable verdict (see *People v Pitts*, 4 NY3d 303, 311 [2005]).

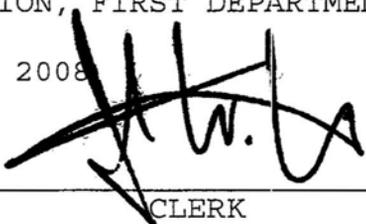
Defendant's remaining contentions, including his pro se claims, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Accordingly, the judgment of the Supreme Court, Bronx County (Martin Marcus, J.), rendered July 8, 2002, convicting defendant, after a jury trial, of kidnapping in the first degree, attempted murder in the first degree, attempted assault in the second degree, and criminal possession of a weapon in the second degree, and sentencing him to consecutive prison terms of 25 years to life, 15 years to life and 1½ to 4 years, concurrent with a term of 5 years, respectively, should be affirmed. The orders of the same court and Justice, entered on or about September 8, 2005 and March 13, 2006, which, respectively, denied defendant's CPL 440.30(1-a) motion to compel forensic testing and CPL 440.10(1) motion to vacate the judgment of conviction, should be affirmed.

All concur.

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ENTERED: JUNE 12, 2008



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