



basis for reversal. Defendant concedes that her boilerplate motion did not establish good cause for a substitution, but argues that "an irreconcilable conflict had developed as soon as counsel called his client a liar." However, the conduct of counsel characterized as "calling his client a liar" consisted of the attorney's permissible defense of his own performance (see *People v Nelson*, 7 NY3d 883 [2006]), in which he described defendant's allegations as "inaccurate," "incorrect," and "misleading." Counsel appropriately brought these inaccuracies to the court's attention (see *People v DePallo*, 96 NY2d 437, 441-442 [2001]). Moreover, counsel did not accuse his client of perjury or falsehood, impugn her credibility before a trier of fact (compare *People v Berroa*, 99 NY2d 134 [2002]; *People v Darrett*, 2 AD3d 16 [2003]), or demonstrate any inability to continue providing effective assistance.

Defendant's challenge to the constitutionality of her adjudication as a persistent violent felony offender is not preserved for our review (*People v Rosen*, 96 NY2d 329, cert denied 534 US 899 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we conclude that

it is without merit (see *Almendarez-Torres v United States*, 523 US 224 [1998]; *People v Leon*, 10 NY3d 122, 126 [2008], cert denied 554 US \_\_\_, 128 S Ct 2976 [2008]).

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

ENTERED: MAY 5, 2009

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CLERK

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

465 In re Vincent Z.,  
Petitioner-Appellant,

-against-

Dominique K.,  
Respondent-Respondent.

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Cohen Lans LLP, New York (Mara T. Thorpe of counsel), for  
appellant.

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Order, Family Court, New York County (Karen I. Lupuloff,  
J.), entered on or about May 2, 2008, which, to the extent  
appealed from, granted respondent mother's objections, vacated  
the modified order of support dated February 13, 2008, and  
reinstated the prior order of support entered December 19, 2005,  
unanimously modified, on the law, the facts and in the exercise  
of discretion, the objections denied, and the modified order of  
February 13, 2008 reinstated, and otherwise affirmed, without  
costs.

Parties may agree to dispense with the "unanticipated or  
unreasonable change in circumstances" standard for modifying a  
support obligation (*see Colyer v Colyer*, 309 AD2d 9, 15-16  
[2003]). Here, the record of the open court proceedings  
regarding the proposed stipulation of settlement indicates that  
the parties and the support magistrate intended to give the court  
broad power to modify the parties' child support obligations once  
respondent obtained full-time employment as a physician.

Accordingly, the court improperly granted her objections to the modified order of support and reinstated the prior order on the ground that petitioner father had failed to establish that the stipulation was unfair when entered into, or that respondent's increased earnings were unanticipated and unreasonable (see generally *Corniello v Gavalas*, 264 AD2d 418 [1999]).

Petitioner did not raise this issue before the Family Court, but it was raised before the Support Magistrate and we consider it in the interest of justice. As the Support Magistrate found, respondent's fivefold increase in earnings constituted a substantial change in circumstances warranting a downward modification of petitioner's child support obligations (see generally *Matter of Freedman v Horike*, 29 AD3d 1093, 1094 [2006]).

Petitioner is not, however, entitled to a credit against future child support payments for overpayments he has made by virtue of complying with the Family Court's order (see *Matter of Maksimyadis v Maksimyadis*, 275 AD2d 459, 461 [2000]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: MAY 5, 2009

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(see CPLR 7803[3]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 234-236 [1974]).

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

ENTERED: MAY 5, 2009

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CLERK

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

467-

467A Lamont Ensley,  
Plaintiff-Appellant,

Index 15468/05

-against-

Snapper, Inc.,  
Defendant-Respondent,

Trim-A-Lawn Equipment,  
Defendant.

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Segal & Lax, LLP, New York (Patrick Daniel Gatti of counsel), for appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Brian J. Carey of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered April 3, 2008, which conditionally granted defendant Snapper's motion to preclude plaintiff from offering certain evidence at trial, and order, same court and Justice, entered on or about May 6, 2008, which denied plaintiff's motion to vacate or modify the prior order and precluded the testimony of plaintiff's expert for all purposes, unanimously affirmed, without costs.

Plaintiff failed to comply in a timely fashion with three discovery orders, and failed to offer a reasonable excuse (see *Kihl v Pfeffer*, 94 NY2d 118 [1999]) or set forth the merits of his claim (see *Tejeda v 750 Gerard Props. Corp.*, 272 AD2d 124 [2000]) when moving to vacate the final, conditional order.

Since his counsel was personally present when the earlier order was issued, plaintiff was on notice of it and bound by its provisions (see *Matter of Raes Pharm. v Perales*, 181 AD2d 58, 61-62 [1992]).

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

ENTERED: MAY 5, 2009

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CLERK



Dominos Pizza. As it was undisputed that the vehicle involved in the accident belonged to plaintiff's insured, a deliveryman for Dominos Pizza who was making a pizza delivery, defendant is an excess insurer required to contribute to the settlement only after the exhaustion of plaintiff's policy (*Federal Ins. Co. v Ryder Truck Rental*, 189 AD2d 582, *affd* 82 NY2d 909 [1994]). There is no merit to plaintiff's argument that this "excess" provision of the other insurance clause is contradicted and negated by the "proportionate payment" provision of the same clause. The latter, by its terms, only applies to coverage that is "on the same basis," i.e., where the policy is primary and there are other primary policies, the policy will pay pro rata with the other primary policies, and where the policy is excess and there are other excess policies, the policy will pay pro rata with the other excess policies (*General Acc. Fire & Life Assur. Corp. v Piazza*, 4 NY2d 659, 669). Here, plaintiff's policy is primary and defendant's policy is excess.

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

ENTERED: MAY 5, 2009

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CLERK

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

470-

471           The People of the State of New York,           Index 405326/06  
              by Andrew M. Cuomo, etc.,  
              Plaintiff-Appellant,

-against-

              Wells Fargo Insurance Services, Inc., et al.,  
              Defendants-Respondents.

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Andrew M. Cuomo, Attorney General, New York (Richard Dearing of counsel), for appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC (Richard Brusca of counsel), for respondents.

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              Appeal from order, Supreme Court, New York County (Bernard J. Fried, J.), entered January 15, 2008, which, inter alia, granted defendants' motion to dismiss plaintiffs' causes of action for breach of fiduciary duty and fraud under Executive Law § 63(12), deemed to be an appeal from judgment, same court and Justice, entered March 17, 2008 (CPLR 5501[c]), dismissing, inter alia, the causes of action, and so considered, said judgment unanimously affirmed, without costs.

              The complaint failed to state a cause of action for breach of fiduciary duty and we decline plaintiff's request that we not follow our decision in *People v Liberty Mut. Ins. Co.* (52 AD3d 378 [2008]), where we held, among other things, that an insurance broker may not be liable to its client for breach of fiduciary duty absent a special relationship, which does not exist here

(*id.* at 380; see also *Loevner v Sullivan & Strauss Agency, Inc.*, 35 AD3d 392, 393 [2006], *lv denied* 8 NY3d 808 [2007]). Nor has plaintiff pleaded a cause of action for breach of fiduciary duty based merely on the existence of contingent commissions (see *Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 645 [2007]).

The motion court also appropriately determined that the complaint failed to state a cause of action for fraud under Executive Law § 63(12) with sufficient particularity (see e.g. *People v Katz*, 84 AD2d 381, 384-385 [1982]). The complaint fails to allege wrongdoing within the meaning of the statute as contingent commissions are not illegal in this State and disclosure of the commissions was not required as of the time of the conduct alleged in the complaint (see *People v Liberty Mut. Ins. Co.*, 52 AD3d at 379; *Hersch*, 43 AD3d at 645). We need not determine whether disclosure is required as a result of a circular letter issued by the Department of Insurance in 2008.

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

ENTERED: MAY 5, 2009

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CLERK

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

474 Rita Citrin, Index 602119/07  
Plaintiff-Respondent,

-against-

Baratta and Goldstein, et al.,  
Defendants-Appellants.

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Renda & Associates, P.C., Brooklyn (Sigismondo F. Renda of  
counsel), for appellants.

Daniel L. Abrams, New York, for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick,  
J.), entered February 13, 2008, which denied defendants' motion  
to dismiss the complaint, unanimously affirmed, without costs.

Following a five-day jury trial in a prior action alleging  
fraud and conspiracy against plaintiff Citrin and three  
codefendants, the jury reached a verdict in favor of the  
plaintiffs and awarded substantial compensatory and punitive  
damages. A motion by Citrin for judgment notwithstanding the  
verdict was denied by the trial judge, who noted in his  
memorandum decision that the verdict had been supported by the  
evidence and also rejected Citrin's other claims, including  
conflict of interest based on the fact that the same attorney had  
represented her and a codefendant. Citrin, through a successor  
counsel, then settled the matter pursuant to a stipulation, so-  
ordered by the trial judge, who vacated his prior order "as it  
pertains to any and all liability against Rita Citrin, directly

and/or indirectly, in law and/or based on equitable claims, including all findings of fact supporting such liability.”

Citrin then commenced the instant action against her trial attorneys for legal malpractice and breach of contract, alleging a conflict of interest in their representation of both her and a codefendant in the prior action. Defendants moved to dismiss on the ground that Citrin was collaterally estopped from making this claim because of the trial judge’s post-verdict order and memorandum decision.

The motion court correctly interpreted the trial judge’s so-ordered stipulation as having vacated his own post-verdict decision in its entirety as it pertained to Citrin, including any finding with respect to conflict of interest (see *Church v New York State Thruway Auth.*, 16 AD3d 808, 810 [2005]; *Ruben v American & Foreign Ins. Co.*, 185 AD2d 63 [1992]). Furthermore, there was no identity of issues necessarily decided in the prior action, nor a full and fair opportunity to contest the issue of legal conflict of interest as might warrant collateral estoppel (*Schwartz v Public Adm’r of County of Bronx*, 24 NY2d 65, 71 [1969]).

We have considered defendants' remaining arguments and find them without merit.

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

ENTERED: MAY 5, 2009

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*People v Mitchell*, 39 NY2d 173, 177-178 [1976], cert denied 426 US 953 [1976]).

The surcharges and fees were properly imposed (see *People v Guerrero*, 12 NY3d 45 [2009]).

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

ENTERED: MAY 5, 2009

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CLERK

Gonzalez, P.J., Buckley, Catterson, Renwick, JJ.

477 Thomas G. Issing, et al., Index 16265/06  
Plaintiffs-Appellants, 590077/08

-against-

Madison Square Garden Center, Inc., et al.,  
Defendants,

Madison Square Garden, L.P., etc.,  
Defendant-Respondent.

[And a Third-Party Action]

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

Tarshis & Hammerman, LLP, New York (Carol R. Finocchio of  
counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.),  
entered April 11, 2008, which granted defendant Madison Square  
Garden, L.P.'s (MSG LP) motion to dismiss the complaint as  
against it, and sua sponte dismissed the complaint as against  
defendant Madison Square Garden Center, Inc. (MSG Center),  
unanimously affirmed, without costs.

Plaintiff slipped and fell in Madison Square Garden while  
attending a basketball game and filed a complaint naming MSG  
Center that was served it on the Secretary of State pursuant to  
Business Corporation Law § 306. It appears that MSG Center,  
which once owned and managed the arena where plaintiff fell, is a  
foreign corporation that has not been authorized to do business  
in New York State since 1998, and that no attempt to serve MSG

LP, which has owned and managed the arena since 1998, was made until after the three-year statute of limitations had run. Plaintiffs, therefore, rely on the relation-back doctrine (CPLR 203[c]) to argue that the timely service made on MSG Center should be deemed to have been service on MSG LP. Such argument fails because MSG Center was not served pursuant to Business Corporation Law § 307, which sets forth procedures for serving an unauthorized foreign corporation that are jurisdictional and require "strict compliance" (*Flick v Stewart-Warner Corp.*, 76 NY2d 50, 57 [1990]). Since plaintiffs argue that, for statute of limitations purposes, the service made on MSG Center amounted to service on MSG LP, MSG LP can assert defenses that could have been raised by MSG Center had it appeared in the action, and since MSG Center was not properly served pursuant to section 307, timely service cannot be deemed to have been made on MSG LP. In any event, the relation-back doctrine would not avail plaintiff even if MSG Center had been properly served where it does not appear that MSG Center and MSG LP are "united in interest" (see generally *Buran v Coupal*, 87 NY2d 173, 177-178 [1995]), i.e., that they "necessarily have the same defenses to the plaintiff[s'] claim" (*Lord Day & Lord, Barrett, Smith v Broadwell Mgt. Corp.*, 301 AD2d 362, 363 [2003] [internal quotation marks omitted]) -- MSG Center's defense is lack of jurisdiction and MSG LP's defense is the statute of limitations. Moreover, even

if MSG Center were properly served, plaintiffs do not show that MSG Center and MSG LP are the same entity such as might permit correction of a misnomer pursuant to CPLR 305(c) (*see Achtziger v Fuji Copian Corp.*, 299 AD2d 946, 947 [2002], *lv dismissed in part and denied in part* 100 NY2d 548 [2003]).

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

ENTERED: MAY 5, 2009

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CLERK





as a matter of law, by submitting evidence that he was stopped in the right lane on the bridge, with no other place to go, due to the mechanical failure of his vehicle (see *Mankiewicz v Excellent*, 25 AD3d 591 [2006]; *Macauley v Elrac, Inc.*, 6 AD3d 584 [2004]).

In opposition, plaintiff failed to raise a triable issue of fact; she and co-defendant Kazi (driver of vehicle two) both testified that prior to the accident they observed Padilla's vehicle stopped on the bridge in the right lane approximately 50 feet ahead of them. While plaintiff claims that there is an issue of fact as to whether Padilla had his hazard lights on, such fact is irrelevant in light of the testimony of Kazi and plaintiff that they saw Padilla's vehicle stopped before the accident. Thus, any failure to use hazard lights was not the proximate cause of the accident (see *Barile v Lazzarini*, 222 AD2d 635 [1995]).

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

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

ENTERED: MAY 5, 2009

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CLERK

Gonzalez, P.J., Buckley, Catterson, McGuire, JJ.

481N NYCTL 2004-A Trust, et al., Index 15523/05  
Plaintiffs-Respondents,

-against-

Masjid-Al Faysal, etc.,  
Defendant-Appellant.

- - - - -

Ron Gilbert,  
Non-Party Purchaser-Respondent.

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Paul W. Siegert, New York, for appellant.

Windels Marx Lane & Mittendorf, LLP, New York (Leonid Krechmer of counsel), for NYCTL 2004-A Trust and The Bank of New York, respondents.

Cuddy & Feder LLP, White Plains (Joshua E. Kimerling of counsel), for Ron Gilbert, respondent.

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Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered September 19, 2008, which denied defendant Masjid-Al Faysal's motion to vacate the default judgment of foreclosure and sale of its property and to enjoin or annul the delivery of the deed to the purchaser, unanimously reversed, on the law, with costs, the motion granted, and the complaint dismissed for lack of jurisdiction. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Plaintiffs failed to properly serve defendant, a corporation (see CPLR 311[a][1]; Business Corporation Law § 306[b]; *Gouiran Family Trust v Gouiran*, 40 AD3d 400, 401 [2007] ["CPLR 308(5) provides for special service upon natural persons only"]).

Accordingly, the judgment must be vacated and the action dismissed (CPLR 5105[a][4]; *Security Pac. Natl. Trust (N.Y.) v Chunassamy*, 289 AD2d 151 [2001]; *Resolution Trust Corp. v Beck*, 243 AD2d 307 [1997]).

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

ENTERED: MAY 5, 2009

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CLERK

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

482            754 Fifth Avenue Associates, L.P.,            Index 104406/06  
                  Petitioner,

-against-

Hon. Emily Jane Goodman, etc., et al.,  
Respondents.

Application for an order pursuant to article 78 of the Civil Practice Law and Rules, unanimously withdrawn pursuant to the correspondence of the parties hereto. No opinion. Order filed.



the motion, and that defendant has authorized him to withdraw the motion. Accordingly, the motion to suppress was denied as abandoned, and we deem the challenge to it on appeal abandoned as well.

Aside from the challenge to the denial of the suppression motion, the only other issue raised on appeal was the excessiveness of the sentence. Inasmuch as we do not find the sentence to be excessive, the judgment should be affirmed.

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

ENTERED: MAY 5, 2009

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the lack of a warning that his sentence would include PRS rendered the plea involuntary under *Catu*, because "the omission at issue is clear from the face of the record" (*People v Louree*, 8 NY3d 541, 546 [2007]; see also *People v Cooks*, 67 NY2d 100 [1986]; CPL 440.10[2][c]). *People v Hill* (9 NY3d 189 [2007], cert denied 553 US \_\_\_, 128 S Ct 2430 [2008]) is not to the contrary, as the issue there was raised on direct appeal. There was no impediment to defendant raising this issue on his direct appeal, and to the extent he contends the attorney who represented him on that appeal rendered ineffective assistance, that claim would require a coram nobis motion addressed to this Court (see *People v Cuadrado*, 37 AD3d 218, 223 [2007], affd 9 NY3d 362 [2007]).

Nevertheless, defendant's sentence is presently unlawful because it does not include a period of PRS.

The Decision and Order of this Court entered herein on December 23, 2008 is hereby recalled and vacated (see M-225 decided simultaneously herewith).

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

ENTERED: MAY 5, 2009

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CLERK



actions in rolling around with the complainant on the ground caused the complainant's injuries, and that defendant's actions were justified. The fact that defendant testified that he did not kick or punch the complainant while they rolled on the ground does not alone preclude a justification instruction, since the evidence, viewed as a whole, supported such an instruction (see *People v Suarez*, 148 AD2d 367, 368-369 [1989]; *People v Ingrassia*, 118 AD2d 587, 588 [1986]). To accept a justification defense, the jury would not have been required to speculate as to a scenario not supported by any testimony.

We note that defendant's conviction cannot stand based solely on the fact that defendant struck the complainant while he was still on the bus. That blow to the face does not appear, on this record, to have resulted in the physical injury required to sustain the People's burden (see Penal Law §§ 120.05[11]; 10.00[9]; see also *People v McDowell*, 28 NY2d 373 [1971] [incidental reference to an injury without development of its appearance or seriousness not sufficient to sustain conviction]).

Finally, the identification testimony at issue on this appeal did not require CPL 710.30(1)(b) notice (*see People v Burgos*, 219 AD2d 504 [1995], *lv denied* 86 NY2d 872 [1995]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: MAY 5, 2009

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knee, appeared at the correct medical office for an orthopedic independent medical examination (IME), the orthopedist who was supposed to examine her was absent, and she was examined instead by a neurologist, although no neurological injuries are claimed. As it appears from the record that this was the result of a mutual misunderstanding of some kind, defendants should be afforded an additional opportunity to conduct an orthopedic IME, without which their defense would be severely prejudiced.

A prior order of the motion court, dated November 28, 2007, directed plaintiff to provide "HIPAA authorization for Montefiore Hospital *unlimited as to time* for all meds [sic] including films and all emergency room records as to treatment for [the right] knee & leg" (emphasis added), as well as "HIPAA authorization for Montefiore Radiology including all meds [sic] and films related to right knee & leg," with no time limitation mentioned. The absence of a time limitation is significant, as plaintiff admits to having been treated for an injury to her right knee at some point several years before the subject incident; she apparently does not recall the date or year of the prior injury. Nonetheless, plaintiff provided authorizations directed to Montefiore for the release of records dating back only to March 1, 2000. Plaintiff should provide defendants with authorizations for Montefiore without a time limitation, as required by the November 2007 order, which she has never challenged.

We have considered defendants' remaining contentions and find them without merit.

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

ENTERED: MAY 5, 2009

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CLERK



Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

485           In re Jose F.,  
                  Petitioner-Respondent,

-against-

Rosa R.N.A.,  
Respondent.

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Lawyers for Children, Inc.,  
Appellant.

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WolfBlock LLP, New York (Kenneth G. Roberts of counsel), for  
appellant.

Philip Schiff, New York, for Jose F., respondent.

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Order, Family Court, New York County (Helen C. Sturm, J.),  
entered on or about October 25, 2007, which changed custody of  
the subject child from respondent mother to petitioner-father,  
unanimously reversed, on the facts, without costs, and the matter  
remanded to Family Court for further proceedings consistent  
herewith.

While the decision of the Family Court was pending, and  
immediately after said decision was rendered, events took place  
which call into question whether the father has engaged in  
conduct detrimental to the well-being of the child, and thus,  
whether it is in the best interests of the child for custody to  
be changed to the father. Accordingly, this matter is remanded

to Family Court for further proceedings as to these issues.

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

ENTERED: MAY 5, 2009

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CLERK



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: MAY 5, 2009

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CLERK



attorney may be liable for his ignorance of the rules of practice, his failure to comply with conditions precedent to suit, his neglect to prosecute an action, or his failure to conduct adequate legal research (see *McCoy v Tepper*, 261 AD2d 592 [1999]). Here, the documentary evidence -- in particular, an October 26, 2004 letter agreement -- established plaintiff's authorization for defendants "to proceed with any potential malpractice claim against Melisande Hill as it relates to the October 7, 2000 motor vehicle accident," and defendants apparently continued to pursue such a claim even after allegedly referring plaintiff to New York counsel, thus creating the impression that the underlying malpractice claim remained viable. By virtue of that conduct, defendants had a duty, at a minimum, to expressly advise plaintiff that a limitations period existed, and of the need to contact New York counsel immediately to insure that an action was timely filed (see *id.*). However, a question of fact exists as to whether plaintiff would have succeeded in the underlying action "but for" the attorney's negligence (*Leder v Spiegel*, 9 NY3d 836 [2007], cert denied sub nom. *Spiegel v Rowland*, \_\_ US \_\_, 128 S Ct 1696 [2008]), which warrants the

denial of all summary judgment motions.

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

ENTERED: MAY 5, 2009

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CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

488-

488A John Galliano, S.A.,  
Plaintiff-Respondent,

Index 109292/07

-against-

Stallion, Inc.,  
Defendant-Appellant.

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Silverman Sclar Shin & Byrne PLLC, New York (Alan M. Sclar and Mikhail Ratner of counsel), for appellant.

Ellenoff Grossman & Schole LLP, New York (Ted Poretz of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Marylin G. Diamond, J.), entered April 29, 2008, awarding plaintiff, on its motion for summary judgment in lieu of complaint, the aggregate sum of \$601,284.52, including interest at 5% prior to October 7, 2004, and 9% thereafter, and order, same court and Justice, entered September 26, 2008, which denied defendant's motion to renew, unanimously modified, on the law and the facts, renewal granted, the rate of interest after October 7, 2004 decreased to 5%, and otherwise affirmed, without costs.

The motion court should have granted renewal to consider the affidavit of Fran Cannara because the allegation that Cannara had accepted service of process voluntarily and told the process server she was authorized to accept service was only first raised in plaintiff's reply papers on its summary judgment motion (see *e.g. Welch v Scheinfeld*, 21 AD3d 802, 808 [2005]), and the

court's rules did not permit defendant to submit a sur-reply.

Renewal should also have been granted in the interest of justice (see generally *Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460 [2007]) to consider the documents that defendant obtained from the Department of Justice via a Freedom of Information request. In its opposition to plaintiff's summary judgment motion, defendant submitted printouts from the web site of the Hague Conference on Private International Law. While the court's rejection of the printouts was not sua sponte, defendant may very well have been surprised by such rejection, as other courts have relied on the Hague web site (see e.g. *Casa de Cambio Delgado v Casa de Cambio Puebla, S.A. de C.V.*, 196 Misc 2d 1, 6 [2003]; *Saysavanh v Saysavanh*, 145 P3d 1166, 1170 [2006]).

Even after considering the materials defendant submitted on renewal, we conclude that summary judgment was properly granted to plaintiff. It is true that CPLR 5304(a)(2) declares a foreign country judgment to be not conclusive if the foreign court never had personal jurisdiction over the defendant. However, CPLR 5305(a)(3) states that a foreign country judgment should not be refused recognition for lack of personal jurisdiction if "the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved." Prior to commencement of the French proceedings, defendant entered into a contract in which it

agreed that all disputes would be submitted to a French court, effectively establishing personal jurisdiction under CPLR 5305(a)(3) (*Dynamic Cassette Intl. Ltd. v Mike Lopez & Assoc.*, 923 F Supp 8, 11 [ED NY 1996]).

Defendant received notice of the French action; its service by personal delivery is unlikely to give rise to any objections based on due process (see *Burda Media, Inc. v Viertel*, 417 F3d 292, 303 [2d Cir 2005]).

Contrary to defendant's claim, New York's public policy favoring resolution of disputes on the merits does not preclude enforcement of a foreign default judgment (see *Westland Garden State Plaza, L.P. v Ezat, Inc.*, 25 AD3d 516 [2006]).

Normally, plaintiff would be entitled to interest at the New York rate of 9% from October 7, 2004, the date of the French judgment (see e.g. *Wells Fargo & Co. v Davis*, 105 NY 670 [1887]). However, in its papers, plaintiff requested interest at only 5% (the French rate) from the date of the French judgment until the date of the New York award. Therefore, it waived its right to a higher interest rate for the period prior to that award (see *Goldbard v Empire State Mut. Ins. Co.*, 156 NYS2d 324, 329 [1956],

*mod on other grounds* 164 NYS2d 294 [App Term 1957], *mod* 5 AD2d 230 [1958]).

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

ENTERED: MAY 5, 2009

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CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

489	Lorraine K. Sullivan, et al., Plaintiffs-Respondents,  -against-  FC Bruckner Associates, L.P., sued herein as Bruckner Plaza Associates, L.P., et al., Defendants-Appellants. - - - - - FC Bruckner Associates, L.P., etc., et al., Third-Party Plaintiffs-Respondents,  -against-  MCG Architects, also known as McClellan, Cruz, Gaylord & Associates, Third-Party Defendant-Appellant. - - - - - FC Bruckner Associates, L.P., etc., et al., Second Third-Party Plaintiffs-Respondents,  -against-  York Hunter of New York, Inc., Second Third-Party Defendant- Appellant-Respondent. - - - - - MCG Architects, also known as McClellan, Cruz, Gaylord & Associates, Third Third-Party Plaintiff-Respondent,  -against-  McHenry & Associates, Inc., Third Third-Party Defendant-Appellant.  [And a Fourth-Party Action]  FC Bruckner Associates, L.P., etc., et al., Fifth Third-Party Plaintiffs-Respondents,  -against-  R & L Construction Management Corp., Fifth Third-Party Defendant- Appellant-Respondent.	Index 14817/97 83148/02 83573/02 83911/04 83976/04 86024/07
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Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for FC Bruckner Associates, L.P. and First New York Management, Inc., appellants/respondents.

Gogick, Byrne & O'Neill, LLP, New York (Stephen P. Schreckinger of counsel), for MCG Architects, appellant/respondent.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Michelle L. Meiselman of counsel), for York Hunter of New York, Inc., appellant-respondent.

L'Abate, Balkan, Colavita & Contini, L.L.P., Garden City (Martin A. Schwartzberg of counsel), for McHenry & Associates, Inc., appellant.

Carroll, McNulty & Kull, LLC, New York (Robert Seigal of counsel), for R & L Construction Management Corp., appellant-respondent.

Cascione, Purcigliotti & Galluzzi, P.C., New York (Thomas G. Cascione of counsel), for Sullivan respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about October 31, 2008, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint, second third-party defendant York Hunter of New York, Inc.'s motion for summary judgment dismissing the complaint or, in the alternative, dismissing the second third-party complaint and all cross claims as against it, and fifth third-party defendant R & L Construction Management Corp.'s motion for summary judgment dismissing defendants' claims against it for indemnification and contribution, unanimously modified, on the law, to grant R&L's motion in its entirety, and otherwise affirmed, without costs. The Clerk is directed to enter judgment

accordingly. The caption is amended to substitute FC Bruckner Associates, LP and First New York Management, Inc. as defendants and third party plaintiffs.

After shopping at a store in defendants' newly constructed shopping center, at about 9 o'clock on a December night, plaintiff fell when she did not see the curb at the edge of the platform outside the store. The platform was the same color and texture as the concrete surface of the parking deck. The record indicates that lighting and paint demarcations required by plans for the shopping center had yet to be installed. Plaintiff's expert opined that the conditions were dangerous and traplike and that the failure to properly mark and illuminate the transition was a proximate cause of plaintiff's injury. Third-party defendant York Hunter's expert opined that the platform and parking deck complied with all applicable building codes and regulations and that it was customary for curbs to be unpainted. A question of fact exists whether the condition complained of was

inherently dangerous (see *Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 211 [1988]; *O'Neil v Port Auth. of N.Y. & N.J.*, 111 AD2d 375 [1985]; *Alger v CVS Mack Drug of N.Y., LLC*, 39 AD3d 928, 930 [2007])).

The third-party defendants cannot avoid liability under their indemnification agreements simply because the party named as the owner in those agreements was not named by plaintiff in the summons and complaint. The actual owner accepted service, appeared, and answered, acknowledging that it had been sued herein under a different name. Neither third-party defendant claims prejudice as a result of the error. These circumstances would warrant amendment of the summons and complaint to correct the error (see *Fink v Regent Hotel*, 234 AD2d 39, 41 [1996]), and the caption is hereby so amended.

R & L Construction Management, however, established its entitlement to dismissal of the indemnification and contribution claims against it on the ground that plaintiff's claim does not arise out of its performance or nonperformance of its work under the contract or out of any alleged negligence on its part. Plaintiff's allegations of negligence are based on the failure to

paint or demarcate the curb and the inadequacy of the lighting,  
which are unrelated to R & L's concrete work on the platform.

THIS CONSTITUTES THE DECISION AND ORDER  
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this particular pattern as a method of transferring drugs, and that he had often seen it occur in that neighborhood. This pattern, viewed in light of the officer's expertise, provided probable cause for defendant's arrest (see *People v Valentine*, 17 NY2d 128, 132 [1966]; *People v Ramos*, 11 AD2d 286 [2004], 4 NY3d 766 [2005]), regardless of the type of packaging employed (see *People v Jones*, 90 NY2d 835 [1997]; *People v Schlaich*, 218 AD2d 398 [1996], *lv denied* 88 NY2d 994 [1996]). A combination of factors rendered this conduct inconsistent with an innocuous transaction, including the haste of the participants, the fact that the package was dropped into the car rather than handed to its recipient, and the absence of the slightest greeting, acknowledgment or other conversation.

Since the officer had probable cause to believe that a drug transaction had occurred, he was entitled, under the automobile exception, to conduct a warrantless search of defendant's vehicle including the closed center console (*People v Yancy*, 86 NY2d 239, 245 [1995]). The record also supports the hearing court's alternative finding that the officer had reasonable suspicion on which to stop the car, and a reasonable basis to fear for his safety justifying a limited intrusion into the console, which was

within defendant's reach as he sat in the car (see *People v Grullon*, 44 AD3d 516 [2007], *lv denied* 10 NY3d 756 [2008]).

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actual or constructive notice of it. Plaintiffs failed to submit any expert testimony supporting their contention that the elevator was defective and that such defect caused the accident. Moreover, on this record, plaintiffs' proof of notice was entirely speculative (see *Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337 [2008]). Neither plaintiffs' deposition testimony nor an affidavit by a neighbor sufficiently established that anyone made any complaint to NYCHA or that NYCHA knew of any complaints concerning the elevator doors. Plaintiffs offered insufficient detail as to when and how often the elevator door closed too quickly and made unsubstantiated conclusions that there were prior accidents involving a similar malfunctioning of the door (see *Gjonaj*, 38 AD3d at 385).

The circumstances of this case do not warrant the application of the doctrine of *res ipsa loquitur* (see *Feblot v New York Times Co.*, 32 NY2d 486, 495 [1973]; *Parris v Port of N.Y. Auth.*, 47 AD3d 460, 461 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: MAY 5, 2009

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Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

493            In re Brandon H.,  
  
                 A Dependent Child Under the  
                 Age of Eighteen Years, etc.,  
  
                 Leila Darlene H.,  
                            Respondent-Appellant,  
  
                 Hale House Center, Inc.,  
                            Petitioner-Respondent.

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Susan Jacobs, Center for Family Representation, Inc., New York  
(Karen Fisher McGee of counsel), for appellant.

Law Office of Alayne Katz, P.C., Irvington (Dana Forster-Navins  
of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Hal  
Silverman of counsel), Law Guardian.

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Order, Family Court, New York County (Jody Adams, J.),  
entered on or about August 14, 2007, which, upon a finding of  
permanent neglect, terminated respondent mother's parental rights  
to the subject child and committed his custody and guardianship  
to petitioner agency for the purposes of adoption, unanimously  
affirmed, without costs.

The finding of permanent neglect was supported by clear and  
convincing evidence that respondent failed to maintain contact or  
plan for the child's future despite the agency's diligent efforts  
to encourage and strengthen the parental relationship (see Social  
Services Law § 384-b[7][a]; see also *Matter of Star Leslie W.*, 63  
NY2d 136 [1984]). The record shows that the agency explored the

parental resources that were offered, emphasized to respondent the need to stay in contact with the child and to keep the agency informed of her location, located respondent when she failed to tell the agency that she had been transferred to a different correctional facility, and arranged visits between respondent and the child (see *Matter of Sheila G.*, 61 NY2d 368 [1984]).

The evidence at the dispositional hearing was preponderant that the best interests of the child would be served by terminating respondent's parental rights and freeing the child for adoption. Although respondent maintained a regular visitation schedule after the termination petition was filed, the quality of her visits did not improve. She did not focus on the child or interact with him and the child sought out agency staff to play with him. Respondent never lived independently; she had a long history of incarceration, mental illness and aggressive behavior and was not working. Although respondent claimed that she did play with and talk to her son, the court found that she was not credible, and we see no reason to disturb its findings (see *Matter of Gloria Melanie S.*, 47 AD3d 438; see generally *Matter of Trudya J.*, 223 AD2d 470 [1996], lv denied 87 NY2d 812 [1996]). In contrast, the pre-adoptive home, where the child had formed a strong bond with the parents, was better suited to address his special needs (see *Matter of Star Leslie W.*, 63 NY2d at 147).

We have considered respondent's other arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER  
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this action involved a fatal accident at a construction site. Under a so-called wrap-up insurance policy, plaintiff insured both the owner of the site and the subcontractor that employed the decedent; defendant also insured the employer under a workers' compensation policy that provided coverage for damages claimed by a "third party as a result of injury to your employee." After the decedent's wife was granted summary judgment against the owner on the issue of liability, plaintiff caused the owner to commence a third-party action against the employer, but plaintiff settled the main action after a trial on damages was held, and the employer was not involved in either the trial or the subsequent settlement. There is no merit to plaintiff's present claim that, because the employer was the only possible active tortfeasor, defendant is obligated to reimburse it for half of the settlement. Although the third-party action did not go forward after the settlement of the main action, the anti-subrogation rule would have required its dismissal, and thus any attempt by plaintiff, after having paid

the settlement, to obtain reimbursement from a co-insurer must fail (*National Cas. Co. v State Ins. Fund*, 227 AD2d 115, 116-117 [1996], *lv denied* 88 NY2d 813 [1996]).

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any event, he then gave the court an unequivocal assurance of his impartiality. Given the totality of his responses, the panelist's assurance was not rendered equivocal by his use of the phrases "I believe so" and "I think so" (see *People v Chambers*, 97 NY2d 417, 419 [2002]).

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they primarily involve matters outside the record concerning counsel's tactical decisions and preparation (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; see also *Strickland v Washington*, 466 US 668 [1984]).

We have considered and rejected defendant's remaining pro se claims.

We perceive no basis for reducing the sentence.

**M-1567      *People v Thomas Smith***

Motion seeking leave to relieve counsel  
denied.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED:    MAY 5, 2009

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CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

497 Superb General Contracting Co., Index 600744/04  
Plaintiff-Appellant,

-against-

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

S.J. Rehab Corp.,  
Defendant.

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Agovino & Asselta, LLP, Mineola (Robert C. Buff of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for City of New York, respondent.

Landman Corsi Ballaine & Ford P.C., New York (Christopher G. Fretel of counsel), for Amherst Rehab Associates, Inc. and Amherst Development Services Corporation, respondents.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 18, 2008, which granted defendant City's motion for summary judgment dismissing the first cause of action and granted the other defendants' cross motion to dismiss the entire complaint against the Amherst defendants, unanimously affirmed, without costs.

On a prior order (39 AD3d 204, *lv dismissed* 10 NY3d 800), we dismissed the second through seventh causes of action against the City and the entire complaint against defendant S.J. Rehab., under the statute of limitations. That ruling constituted law of the case, precluding plaintiff from raising the issue on the

present appeal (see *Clark Constr. Corp. v BLF Realty Holding Corp.*, 54 AD3d 604 [2008]; *J-Mar Serv. Ctr., Inc. v Mahoney, Conner & Hussey*, 45 AD3d 809 [2007]), and plaintiff even conceded as much.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: MAY 5, 2009

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CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

498 Skilled Investors, Inc., Index 603818/03  
Plaintiff,

-against-

Bank Julius Baer & Co., Ltd., et al.  
Defendants.

- - - - -

Bank Julius Baer & Co., Ltd.,  
Plaintiff-Appellant,

Bernard Spilko,  
Plaintiff,

-against-

Baruch Ivcher, et al.,  
Defendants-Respondents,

Menachem Ivcher, et al.,  
Defendants.

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Wilmer Cutler Pickering Hale and Dorr LLP, New York (Catherine M. Rahm of counsel), for appellant.

The Law Office of Joseph Yerushalmi, Great Neck (Kenneth F. Peshkin of counsel), for respondents.

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Order, Supreme Court, New York County (Helen E. Freedman, J.), entered June 3, 2008, which, to the extent appealed from, upon reargument, denied the motion of defendant/cross-claim plaintiff Bank Julius Baer & Co. Ltd. (the bank) for partial summary judgment against defendants/cross-claim defendants Baruch Ivcher and Waxfield Limited, unanimously reversed, on the law, with costs, and the motion granted.

After the bank settled this action with plaintiff, a victim

of a complex Ponzi scheme perpetrated by a now deceased individual, it was assigned all plaintiff's claims against Ivcher and Waxfield. Funds were improperly transferred from plaintiff's account to Ivcher and Waxfield. Thus, standing in the shoes of plaintiff, its assignor, the bank is entitled to summary judgment on its claims against Ivcher and Waxfield for money had and received and unjust enrichment (see *Madison Liquidity Invs. 119, LLC v Griffith*, 57 AD3d 438, 440 [2008]). Ivcher and Waxfield have no defense to these claims based on the bank's own alleged unclean hands, since there is no evidence - indeed, there is no allegation - of wrongdoing on the part of plaintiff assignor (see *Pro Bono Investments, Inc. v Gerry*, 2008 WL 4755760, \*20, 2008 US Dist LEXIS 87450, \*56 [SD NY 2008]; *Rankin v Toberoff*, 1998 WL 370305, \*5, 1998 US Dist LEXIS 9714, \*20 [SD NY 1998]).

THIS CONSTITUTES THE DECISION AND ORDER  
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Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

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501 Skilled Investors, Inc.,  
Plaintiff,

Index 603818/03

-against-

Bank Julius Baer & Co., Inc., et al.,  
Defendants.

- - - - -

Bank Julius Baer & Co., Ltd.,  
Plaintiff-Respondent-Appellant,

Bernard Spilko,  
Plaintiff,

-against-

Menachem Ivcher, et al.,  
Defendants,

Eclectic Holdings, Inc.,  
Defendant-Respondent,

Sydney Plastics, Inc.,  
Defendant-Appellant.

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Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C.,  
(Bruce E. Coolidge of counsel), for appellant.

Zaroff & Zaroff LLP, Garden City (Richard Zaroff of counsel), for  
Sydney Plastics, Inc., appellant, and Eclectic Holdings Inc.,  
respondent.

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Judgment, Supreme Court, New York County (Helen E. Freedman,  
J.), entered February 14, 2008, and bringing up for appeal an  
order, same court and Justice, entered January 14, 2008, in favor  
of defendant/cross-claim plaintiff Bank Julius Baer & Co. Ltd.  
(the bank) against cross-claim defendant Sydney Plastics, Inc.,

unanimously modified, on the law, to award judgment in the same amounts against cross-claim defendant Eclectic Holdings, Inc. as well, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In opposition to the bank's prima facie showing that it extended loans to both Sydney and Eclectic and that the loans were not repaid (*see Takeuchi v Silberman*, 41 AD3d 336, 336-337 [2007]), Sydney purports to raise issues of fact as to, inter alia, the bank's complicity in a certain underlying Ponzi scheme, the paperwork for the loans, the bank's operational failures, and the authority of a certain individual to borrow money on behalf of Sydney. These issues are extrinsic to the uncontested existence of the loans and do not raise any material issues of fact (*see Warburg, Pincus Equity Partners, L.P. v O'Neill*, 11 AD3d 327 [2004]).

Eclectic argues that there is no proof it ever received any of the borrowed money, speculating that its corporate resolution, which expressly bestowed a power of attorney upon the individual who requested the loans, might have been doctored by the bank. A conclusory allegation of forgery is insufficient to create a question of fact (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]). Not only did this person have the

authority to act on Eclectic's behalf, but in addition there is evidence that the loans were accepted by the company, which reaped the benefit thereof, with the knowledge of its owner. Consequently, the loans cannot now be repudiated (see *Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360, 363-364 [2008], *lv denied* 11 NY3d 904 [2009]; *Matter of Cologne Life Reins. Co. v Zurich Reins. [N. Am.]*, 286 AD2d 118, 126 [2001]).

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late 2001. His delay until August 2007 in requesting leave to amend his answer is inexcusable (see *Chichilnisky v The Trustees of Columbia Univ. in City of N.Y.*, 49 AD3d 388, 389 [2008]; *Spence v Bear Stearns & Co.*, 264 AD2d 601 [1999]).

Moreover, allowing the proposed amendment, which concerns events that took place no later than 1999, would significantly alter the status of this litigation by adding multiple new cross claims and a new cross-claim plaintiff, effectively resurrecting two cases that, after many years of litigation, are close to being resolved. In any event, the new cross claims are untimely (see CPLR 213[8]), and the "relation back" provision of CPLR 203(f) does not apply because "the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

We have considered defendants' remaining arguments and find them unavailing.

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filed a notice of pendency. However, on or about February 1, 2008, plaintiff, upon realizing its mistake, filed a second lien, which was designated "Amended Notice of Mechanic's Lien." The February 2008 lien correctly identified Meridian as the general contractor, and on or about March 10, 2008, plaintiff filed an supplemental summons and amended complaint, adding Meridian as an additional defendant. Plaintiff also filed and served upon Meridian a notice of pendency, which referred to the second lien.

The motion court erred in terminating the lien and dismissing the lien foreclosure cause of action. Lien Law § 10(1) permits the filing of a notice of lien "at any time during the progress of the work and the furnishing of materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished." Moreover, the Lien Law is permissive and allows the filing of successive liens for the same work to cure an irregularity in an earlier lien, as long as the successive lien is filed within the period prescribed in section 10 (see *Madison Lexington Venture v Crimmins Contr. Co.*, 159 AD2d 256, 257 [1990], *lv dismissed* 78 NY2d 905 [1991]).

Here, the lien filed in February 2008 was not shown to be defective, and was filed well within the eight-month period applicable under Lien Law § 10. Furthermore, plaintiff filed an

amended complaint referring only to the second lien, and served and filed a notice of pendency, which also referred to the second lien. Under these circumstances, the motion court should have treated the second lien as a successive lien and allowed the foreclosure action to proceed under the amended complaint (see *Madison Lexington Venture*, 159 AD2d at 257-258; *AJ Contr. Co., Inc. v Farmore Realty*, 3 Misc 3d 1110[A], 2004 NY Slip Op 50540[U] [2004]; see also *Verizon N.Y. Inc. v Consolidated Edison, Inc.*, 38 AD3d 391 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: MAY 5, 2009

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Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

504

[M-1367] In re Quintin Xavier Drakeford,  
Petitioner,

Index 10985/08

-against-

Hon. Charles Solomon, etc., et al.,  
Respondents.

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Quintin Xavier Drakeford, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Roberta L. Martin of  
counsel), for Hon. Charles Solomon, respondent.

Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer  
of counsel), for non-party respondent.

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Application for an order pursuant to article 78 of the Civil  
Practice Law and Rules denied and the petition dismissed,  
without costs or disbursements. All concur. No opinion. Order  
filed.

Saxe, J.P., Friedman, Sweeny, Nardelli, DeGrasse, JJ.

5132-

5133 Castle Village Owners Corp.,  
Plaintiff-Appellant,

Index 604415/05  
590264/07  
6604371/06  
590605/08

-against-

Greater New York Mutual Insurance  
Company, et al.,  
Defendants,

American International Specialty  
Lines Insurance Company,  
Defendant-Respondent.

[And Other Actions]

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William Hart, Scarsdale, for appellant.

Drinker Biddle & Reath LLP, New York (Mark D. Sheridan, of the  
State of New Jersey Bar, admitted pro hac vice, of counsel), for  
respondent.

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Order, Supreme Court, New York County (Helen E. Freedman,  
J.), entered February 5, 2008, and order, same court and Justice,  
entered July 8, 2008, affirmed, with one bill of costs.

Opinion by Nardelli, J. All concur.

Order filed.

**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**MAY 5, 2009**

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Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-1901X    Brine v 65<sup>th</sup> Street Townhouse LLC - Rinzler  
            Appeal withdrawn.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-1902X    Schuit v Tree Line Management Corp., doing business  
            as The Treeline Companies  
            Appeal withdrawn.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-1900X    Levi v Ventana Condominiums  
            Appeal and cross appeal withdrawn.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-1443      Gordon v Brown  
            Appeal, previously perfected for the May 2009 Term,  
withdrawn.

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

M-1535 People v Johnson, Clifford

Appeal deemed withdrawn.

Gonzalez, P.J., Tom, Mazzairelli, Andrias, Saxe, JJ.

M-1606 Schaefer v New York City Transit Authority

Motion deemed withdrawn, as indicated.

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

M-1576 In the Matter of Rueda v S., Anastasia - Montefiore  
North Medical Center

Motion deemed withdrawn.

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

M-1465 People v Gordian, Alana

Motion deemed withdrawn, as indicated.

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

M-1381 National Union Fire Insurance Co. of Pittsburgh v  
Arch Insurance Company

Dismissal of appeal denied.

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

M-1344 One Hundred Grand, Inc. v Chaplin, formerly known as  
M-1584 Rochon

Appeal dismissed unless perfected for the September 2009 Term, as indicated. Enlargement of time to perfect appeal granted, as indicated.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-1703 People v Jenkins, Quinn

M-1704 People v Mackey, Lashawn

M-1706 People v McCoy, Michael

M-1707 People v McNair, Dwight

M-1708 People v Mitchell, Paul

M-1710 People v Quintana, Victor

M-1711 People v Sams, Nathan

Leave to prosecute appeals as poor persons granted, as indicated.

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

M-1392 In the Matter of Bradley v Klein

Leave to prosecute appeal as a poor person granted to the extent indicated; time to perfect appeal enlarged to the January 2010 Term.

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

M-1596      Fridman v Broeksmit - Silverlining Interiors, Inc.

Stay of trial granted; appeals consolidated; appellants directed to perfect consolidated appeals for the September 2009 Term.

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

M-1634      In Re: New York Lipitor Products Liability Litigation - Avery v Pfizer, Inc. - Wilson  
(And other actions)

Clerk directed to calendar appeals for hearing together, as indicated; time to perfect appeals enlarged to the September 2009 Term.

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

M-1860      Gryphon Domestic VI, LLC v APP International Finance Company

Time to perfect appeal and cross appeal enlarged to the December 2009 Term.

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

M-1506      In the Matter of Shady Al's Sports Bar Corp. v New York State Liquor Authority

Stay denied; interim relief granted by order of a Justice of this Court, dated March 26, 2009, vacated.

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

M-1565 People v Freeman, Rodney

Enlargement of time to file pro se supplemental brief granted for the September 2009 Term, to which Term appeal adjourned, as indicated.

Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

M-1717 Zak v Mintz

Reargument denied.

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

M-1594 Randall Co. LLC v 281 Broadway Holdings LLC - The John Buck Company  
(And a third-party action)

Clerk directed to calendar appeals for hearing together on condition respective appeals perfected for the September 2009 Term.

Tom, J.P., Andrias, Friedman, Catterson, JJ.

M-7024A In the Matter of F., Timothy v M., Melanie

Leave to prosecute appeal as a poor person granted, as indicated. The order of this Court entered on February 15, 2007 (M-7024) recalled and vacated.

Mazzarelli, J.P., Sweeny, Nardelli, Freedman, Richter, JJ.

M-1769 Taub v The Art Students League of New York

Caption amended, as indicated; motion otherwise denied.

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

M-1461 Denenberg v Rosen - Bankers Life of New York, also known as Bankers Life Insurance Company of New York - Hartsein - ECI Pension Services, LLC - Economic Concepts, Inc. - Thornhill - The Private Consulting Group - Smith - Bryan Cave LLP - Repetti - Graf Repetti & Co. LLP,

Leave to file supplemental record on appeal granted, as indicated; appellants' brief deemed timely filed.

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

M-1438 Gonzalez v Societe Generale - Estate of Turbel

Time to perfect appeal enlarged to the September 2009 Term, as indicated.

Mazzarelli, J.P., Sweeny, Nardelli, Freedman, Richter, JJ.

M-1531 San Filippo v The New York City Department of Buildings

Time to perfect proceeding enlarged to the September 2009 Term.

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

M-1540 Delgado v The City of New York - New York City Police  
Department - New York City Housing Authority - New York  
City Housing Police Department - Witkowitch -  
Washington - Masiello

Time to perfect appeals enlarged to the January 2010  
Term, as indicated.

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

M-1331 McKenzie-Tirado v Bebbington - McKenzie  
M-1655

Time to perfect appeal enlarged to the September 2009  
Term; appeal dismissed unless perfected for said Term, as  
indicated.

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

M-1783 Seger v Turner Construction Company - Memorial Sloan  
Kettering Hospital Center

Stay of trial denied.

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

M-1309 In the Matter of Lakins v New York City Housing  
Authority

Leave to prosecute appeal as a poor person granted to  
the extent indicated; stay of trial denied.

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

M-1583 Rivera v Sheridan Manor Associates Limited Partnership  
- P & T Contracting Corporation

Stay of trial denied.

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

M-1294 Estate of Hyman - Smith - Silverman

Dismissal of appeal denied, as indicated.

Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

M-225 People v Hogue, William

Reargument granted and, upon reargument, the decision and order of this Court entered on December 23, 2008 (Appeal No. 4885) recalled and vacated and a new decision and order substituted therefor. (See Appeal No. 4885, decided simultaneously herewith.)

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

M-1481 Hamiltonian Corporation v Trinity Centre LLC

Appeal adjourned to the September 2009 Term; defendant-appellant directed to immediately file supplemental record on appeal, as indicated.

Catterson, J.

M-598 People v Medina, Jose  
Leave to appeal to this Court denied.

Catterson, J.

M-707 People v Al-Martin, Mahmud Khabir  
Leave to appeal to this Court denied.

Catterson, J.

M-850 People v Davis, Raul  
Leave to appeal to this Court denied.

Catterson, J.

M-1212 People v Garvin, Earl  
Leave to appeal to this Court and other relief denied.

Catterson, J.

M-1396 People v Stevens, Anthony  
Leave to appeal to this Court denied.

Acosta, J.

M-1238 People v Oberoi, Gurpreet  
Leave to appeal to this Court denied.

DeGrasse, J.

M-1571 People v Partee, Cedric  
Leave to appeal to this Court denied.

Richter, J.

M-1433 People v Giles, Nathan  
Leave to appeal to this Court and other relief denied.