SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 10, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3845 Nancy Haseley, Index 115345/05
Plaintiff-Appellant,

-against-

Gregory Abels, et al.,
Defendants-Respondents,

The City of New York,
Defendant.

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Eric H. Green, New York (Hiram Anthony Raldiris of counsel), for appellant.

Rebore, Thorpe & Pisarello, P.C., Farmingdale (Timothy J. Dunn III of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 13, 2009, which, to the extent appealed from as limited by the briefs, granted the Abels defendants' motion for summary judgment, reversed, on the law, without costs, the motion denied, the complaint reinstated against those defendants, and the matter remanded for further proceedings.

Defendants Gregory and Karpal Abels own a brownstone at 120

Washington Place in Manhattan. In the early 1970s, the Abelses arranged for a metal fence to be built around a tree well in front of their property. The square fence consisted of four sides, which were originally welded together. Each side had repeating wicket shaped loops. The record does not indicate whether or how the fence was connected to the sidewalk or dirt surrounding the tree.

At her deposition, plaintiff testified that on the evening of December 28, 2004, she was walking home from dinner when she tripped on a dislodged portion of the Abelses' fence. She claimed that the fence was obstructing the sidewalk. She recounted that it was snowing at the time, and that approximately 1/4 inch of snow had accumulated on the ground. Haseley testified that she lived less than a block from the Abelses for at least four years prior to the accident, and would walk past their property several times every day, either walking to and from work or when walking her dog. She recounted that on several occasions prior to her accident, she observed the fence in a state of disrepair, with the side facing the house "loose, dislodged from the other sections and basically lying against the tree."

In direct contrast to this account, Mr. Abels testified that

he and his wife were away during the week plaintiff was injured, and had not seen the tree fence in disrepair until the beginning of 2005. He also testified that he had never received any complaints about the tree fence. A representative from the New York City Department of Parks, which maintains the tree and responds to complaints about its surrounding area, testified that his office had not received notice of any problem with the subject tree well. On November 3, 2005, plaintiff sued the Abelses and the City of New York.[1]

At the close of discovery, the Abelses moved for summary judgment. They argued that they did not have actual or constructive notice of a hazardous condition of a dislodged tree fence. In support of their motion, defendants included portions of the deposition transcripts of plaintiff, Mr. Abels, and the city official, as well as photographs taken by plaintiff the day after the accident. In opposition, plaintiff submitted an affidavit stating that she had seen the tree fence in a state of disrepair for "several months before [her] accident." Additionally, plaintiff submitted clearer photographs taken the

[1]Plaintiffs have stipulated to the removal of the City from this action. The only motion at issue on appeal is the one brought by the Abelses.

day after the accident showing the house side of the tree fence leaning in towards the tree. The motion court granted defendants' motion, finding no evidence that defendants had actual or constructive notice of the tree fence lying on the sidewalk, thereby creating a tripping hazard.

We reverse. A landowner has a duty to maintain its property in a reasonably safe condition (*Basso v Miller*, 40 NY2d 233 [1976]). A plaintiff alleging injury caused by a dangerous condition must show that the defendant either created the condition (*Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 [1984], *affd* 64 NY2d 670 [1984]), or failed to remedy it, despite actual or constructive notice thereof (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]; *Beck v J.J.A. Holding Corp.*, 12 AD3d 238 [2004], *lv denied* 4 NY3d 705 [2005]). The plaintiff must show that the defendant's negligence was a proximate cause of the injuries (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Moreover, on a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party, here plaintiff, affording it the benefit of every favorable inference which can be drawn from the evidence (*Boyd v Rome Realty Leasing, Ltd. Partnership.*, 21 AD3d 920 [2005]).

Applying these principles, we find issues of fact precluding

summary dismissal. The parties' submissions, including excerpts from both Mr. Abels's and plaintiff's depositions, plaintiff's affidavit, and photographs of the site, raise issues as to: whether (1) the tree fence was in disrepair for months prior to the accident; (2) defendants had constructive notice of its damaged state; and (3) obstruction of the walkway by the dislodged portion of the fence was a foreseeable consequence of its condition (*see generally D'Ambrosio v City of New York*, 55 NY2d 454 [1982]).

Relying upon *Gordon v American Museum of Natural History* (67 NY2d 836 [1986]) and *Early v Hilton Hotels Corp.* (73 AD3d 559 [2010]), the dissent would grant defendant summary judgment on the ground that defendants had no notice of "the fence lying on the sidewalk." However, unlike both *Early* and *Gordon*, here the record evidence contains sworn statements that the inside panel of a tree fence installed and existing on 120 Washington Place for almost 40 years was dislodged and that it had been in that condition for months prior to plaintiff's accident. The question of whether a fence in this state would obstruct the sidewalk is a question of foreseeability, for a jury's consideration, mindful of the fact that "[t]he precise manner of the event need not be anticipated" and "[a]n intervening act may not serve as a

superceding cause . . . where the risk of the intervening act occurring is the very same risk which renders [defendant] negligent" (*Derdiarian*, at 316).

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

CATTERSON, J. (dissenting)

The record establishes that although the fence surrounding the tree well may have been in some disrepair, the plaintiff tripped over a section of fence that had been dislodged and was lying on the sidewalk one foot away from the tree well.

In my view, the appropriate question is not whether it was foreseeable that a fence in some disrepair would move from the tree well to the middle of the sidewalk, but whether defendants had any notice of the fence lying on the sidewalk.

Our recent decision of Early v. Hilton Hotels Corp., 73 A.D.3d 559, 904 N.Y.S.2d 367 (2010), relied upon by the plaintiff, is instructive in this regard. In Early, we summarized hornbook law on owner liability for a defective condition:

> "A defendant owner is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the occurrence of an accident to permit the defendant to discover and remedy the condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373 [2005]). The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Val. Realty Co.*, 300 AD2d 422, 423 [2002], *lv denied* 99 NY2d 509 [2003]; *McDuffie v Fleet Fin. Group*, 269 AD2d 575 [2000]). Alternatively, a defendant may be charged with constructive notice of a hazardous condition if it is proven

> that the condition is one that recurs and about which the defendant has actual notice (*Chianese v Meier*, 98 NY2d 270, 278 [2002]; *Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107, 107 [2003]). If such facts are proven, the defendant can then be charged with constructive notice of each condition's recurrence (*id.*; *Anderson* at 422)."

73 A.D.3d at 561, 904 N.Y.S.2d at 369. In Early, the plaintiff alleged that she tripped and fell on a loose plastic packing strap on the sidewalk adjacent to defendant's premises. We found for the defendant on both actual and constructive notice because the defendant never saw straps on the sidewalk and received no complaints to that effect, the plaintiff had never seen straps at the location before, and most importantly, there was no evidence as to how long the strap had been on the sidewalk.

In the instant case, there were no prior complaints that the fence had become dislodged onto the sidewalk, nor is it apparent from the record that it had happened before. The defendants testified that they were unaware that there was anything wrong with the fence. Moreover, contrary to the majority's description of the fence as "dislodged," the plaintiff's sworn statements describe that section of the fence as "not upright as it should be" and "dislodged from the other sections." She testified that over a period of months she observed the fence "pushed inward toward the tree."

In my view, the majority improperly posits a triable issue as to foreseeability because it conflates notice of the fence's condition with constructive notice of its obstruction of the sidewalk. Precedent militates against such a convoluted application of the well-established principles governing a landowner's duty to maintain property in a reasonably safe condition. See Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 838, 501 N.Y.S.2d 646, 647, 492 N.E.2d 774, 775 (1986) (general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's injury).

In any event, there is no evidence of record that the condition of the fence itself caused the fence to be on the sidewalk, one foot from the tree well. Even if it was indisputable that the fence was "loose, dislodged from the other sections and basically lying against the tree," as a matter of law such a condition could not render it foreseeable that the dislodged section would travel away from the tree, out of the tree well and into the middle of the sidewalk. It is more likely, as the motion court observed, that it would "take some outside force" in order to move the section of fence. In other

words, that someone or something dislodged the fence immediately prior to plaintiff's happening upon it. This case, therefore, is nothing more than a Gordon case and should be dismissed.

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

ENTERED: MAY 10, 2011

CLERK

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4262 In re Leroy R., Jr.,

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

New York City Administration for
Children's Services,
Petitioner-Appellant,

Shaunette W., et al.,
Respondents.

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

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Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about August 31, 2010, which, following a hearing pursuant to Family Court Act § 1028, granted the application of respondent father to release the subject child to his custody on condition that the child not be left alone with the respondent mother, and subject to the father demonstrating to the "reasonable satisfaction" of the petitioner agency (ACS) that there are appropriate arrangements in place to ensure that the child will not be left alone with the mother, unanimously reversed, on the law and the facts, and the application denied, without costs.

A court, when analyzing an application for a child's return

under section 1028, "must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal"(*see* Family Ct Act § 1028[a]; *Nicholson v Scoppetta*, 3 NY3d 357, 380 [2004]). The court properly found that the child was at imminent risk of harm if returned to its mother, but improvidently exercised its discretion in ordering the conditional parole of the child to the father.

The record contains disturbing testimony and evidence as to the conduct of the subject child's father at the hospital where the child was born, and at the courthouse prior to the hearing. The father's graphic, profanity-laced death threats were directed at ACS staff and hospital personnel within hours of his son's birth.

On the first occasion, when he spoke on the phone to the ACS specialist assigned to the case, he called her a "bitch" and threatened to "fucking kill [her]" if she tried to remove the child from the hospital. The next day, the hospital social worker told the ACS specialist that the father had appeared at the hospital and had "made threats . . . that he wanted to kill everyone in the whole world and he also wanted to kill everyone in the hospital." The social worker said she "was so fearful

that she locked the doors of her office."

Subsequently, on a motion to renew, ACS presented an affidavit of the child's case planner who had observed the father on the day of the hearing. The case planner heard the father say that he was going "to kill all the motherfuckers associated with taking his son from him" and, referring to the ACS specialist, that he would "gut the pretty one like a fish." The case planner stated that the father "continued to make threats about how he was going to get all the workers on the case even the lawyers." The case planner also observed the father instructing the mother not to talk to her attorney who arrived for the hearing, and not to move off the bench as they waited to see the judge.

The father's conduct raises questions as to how ACS workers can make any determination regarding "appropriate arrangements" without coming into contact with the father, and thus putting themselves at risk. Further, such conduct by the father, described as "hostile and hateful" by the hospital social worker, suggests that the parole of the child to the father may pose as much of an imminent risk of harm to the child as returning him directly to his mother.

Accordingly, we deny the father's section 1082 application in its entirety since any doubt concerning the father's conduct must be resolved in favor of protecting the child (*see Matter of Kasheena M.*, 245 AD2d 231 [1997]).

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

ENTERED: MAY 10, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4756 Ana Ramona Peralta, Index 21364/03
Plaintiff-Appellant,

-against-

Grenadier Realty Corp., et al.,
Defendants-Respondents.

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Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for appellant.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered November 23, 2009, upon a jury verdict in favor of defendants, dismissing the complaint in this action for personal injuries sustained when plaintiff slipped on a puddle of water and fell as she descended an interior stairwell in a building owned and managed by defendants, unanimously affirmed, without costs.

Plaintiff was not deprived of her right to a fair trial by the court's refusal to permit her counsel to conduct re-cross-examination of two witnesses. Although it would have been better if the court had allowed at least some re-cross-examination, in this case, it was harmless error. The only possible scope of inquiry for plaintiff's denied re-cross-examination, as would

have been limited by the scope of the prior redirect (*see Matter of Eberhart v Ward*, 161 AD2d 396, 397 [1990]), was of questionable probative value and could not have affected the outcome of the trial. While plaintiff was prevented from attempting to discredit the testimony of defendants' porter on the collateral issue of whether liquid spillage or mopping could cause paint flaking, counsel was effectively able to cast doubt on it during cross-examination of defendants' own expert witness, who testified that mopping would not cause paint flaking. Furthermore, the testimony of defendants' expert, that he did not see water in photographs of the area where plaintiff fell, could be discredited by the jurors themselves upon their review of the photographs during deliberations.

Plaintiff also failed to demonstrate that the court was biased or that other conduct of the court deprived her of a fair trial. The "trial court has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to [*sic*] admonish counsel and witnesses when necessary" (*Campbell v Rogers & Wells*, 218 AD2d 576, 579 [1995]). In any event, many of the challenged

occurrences only bore upon damages, an issue that the jury did not reach (*see Gilbert v Luvin*, 286 AD2d 600, 600 [2001]).

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

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

ENTERED: MAY 10, 2011

CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3931-
3932 Angela Ruffo Suits, et al., Index 18622/06
Plaintiffs-Respondents,

-against-

Wyckoff Heights Medical Center,
Defendant-Appellant,

Wyckoff Emergency Medicine Services, P.C., et al.,
Defendants-Respondents.

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Arshack, Hajek & Lehrman, PLLC, New York (Lynn Hajek of counsel), for appellant.

Annette G. Hasapidis, South Salem, for Suits respondents.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, White Plains (Terence E. Dempsey of counsel), for Wyckoff Emergency Medicine Services, P.C. and T. Abakporo, M.D., respondents.

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Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered April 20, 2009, which denied the motion of defendant Wyckoff Heights Medical Center (Wyckoff) for partial summary judgment dismissing any independent claims against it, reversed, on the law, without costs, and the motion granted to the extent of dismissing any and all claims against Wyckoff other than those alleging vicarious liability for the negligence of defendant T. Abakporo, M.D. Order, same court (Alison Y. Tuitt, J.), entered March 2, 2010, which, insofar as appealed from as limited by the

briefs, denied Wyckoff's motion to renew, unanimously dismissed, without costs, as academic.

In this medical malpractice action, plaintiffs allege that plaintiff Angela Ruffo Suits (plaintiff) sought emergency medical attention at Wyckoff for a severe abrasion on the lower part of her left leg and that Wyckoff failed to provide proper treatment, causing the wound to become infected and gangrenous. Pursuant to a stipulation, plaintiffs added Wyckoff Emergency Medicine Services, P.C. (Services) and T. Abakporo, M.D., as defendants and filed an amended complaint in which they alleged upon information and belief that Dr. Abakporo was the "physician on staff" when plaintiff sought treatment and that Services was "the entity that attends to emergency services at Wyckoff."

To sustain a cause of action for medical malpractice, a plaintiff must prove a deviation or departure from accepted practice and that such departure was a proximate cause of the plaintiff's injury (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [2009]; *Alvarado v Miles*, 32 AD3d 255, 257 [2006], *affd* 9 NY3d 902 [2007]). Thus, on a motion for partial summary judgment, the movant has the initial burden of establishing the absence of any departure from good and accepted practice, or that the plaintiff

was not injured by any departure (*see Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2009]). It is only after the movant has carried its prima facie burden that the nonmoving party is required to submit competent proof in opposition for the purpose of establishing the presence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

A hospital may not be held concurrently liable for injuries suffered by a patient who is under the care of a private attending physician chosen by the patient where the resident physicians and nurses employed by the hospital merely carry out the orders of the private attending physician, unless the hospital staff commits "independent acts of negligence or the attending physician's orders are contradicted by normal practice" (*Cerny v Williams*, 32 AD3d 881, 883 [2006]; *see also Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). Further, a hospital cannot ordinarily be held vicariously liable for the malpractice of a private attending physician who is not its employee unless a patient comes to the emergency room seeking treatment from the hospital, and not from a particular physician of the patient's choosing, and there is created an apparent or ostensible agency by estoppel (*see Schultz v Shreedhar*, 66 AD3d 666, 666 [2009]; *Salvatore v Winthrop Univ. Med. Ctr.*, 36 AD3d 887, 888 [2007]).

In its post-note of issue motion, Wyckoff moved for partial summary judgment seeking the limited relief of an adjudication "that there are no independent claims against" it. Because Wyckoff did not move to dismiss the claims against it based on its vicarious liability for Dr. Abakporo's alleged negligence, whether as an independent contractor or employee, Supreme Court erred when it denied the motion on the ground that Wyckoff failed to meet its burden of proof of proffering any documentary proof "evidencing the independent contractor relationship between Dr. Abakporo and the hospital."

As to the relief that Wyckoff did seek, i.e., the dismissal of any independent claims against it, it was incumbent on Wyckoff to address and rebut any specific allegations of malpractice set forth in plaintiffs' bill of particulars (*see Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 875 [2008]; *Terranova v Finklea*, 45 AD3d 572, 573 [2007]).

In their verified bill of particulars, plaintiffs alleged that "defendant, its servants, agents and employees were negligent in failing to recognize the extent and serious nature of [plaintiff's] injuries upon presenting to the emergency room; in failing to properly debride her wounds; in failing to take x-rays, in failing to administer medication such as betadine or

other topical antibacterial aid; in failing to administer or prescribe antibiotics; in failing to otherwise administer proper first aid treatment; in failing to properly instruct the patient in the care of the injury." Plaintiffs further alleged that "[u]pon information and belief, the person who was negligent was T. Abakaporo M.D." and that Wyckoff was vicariously liable "due to the fact that the defendant is a hospital and hired a staff to do emergency services. The staff, especially the emergency doctor (who we are informed is T. Abakporo, M.D.) whose actions or omissions are responsible for this liability. [*sic*]"

"'The purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial'" (*Harris v Ariel Transp. Corp.*, 37 AD3d 308, 309 [2007], quoting *Twiddy v Standard Mar. Transp. Servs.*, 162 AD2d 264, 265 [1990]). "[R]esponses to a demand for a bill must clearly detail the specific acts of negligence attributed to each defendant" (*Miccarelli v Fleiss*, 219 AD2d 469, 470 [1995]; *see Batson v La Guardia Hosp.*, 194 AD2d 705 [1993]). Given that the only person identified by plaintiffs as being negligent was Dr. Abakporo and that plaintiffs failed to distinguish any separate alleged acts and omissions of Wyckoff's staff, Wyckoff sustained its prima facie burden of establishing that there were no independent

claims against it and that it can only be held vicariously liable for Dr. Abakporo. Plaintiffs did not specify any independent acts of negligence by Wyckoff's staff and "[o]ur jurisprudence does not 'require a defendant [moving for summary judgment] to prove a negative on an issue as to which [it] does not bear the burden of proof'" (*Martinez v Hunts Point Coop. Mkt., Inc.*, 79 AD3d 569, 570 [2010] quoting *Strowman v Great Atl. & Pac. Tea Co.*, 252 AD2d 384, 385 [1998]; *see also Wellington v Manmall*, LLC, 70 AD3d 401, 401 [2010]).

Plaintiffs did not sustain their burden in that there is no evidence that anyone but Dr. Abakporo managed plaintiff's care and no indication that hospital staff did not follow his orders. "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice," do not suffice (*Alvarez*, 68 NY2d at 325; *see also Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]).

Accordingly, Wyckoff was entitled to partial summary judgment dismissing any and all claims against it other than those alleging vicarious liability for the negligence of Dr. Abakporo. In view of this determination, we dismiss the appeal from the order denying renewal as academic.

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

ACOSTA, J. (dissenting)

I respectfully dissent because in my opinion defendant Wyckoff Heights failed to establish its prima facie entitlement to summary judgment as to any independent claims against it.

The allegations made by plaintiffs in their complaint and bill of particulars encompassed any negligence attributable to the failure to act by defendant Wyckoff Heights, its employees, agents or personnel. Consequently, in order to prevail on its summary judgment motion, Wyckoff Heights was required to submit evidence in support of its claim that only Dr. Abakporo was negligent (*see G.P. v Children's Hosp. of Buffalo*, 45 AD3d 1484 [2007] [holding that hospital has the burden of establishing that no act or omission on the part of its employees either resulted in or exacerbated plaintiff's alleged injuries]; *see also Toth v Bloshinsky*, 39 AD3d 848, 850 [2007] [affirming a motion for summary judgment on the ground that the "defendant hospital demonstrated, prima facie, that it [did not] commit[] independent acts of negligence"]).

Wyckoff Heights, however, failed to make a prima facie showing that neither it nor its employees committed independent acts of negligence (*see Fiorentino v Wenger*, 19 NY2d 407, 414 [1967] ["[w]here a hospital's alleged misconduct involves an

omission to act, the hospital will not be held responsible unless it had reason to know that it should have acted within the duty it concededly had"]). Indeed, in its motion for partial summary judgment, Wyckoff Heights merely attached the pleadings and bill of particulars. Significantly, Abakporo's deposition testimony was not included.[1] Thus, Wyckoff Heights failed to establish its prima facie entitlement to summary judgment, and accordingly the burden never shifted to plaintiff to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

That plaintiffs' bill of particulars stated that plaintiffs believed that the injuries were caused by Dr. Abakporo's negligence is of no moment inasmuch as the underlying pleadings must be liberally construed (CPLR 3026). In any event,

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[1]Had Wyckoff Heights attached Abakporo's deposition, the flaw in its argument would have been even more apparent. Abakporo noted that "anyone" could have debrided plaintiff's wound, and he did not have to authorize such actions – with the sole exception of nurses. Significantly, Abakporo's testimony suggests that there were other individuals, including an orthopedist or podiatrist and apparently a resident, with the capacity to assist plaintiff. Moreover, Abakporo documented plaintiff's injury in the hospital charts, which presumably would have been available to the staff (*see Fiorentino v Wenger*, 19 NY2d at 414).

plaintiffs' action is not limited to the wording in the bill of particulars cited by the majority, especially when plaintiffs also stated that their claim was against Wyckoff Heights' *employees and agents* (*see Toth v Bloshinsky*, 39 AD3d at 849 [holding that all that was required of the plaintiff in serving a bill of particulars was to "provide a general statement of the acts or omissions constituting the alleged negligence"]). In short, the specific wording of the bill of particulars cited by the majority did not relieve Wyckoff Heights of its obligation to establish its prima facie entitlement to summary judgment with proof in admissible form.

Defendant's motion to renew was correctly denied since the deposition transcript proffered upon renewal existed at the time the original motion was made, and defendant failed to proffer any reasonable excuse for its failure to obtain a copy of the

transcript from co-defendant's counsel before making that motion (*see* CPLR 2221[e]; *Silverman v Leucadia Inc.*, 159 AD2d 254 [1990]).

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

ENTERED: MAY 10, 2011

CLERK

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

4305 Kirkwood Stewart, et al., Index 302679/07
Plaintiffs-Appellants,

-against-

World Elevator Co, Inc, et al.,
Defendants-Respondents.

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Alpert & Kaufman, LLP, New York (Morton Alpert and Gary Slobin of counsel), for appellants.

Gottlieb, Siegel & Schwartz, LLP, Bronx (Evan N. Majzner of counsel), for respondents.

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Order, Supreme Court, Bronx County (Cynthia Kern, J.), entered on or about November 2, 2009, which, in an action for personal injuries allegedly sustained when the elevator car in which plaintiff Kirkwood Stewart was riding suddenly dropped, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiff Kirkwood Stewart (plaintiff), a security guard at the Fashion Institute of Technology (FIT), alleges that on July 18, 2006, he arrived at the building at approximately 5:38 a.m. and pressed a button to summon the elevator. The "A"" building had two automatic elevators, designated as elevator #1 and elevator #2. When elevator #1 arrived, plaintiff entered and

pressed the button for the eighth floor, intending to open up the rooms on the top floor and work his way down.

Before the elevator doors could open at the eighth floor, plaintiff alleges that the elevator cab suddenly dropped, causing him to fall and strike his head on the floor, which in turn caused him momentarily to lose consciousness. When plaintiff regained consciousness, he observed the elevator cab begin to move upward, passing the 5th and 6th floors, and finally stopping on the 7th floor. The elevator door, however, did not open on the 7th floor. Plaintiff, after unsuccessfully trying to press the button to open the doors, radioed the security desk for assistance.

Plaintiff's supervisor used a master key in order to lower the elevator to the ground floor, a process taking approximately 20 minutes, and then the supervisor, together with several other employees, had to pry open the elevator doors in order to release plaintiff. Plaintiff's supervisor's hand became jammed in the door during the attempt. Following his extrication from the elevator, plaintiff filled out an incident report and complainant/witness statement setting forth the details of the elevator malfunction. Immediately after the incident, plaintiff complained of head, neck and back pain, as well as a tingling

sensation in the right hand.

On or about November 8, 2007, plaintiff and his wife commenced the instant action against defendants, alleging that they were negligent in inspecting, repairing and maintaining the subject elevator.

In April 2009, defendants moved for summary judgment dismissing the complaint, arguing, inter alia, that the incident, as described by plaintiff, was physically and mechanically impossible. Defendants relied on the deposition testimony of their resident mechanic, Michael Kavanagh. Kavanagh, however, did not start working for defendants until 2007, more than 1½ years after the incident, and had no knowledge or information regarding defendants' inspection procedures on the date of the accident, nor of the condition of the elevator or equipment following the incident. Kavanagh "guessed" that defendants maintained maintenance records for "one year." The only record produced by defendants in response to discovery requests, however, was an excerpt from a "work log" as to which Kavanagh was incompetent to testify (and which appears nowhere in the record). Defendants stated that other than the work log they were in possession of no work orders, maintenance or repair records up through and inclusive of the date of the incident.

Defendants also relied on the affidavit from Joe D'Ambra, vice-president of defendant New World Elevator LLC and a licensed New York City elevator inspector. D'Ambra opined, to a reasonable degree of mechanical certainty, that in order for the elevator to have suddenly dropped, as plaintiff alleged, either (1) a cable would have to break and the emergency braking mechanism would have to fail, or (2) the elevator would have to be overloaded. D'Ambra discounted both possibilities. D'Ambra stated that it was clear none of the cables had broken, as the elevator operated normally immediately after the alleged incident, and there was no record of a shutdown. D'Ambra averred that it was clear the elevator had not been overloaded, since plaintiff was alone at the time of injury, and the elevator's counterweights are designed to offset the weight of the cab plus 40% of its rated load. D'Ambra stated that no defect was ever found with the cables, governor or emergency braking device before or after the incident. D'Ambra thus opined that plaintiff's description of the alleged incident was neither physically nor mechanically possible.

In opposition, plaintiffs argued that defendants had failed to make a prima facie case, asserting that D'Ambra's statements were purely conclusory and based on hearsay information as to the

alleged condition of the elevator following the accident. Plaintiffs asserted that defendants ought not to be able to invoke the absence of notice as a defense given defendants' exclusive and comprehensive maintenance duties in respect of the elevator. Plaintiffs argued that the doctrine of res ipsa loquitur applied since the misleveling or malfunctioning of an elevator does not ordinarily occur in the absence of negligence, the maintenance and operation of the elevator was within the exclusive control of defendants, and plaintiff in no way contributed to or caused the accident. Counsel annexed a buildings inspection report to his affirmation which revealed that on June 1, 2006, approximately one month before the accident, an unspecified defect was discovered during a routine elevator inspection at FIT.

Plaintiffs relied on the affidavit of John Clarke, an elevator mechanic and adjuster employed by non-party City Elevator Company, with 38 years of experience in elevator installation, maintenance, and mechanical and electrical repair. Clarke opined, with a reasonable degree of mechanical certainty, that the failure of the elevator cab to properly function, as alleged by plaintiff, was "caused either by a defective door sensor; zone relay equipment installed in the elevator shaft

and/or because of a contact failure relating to a defective door belt or motor installed on the top of the elevator cab," mechanisms designed to control the cab's movement to the proper floor and the ability of the door to timely open at the designated floor. These conditions were neither mentioned, ruled out nor addressed by defendants' expert.

Clarke opined, with a reasonable degree of mechanical certainly, that the elevator malfunction described by plaintiff "was mechanically and physically feasible and possible, and was clearly caused by defective parts" that would have been discovered by the defendants during the course of inspections. Clarke noted that defendants' expert entirely ignored the fact that the elevator had to be brought down to the lobby and the doors forcefully pried open, demonstrating the existence of a defect. Clarke explained that the mechanical parts and safety devices identified in his affidavit as the cause of the accident can intermittently malfunction, explaining why plaintiff might not have experienced any problem with the elevator on the preceding day.

The motion court granted defendants' motion and dismissed the complaint. The court found that defendants made a prima facie showing that the accident could not possibly have occurred

as alleged by plaintiff, and plaintiffs, in turn, had failed to raise a triable issue of fact, dismissing Clarke's expert opinion as "speculative." We hereby reverse and reinstate the complaint.

Defendants failed, prima facie, to establish entitlement to summary judgment. "An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found" (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]). Defendants submitted virtually no evidence regarding the maintenance and inspection history of the elevator, either pre or post-accident. The only document produced in response to discovery requests was a "work log" which was referenced during the deposition of Kavanagh – who, notably, was not competent to testify concerning defendants' maintenance and inspection practices at the time of the incident – and which does not even appear in the record. A defendant is not entitled to summary judgment on notice grounds where there is a failure to present sufficient evidence regarding its maintenance procedures in respect of an allegedly malfunctioning elevator (*see Green v City of New York*, 76 AD3d 508 [2010]).

Even without defendants' failure, plaintiff's invocation of the doctrine of res ipsa loquitur raised a triable issue of material fact. Plaintiff testified that the elevator dropped suddenly, causing him to fall. When he regained consciousness, he notified the building superintendent of the emergency, and had to be lowered to the lobby level, where several persons had to pry the door open. Certainly, this is the type of event that does not ordinarily happen in the absence of negligence, and plaintiffs are entitled to invoke the doctrine as against defendants based on plaintiff's testimony concerning the elevator malfunction (*see e.g. Kleinberg v City of New York*, 61 AD3d 436, 438 [2009] [free-falling elevator is not an event that ordinarily happens in the absence of negligence]; *Miller v Schindler Elev. Corp.*, 308 AD2d 312 [2003] [applying doctrine where plaintiff testified that elevator dropped suddenly, causing her to fall, notwithstanding defendant's evidence that the elevator was functioning immediately after the incident]).

The case of *Williams v Swissotel N.Y.* (152 AD2d 457 [1989]) is instructive. In *Williams*, the plaintiff was injured when the elevator on which he was riding dropped nine stories and abruptly stopped just below the lobby floor landing. Although one of defendant's principals maintained, as here, that the accident as

described by the plaintiff was "physically impossible" due to the existence of certain safety features and the findings of a post-accident inspection revealing no "telltale markings" on the elevator cable, this Court found that the testimony of plaintiff was sufficient to support application of the res ipsa doctrine, stating "the testimony of [plaintiff] as to how the elevator fell is sufficient evidence, if found credible by the trier of fact, to support the application of the doctrine" (*id.* at 458).

Plaintiff's testimony, as corroborated by the contemporaneous incident report and witness statement, was sufficient to allow a fact finder to determine that the misleveling and/or free-fall of the elevator was the kind of accident that would not ordinarily happen in the absence of negligence. Defendants had exclusive control over the mechanisms and devices in the elevator, and there is no evidence that the incident was due to any action on the part of plaintiff. The motion court thus erred in refusing to allow the case to proceed to trial on res ipsa loquitur grounds and in dismissing the complaint as a matter of law.

It was also error to dismiss the affidavit of plaintiffs' expert Clarke as "speculative." Clarke's affidavit was not speculative, but rather, constituted legitimate opposition by an

opposing expert, refuting and challenging the claim that the accident was "physically and mechanically impossible." Mr. Clarke, who had 38 years of experience in elevator construction, installation, maintenance and repair, directly challenged the statements of D'Ambra that the accident was not physically or mechanically possible, and provided a list of possibilities that could have caused the misleveling, including mechanical functions that D'Ambra never ruled out, mentioned, or addressed. Further, D'Ambra, in rendering his expert opinion, entirely ignored the undisputed fact that it took twenty minutes to bring the elevator down to the lobby after it became stuck and that plaintiff's supervisor and several other security guards had to forcefully pry the doors open in order to free plaintiff.

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

ENTERED: MAY 10, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5004 Tribeca Lending Corporation, Index 105275/07
Plaintiff-Respondent,

-against-

Gregory Bartlett,
Defendant-Appellant.

_____

Gregory M. Bartlett, appellant pro se.

Solferino & Solferino, L.L.P., Mineola (Thomas P. Solferino of counsel), for respondent.

_____

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered August 18, 2009, which, upon reargument, adhered to the original determination denying defendant's motion to vacate a judgment of foreclosure and sale, unanimously affirmed, without costs.

Defendant demonstrated neither a reasonable excuse for his default nor a meritorious defense to this action (*see* CPLR 5015[a][1]). His excuse that the attorney he hired did not represent his interests does not address his own numerous failures preceding his alleged hiring of the attorney. Indeed, defendant's personal check made payable to counsel is dated nearly eight months after the judgment had been entered in plaintiff's favor. Defendant's vague assertion of "predatory

lending," even construed liberally to invoke former Banking Law § 6-l (*see* L 2007, ch 552, § 1), fails to demonstrate a meritorious defense, because the loan at issue does not fall within the parameters of a high-cost home loan as defined by that statute. Similarly, defendant's argument that plaintiff orally promised to provide him with a second loan to finance his purchase of the property is without merit. Such an agreement would be void unless memorialized, pursuant to the statute of frauds (*see* General Obligations Law §§ 5-701, 5-703), and defendant did not allege, much less show, that plaintiff's promise was memorialized.

To the extent that defendant's motion to vacate can be construed as based on lack of jurisdiction, pursuant to CPLR 5015(a)(4), the motion fails because defendant formally appeared in this action in June 2007 when he served an answer (*see* CPLR 320). The fact that an order was entered in January 2008

striking his answer does not vitiate defendant's formal appearance or divest the court of personal jurisdiction over him.

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

ENTERED: MAY 10, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5005 In re Stephon M.

- - - - -

William W.,
Petitioner-Appellant,

The New York Foundling Hospital,
Respondent-Respondent,

Ruby M., et al.,
Respondents.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Law Offices of Quinlan and Fields, Hawthorne (Daniel Gartenstein of counsel), for The New York Foundling Hospital, respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), attorney for the child.

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Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about May 27, 2010, which, in a proceeding pursuant to article 6 of the Family Court Act, dismissed, without a hearing, a petition for custody of a child, unanimously affirmed, without costs.

Petitioner, who is unrelated to the subject child, failed to make a sufficient evidentiary showing to support his conclusory and nonspecific allegations that special circumstances justified a hearing on the issue of whether awarding him custody would be

in the child's best interests (*see Naomi C. v Russell A.*, 48 AD3d 203, 203 [2008]). Given that the child has lived with his foster parent for many years and wishes to remain in that home where, by all accounts, he is happy and thriving, his best interests would not be served by granting custody to petitioner (*see Matter of Geneva B. v Administration for Children's Servs.*, 73 AD3d 406 [2010]).

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

ENTERED: MAY 10, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5007-
5008 Ryan J. Howard, Index 109987/07
Plaintiff-Respondent,

-against-

Alexandra Restaurant,
Defendant-Respondent,

George L. Repetti, etc., et al.,
Defendants-Appellants.

_____

Thomas D. Hughes, New York, (Richard C. Rubinstein of counsel), for appellants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for Ryan J. Howard, respondent.

Gibson & Behman, P.C., New York (Bella I. Pevzner of counsel), for Alexandra Restaurant, respondent.

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Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered June 3, 2010, insofar as it denied defendants George L. Repetti, as executor of the estate of John L. Repetti, and Maxwell-Kates, Inc.'s motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, said defendants' motion granted and the complaint and all cross claims dismissed as against them. The Clerk is directed to enter judgment in favor of the moving defendants accordingly. Appeal from order, same court and Justice, entered December 29, 2010, which denied the moving defendants' motion for

reargument or renewal, unanimously dismissed, without costs, as academic.

Plaintiff asserts he was injured as he descended a metal staircase after dining at Alexandra Restaurant, located in Manhattan at 455 Hudson Street. Plaintiff testified his accident occurred because the sixth step (about halfway down the stairs) had a clear wet substance on it, causing him to slip and fall down the remaining steps, hitting his left shoulder against the basement floor.

It is well settled that "[a] landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [2010]).

Although the lease agreement does state that the owner of the premises had the right to reenter to make repairs, plaintiff failed to show that the owner violated any specific statutory safety provision. Although plaintiff submitted a report in which

his expert opined that the accident occurred as a result of structural defects in the stairs, that conclusion was at odds with plaintiff's own deposition testimony, which showed no causal connection between the alleged defects and plaintiff's accident. Hence, the report lacked value.

Pursuant to the lease, the sole responsibility for maintaining the area where plaintiff alleges he sustained his injuries belonged to the tenant, with regard to nonstructural defects. Therefore, the out-of-possession owner or, here, his estate, cannot be held liable under these circumstances (*see Lewis v Sears, Roebuck & Co.*, 35 AD3d 273, 274 [2006]; *see also Dexter v Horowitz Mgt.*, 267 AD2d 21, 22 [1999]). In addition, there is no evidence in the record that shows defendant Maxwell-Kates, Inc., as the managing agent for the premises, had complete and exclusive control of the demised space (*see Mangual v U.S.A. Realty Corp.*, 63 AD3d 493 [2009]; *Hakim v 65 Eighth Ave., LLC*, 42 AD3d 374, 375 [2007]; *Gardner v 1111 Corp.*, 286 App Div 110, 112-113 [1955], *affd* 1 NY2d 758 [1956]). Thus, the moving defendants have established their prima facie entitlement to summary

judgment, which plaintiff failed to rebut (*see O'Halloran v City of New York*, 78 AD3d 536, 537 [2010]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]).

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

ENTERED: MAY 10, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5009 Douglas Dean, et al., Index 600989/07
Plaintiffs-Appellants,

-against-

Tower Insurance Company of New York,
Defendant-Respondent.

_____

Bleakley Platt & Schmidt, LLP, White Plains (Robert D. Meade of counsel), for appellants.

Law Office of Max W. Gershweir, New York (Joseph S. Wiener of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered May 7, 2010, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiffs' cross motion for summary judgment on liability, unanimously modified, on the law, defendant's motion denied, the complaint reinstated, and otherwise affirmed, without costs.

Defendant failed to satisfy its prima facie burden on its motion for summary judgment. Because the "residence premises" insurance policy fails to define what qualifies as "resides" for the purposes of attaching coverage, the policy is ambiguous in the circumstances of this case, where the plaintiffs-insureds purchased the policy in advance of closing but were then unable to fulfill their intention of establishing residency at the

subject premises due to their discovery and remediation of termite damage that required major renovations. "[B]efore an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). Accordingly, the ambiguity in the policy must be construed against defendant under the facts of this case, and precludes the grant of summary judgment in its favor (*see Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]). *Marshall v Tower Ins. Co. of N.Y.* (44 AD3d 1014 [2007] is inapposite because it did not address whether the term "residence premises" is ambiguous in light of the policy's failure to define "resides." Moreover, unlike here, the plaintiff in *Marshall* had no intention of living at the premises (*see Marshall v Tower Ins. Co. of N.Y.*, 12 Misc3d 117OA [Sup Ct 2006]).

An issue of fact as to whether plaintiffs misrepresented their intention to reside in the subject premises as contemplated

by the policy precludes a grant of summary judgment to both parties.

We have considered the parties' remaining contentions and find them to be without merit.

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

ENTERED: MAY 10, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5011-
5011A

The People of the State of New York,
Respondent,

Ind. 5179/06
3344/07

-against-

Daniel Rodriguez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael McLaughlin and Steven R. Berko of counsel), for appellant.

Daniel Rodriguez, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; William A. Wetzel, J. at jury trial and sentencing), rendered October 9, 2007, convicting defendant of murder in the second degree, robbery in the first and second degrees and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 15 years to life, unanimously affirmed. Judgment, same court (William A. Wetzel, J.), rendered October 9, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a concurrent term of 3 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing

the prison term to 1 year, and otherwise affirmed.

The court properly denied defendant's suppression motion. The record supports each of the theories on which the court denied suppression.

A detective investigating a murder came upon defendant, who was visibly committing the violation of unlawful possession of marijuana (Penal Law § 221.05). Accordingly, the detective had probable cause to believe that defendant committed a violation in his presence (*see* CPL 140.10[1][a]). The arrest was lawful, since a police officer's authority to effect a custodial arrest for a violation, other than a minor vehicular offense (*see People v Marsh*, 20 NY2d 98 [1967]), remains valid even where the officer has the option of issuing a summons instead (*People v Lewis*, 50 AD3d 595 [2008], *lv denied* 11 NY2d 790 [2008]).

It is irrelevant whether the detective's primary motivation for making an arrest, instead of issuing a summons, may have been a desire to obtain evidence relating to the homicide. The officer's subjective state of mind would not invalidate the arrest because it was justified by the circumstances, viewed objectively (*see Whren v United States*, 517 US 806, 812-813 [1996]). An "arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable

cause," and "his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause" (*Devenpeck v Alford*, 543 US 146, 153 [2004]; *see also People v Robinson*, 97 NY2d 341, 349 [2001]). Since there was a valid custodial arrest, the officer properly searched defendant incident to that arrest, and all subsequent fruits of the arrest were lawfully obtained.

In any event, the evidence also supports the hearing court's finding that there was probable cause to arrest defendant for the homicide. Defendant matched the description of one of the three suspects. The description, standing alone, would have fit too many people to justify an arrest. However, when taken together with strong circumstantial evidence linking defendant to one of the other suspects, it established probable cause, which does not require proof beyond a reasonable doubt (*see Brinegar v United States*, 338 US 160, 175 [1949]; *People v Bigelow*, 66 NY2d 417, 423 [1985]).

The record does not support defendant's speculative assertion that he was subjected to a strip search. We have considered and rejected defendant's remaining suppression arguments.

Defendant's juror misconduct argument is similar to an

argument we rejected on a codefendant's appeal (*People v Almonte*, 73 AD3d 531 [2010], *lv denied* 15 NY3d 771 [2010]), and we find no reason to reach a different result. Defendant did not preserve his claim that the court should have charged justification, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits for the reasons we stated in rejecting a similar argument made by the codefendant (*id.*).

To the extent the existing record permits review, we find that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

As the People concede, the sentence on the controlled substance conviction should be modified, as indicated, to conform to the plea agreement.

Defendant's pro se 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.

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

ENTERED: MAY 10, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5013 In re Louann Filonuk, Index 104898/10
Petitioner-Appellant,

-against-

John B. Rhea, etc.,
Respondent-Respondent.

_____

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (Ronald S. Languedoc of counsel), for appellant.

Sonya M. Kaloyanides, New York (Laura R. Bellrose of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered October 19, 2010, which denied the petition seeking to annul New York City Housing Authority's (NYCHA) determination, dated December 16, 2009, denying petitioner's remaining family member (RFM) grievance, and dismissed this proceeding brought pursuant to CPLR article 78, unanimously vacated, the petition treated as one transferred to this Court for de novo review, and upon such review, the challenged determination confirmed, the petition denied and the proceeding dismissed, without costs.

The subject petition raised an issue of substantial evidence and thus the proceeding should have been transferred to this Court pursuant to CPLR 7804(g). Accordingly, we will "treat the substantial evidence issues de novo and decide all issues as if

the proceeding had been properly transferred" (*Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1992]).

The determination that petitioner did not qualify for RFM status is supported by substantial evidence and has a rational basis in the record (*see* CPLR 7803[4]; *Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). The record supports the agency's finding that petitioner did not become an authorized occupant of her mother's apartment prior to her death in 2006 (*see Matter of Valentin v New York City Hous. Auth.*, 72 AD3d 486, 486 [2010]). Although NYCHA's written consent requirement is not a formal rule or regulation, petitioner was required to obtain such consent in order to be entitled to RFM status (*see Matter of Abdil v Martinez*, 307 AD2d 238, 241-242 [2003]).

Contrary to petitioner's contention, there is no evidence that NYCHA knew or implicitly approved of her occupancy in the apartment (*see Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289, 291 [2004]). Petitioner was not listed on her mother's affidavits of income, data summary, or any other tenant records.

Petitioner lacked standing to assert an American with Disabilities Act claim on her mother's behalf (*see Matter of Rivera v New York City Hous. Auth.*, 60 AD3d 509, 510 [2009]). She also lacked standing to assert a claim based on associational

discrimination; there was no evidence that she sustained an independent injury causally related to the denial of federally required services to her disabled mother (*cf. Loeffler v Staten Is. Univ. Hosp.*, 582 F3d 268, 279-280 [2d Cir 2009, Wesley, J., concurring]).

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

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

ENTERED: MAY 10, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5015 The People of the State of New York, SCI 03026/09
Respondent,

-against-

Duane Mims,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered on or about August 24, 2009 unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: MAY 10, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5016-
5016A-
5016B-
5016C

In re Chelsea C., and Others,

Dependent Children Under the Age of Eighteen Years, etc.,

Bethania C., etc.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

Rosin, Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child Chelsea C.

Law Offices of Randall S. Carmel, P.C., Syosset (Randall S. Carmel of counsel), attorney for the children Victor C., Courtney C., and Richard C.

_____

Orders of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about May 6, 2009, which, upon a fact-finding of permanent neglect, terminated respondent's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The agency demonstrated by clear and convincing evidence

that it exerted diligent efforts to encourage and strengthen the parental relationship by referring respondent for appropriate therapy and a parenting skills class in her native language (*see Matter of Sheila G.*, 61 NY2d 368, 381 [1984]). Respondent, a non-offender coping with sexual abuse, elected to ignore the court's directive that she be referred for counseling with a therapist trained in sexual abuse cases and instead selected a therapist with limited training in that area. She also chose to attend a parenting skills class in English, although she required a Spanish translator in court proceedings. Respondent failed to demonstrate that she took reasonable steps to correct the conditions that led to the children's placement (*see Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]). Indeed, she admitted that she rejected the agency's referrals and did not commence therapy until more than a year after the children were removed from her home.

The record supports the court's determination that the best interests of the children would be served by terminating respondent's parental rights and freeing the children for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). All the children have been doing well in foster homes, where they have resided for several years. All stated that they

do not want contact with respondent, who had adopted them. Three of the children want to be adopted by their foster parents, who want to adopt them, and the fourth child, who was 17 and had reestablished contact with her biological family, stated that she wanted to remain in the foster home until she reached her majority. A suspended judgment would not be in the children's best interests (*see Matter of Michael B.*, 80 NY2d 299, 310 [1992]).

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

ENTERED: MAY 10, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5017 Nancy Angulo, et al., Index 15952/06
Plaintiffs-Respondents, 85526/06
85993/07

-against-

Concourse One Company, LLC,
Defendant-Appellant,

Jitanu Services, Inc.,
Defendant.

- - - - -

Concourse One Company, LLC,
Third-Party Plaintiff,

-against-

Jitanu Services, Inc.,
Third-Party Defendant.

- - - - -

Concourse One Company, LLC,
Second Third-Party Plaintiff-Appellant,

-against-

Bronx-Lebanon Hospital Center,
Second Third-Party Defendant-Respondent.

_____

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellant.

Bamundo, Zwal & Schermerhorn, New York (Ben Bartolotta of counsel), for Angulo respondents.

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for Bronx-Lebanon Hospital Center, respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.),

entered August 25, 2010, which denied defendant Concourse One

Company, LLC's motion for summary judgment dismissing the complaint as against it and for summary judgment on its claim for contractual indemnification against third-party defendant Bronx-Lebanon Hospital Center, unanimously affirmed, without costs.

Plaintiff was injured when she fell on the lobby floor as she exited defendant Concourse One's (defendant) building. It was a rainy day, and the floor was wet, and plaintiff slipped when she stepped off the mat that had been laid on the floor to go around two or three pieces of furniture that occupied a portion of the mat. There is evidence in the record that defendant knew that furniture was being moved through the lobby that day. Thus, an issue of fact exists whether defendant failed to remedy a dangerous condition in the lobby and thereby to discharge its "duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress" (*Peralta v Henriquez*, 100 NY2d 139, 143 [2003]).

Issues of fact exist whether defendant was negligent and whether the indemnification provision in the lease agreement between defendant and Bronx Lebanon Hospital Center "evinces an unmistakable intent to indemnify" defendant for its own

negligence (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 [2006]).

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

ENTERED: MAY 10, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5019 Rosa Severino, Index 100676/08
Plaintiff-Appellant,

-against-

157 Broadway Associates, LLC, et al.,
Defendants-Respondents.

_____

Burns & Harris, New York (Christopher J. Donadio of counsel), for appellant.

Law Offices of Cheng & Associates, PLLC, Long Island City (Pui Chi Cheng of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered November 27, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Upon the record in this personal injury case, it cannot be said that the defects in the exterior stairway which may have contributed to plaintiff's accident were trivial and thus not actionable as a matter of law (*Trincere v County of Suffolk*, 90 NY2d 976, 977-78 [1997]; *see also Nin v Bernard*, 257 AD2d 417 [1999]). Further, as the record reveals that defense counsel never inquired of plaintiff as to the precise cause of her accident, plaintiff was entitled to submit a more detailed

affidavit clarifying her deposition testimony (*see Bosshart v Pryce*, 276 AD2d 314, 315 [2000]).

In addition, further issues of fact remain as to whether the defendants had notice of the allegedly dangerous conditions (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: MAY 10, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5020 Amanda Villaverde, Index 308521/08
Plaintiff-Respondent,

-against-

M.A. Santiago-Aponte, et al.,
Defendants-Appellants.

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Mead Hecht Conklin & Gallagher, LLP, Mamaroneck (Sara Luca Salvi of counsel), for M.A. Santiago-Aponte and Veguilar Butchers Market, Inc., appellants.

Gannon, Lawrence & Rosenfarb, New York (Lisa L. Gokhulsingh of counsel), for Hub Meat Market, LLC., appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered November 19, 2010, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff, a pedestrian, alleges that she was struck by defendants' right-turning truck while crossing the street within the crosswalk at a controlled intersection. Plaintiff claims the traffic light was in her favor at the time of the accident. Nevertheless, plaintiff's claim that she had the right of way hinges upon whether or not she was struck while in the crosswalk

(*see e.g. Fannon v Metro. Transp. Auth.*, 133 AD2d 211 [1987] *see also Brito v New York City Tr. Auth.*, 188 AD2d 253 [1992], *appeal dismissed* 81 NY2d 993 [1993]). In this regard, the truck driver's testimony that his vehicle was past the crosswalk when the accident occurred was sufficient to raise a triable issue of fact as to whether plaintiff had the right of way. Moreover, the driver's testimony that upon making the turn, he checked the intersection for pedestrians and saw no one similarly raises a triable factual issue as to whether he used due care to avoid the collision (*see e.g. Barbieri v Vokoun*, 72 AD3d 853 [2010]).

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

ENTERED: MAY 10, 2011

CLERK

Sweeny, J.P., DeGrasse, Richter, Manzanet-Daniels, JJ.

5022N- 5023N- 5024N- 5025N

CWCapital Asset Management LLC, etc.,
Plaintiff-Respondent,

-against-

Charney-FPG 114 41st Street, LLC,
Defendant-Appellant,

Ibex Construction Company, LLC, et al.,
Defendants.

Index 117469/09

_____

Crowell & Moring LLP, New York (Gary A. Stahl of counsel), for appellant.

Venable LLP, New York (Brent W. Procida of counsel), for respondent.

_____

Amended order, Supreme Court, New York County (Marcy S. Friedman, J.), entered March 10, 2010, which granted plaintiff's motion for appointment of a temporary receiver in a mortgage foreclosure action, unanimously affirmed, with costs. Orders, same court and Justice, entered January 22, 2010, unanimously dismissed, without costs, as superseded by the March 10, 2010 order.

Although a plaintiff in a foreclosure action must generally establish ownership of the mortgage and mortgage note (*see Witelson v Jamaica Estates Holding Corp. I*, 40 AD3d 284 [2007]), and the plaintiff in this action does not hold the mortgage, it

has standing to bring the foreclosure action and seek appointment of a receiver. The foreclosure complaint identified the trustee as the mortgage holder, the action was expressly maintained in plaintiff's capacity as servicing agent, and, in the Pooling and Servicing Agreement, the trustee delegated to plaintiff authority to act with respect to the subject mortgage (*see Fairbanks Capital Corp. v Nagel*, 289 AD2d 99 [2001]).

Contrary to defendant's contention, that the mortgage in *Fairbanks Capital* was actually assigned to the servicing agent is not a "critical fact" distinguishing it from the instant circumstance, inasmuch as the mortgage in that case was assigned to the servicing agent after the foreclosure action had been commenced, so the assignment could not have provided the basis for the servicing agent's standing (*see US Bank N.A. v Madero*, 80 AD3d 751, 752 [2011]). There is no requirement that the agent's authority to foreclose be granted in a document as to which defendant is a party, such as the mortgage instrument or other loan documents (*but see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2007]).

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

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

ENTERED: MAY 10, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5026 The People of the State of New York, Ind. 3228/07
Respondent,

-against-

Angel Beauchamp,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered May 19, 2009, convicting defendant, after a jury trial, of robbery in the first degree (two counts), burglary in the first degree and unlawful imprisonment in the first degree, and sentencing him to an aggregate term of 20 years, unanimously affirmed.

The trial court properly denied defendant's request for new counsel (*see People v Porto*, 16 NY3d 93, 100 [2010]). Approximately three weeks before, at a calendar call, another court had denied the same request. The calendar court had made a thorough inquiry into defendant's complaints, including alleged communication problems, and defendant does not challenge that determination on appeal. When defendant, through counsel, made

the same request at the outset of jury selection, the trial court inquired whether there had been any new developments. When neither defendant nor his counsel had anything to add, the trial court deferred to the prior ruling by the calendar court. This was a proper exercise of discretion under these circumstances (*see People v Sims*, 18 AD3d 372 [2005], *lv denied* 5 NY3d 833 [2005]). The trial justice was "free to exercise his discretion in deciding whether to revisit the issue, or to defer to the earlier, discretionary ruling" (*People v Evans*, 94 NY2d 499, 506 [2000]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The police found defendant's fingerprints on a vase at the crime scene. The only plausible inference was that they were left on the vase during the crime (*see e.g. People v McKenzie*, 2 AD3d 348 [2003], *lv denied* 2 NY3d 764 [2004]), particularly since the vase had recently been cleaned. Defendant's challenge to the reliability of fingerprint

evidence in general is unsupported the record (*see People v Akili*, 289 AD2d 55, 56 [2001], *lv denied* 98 NY2d 635 [2002]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 10, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5027-5028 Atria Builders, L.L.C., et al., Plaintiffs-Appellants, Index 602785/08

-against-

Morgan 32 Holdings, L.L.C., et al., Defendants,

Petra Mortgage Capital Corp., L.L.C., etc., Defendant-Respondent.

_____

Richard L. Yellen & Associates, LLP, New York (Richard L. Yellen of counsel), for appellants.

Warshaw, Burstein, Cohen, Schlesinger & Kuh, LLP, New York (Robert Fryd of counsel), for respondent.

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Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered December 28, 2009, and order, same court and J.H.O., entered January 5, 2010, which, to the extent appealed from as limited by the briefs, granted defendant Petra Mortgage Capital Corp, L.L.C., a/k/a Petra Capital Management's motion to dismiss plaintiff's causes of action for money had and received, conversion, and foreclosure on a mechanic's lien, unanimously affirmed, with costs.

Plaintiff Atria Builders, L.L.C. (Atria) and defendant owner Morgan 32 Holdings, L.L.C. (Morgan) entered a construction contract requiring the former to provide letters of credit in the

total amount of $1,000,000, which were to be drawable solely by the owner's lender, defendant Petra Mortgage Capital Corp. (Petra), in the event of default.

Pursuant to a loan and security agreement (Loan Agreement), entered into by Morgan, as borrower, and Petra, Morgan was to provide letters of credit in the aggregate amount of $1,000,000, as well as an additional letter of credit in the amount of $750,000, as security for Atria's performance under the construction contract.

The Loan Agreement provided that upon the default by Atria under the construction contract, Petra was authorized to draw on the letters of credit. Pursuant to its own obligations under the construction contract, Atria posted two letters of credit, each in the sum of $500,000, and each naming Petra as beneficiary.

In connection with the project, Atria incurred escalated construction costs and time delays, which were allegedly due to Morgan's and Petra's failure to fund certain necessary changes to the scope of the work. Morgan terminated the construction contract, and Petra drew down upon both letters of credit in the aggregate amount of $1,000,000.

Thereafter, plaintiffs commenced this action seeking to recover, inter alia, damages allegedly incurred from Petra's

improper draw down. As relevant to this appeal, plaintiffs asserted causes of action against Petra for money had and received and conversion. Although plaintiffs argue that they also sought a mechanic's lien against Petra, the complaint alleged that cause of action against only Morgan.

J.H.O. Gammerman correctly found that plaintiffs' claims for money had and received were not viable. Atria's right to recover losses based on Petra's improper draw down on the letters of credit was expressly covered by the construction contract. That contract identified Morgan as the party from which Atria was required to seek indemnification and payment. Thus, Atria's quasi-contract claim for money had and received was barred by the existence of the written construction contract (*see Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128, 138 [1991]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]; *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [2003]).

Further, the record shows that Atria did not have a tangible and definable interest in the letters of credit sufficient to maintain a cause of action for conversion (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]).

With respect to plaintiffs' purported cause of action for

foreclosure on a mechanic's lien, even if the cause was asserted against Petra, plaintiffs did not address this issue below, and we decline to review it in the interests of justice.

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

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

ENTERED: MAY 10, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5029 In re Anthony P.,

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

Shanae P.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent,

Robert B.,
Respondent.

_____

Andrew J. Baer, New York, for appellant.

Rosin Steinhagen Mendel, New York (Rebecca L. Mendel of counsel), for Episcopal Social Services, respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Margaret Tarvin of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 2, 2010, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed the custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The determination that the agency exercised diligent efforts

to support reunification of respondent and her child was supported by clear and convincing evidence that the agency provided respondent with a service plan and referrals tailored to her needs, and required her to complete anger management training, parenting skills training, and therapy, among other things. The agency diligently sought to "encourage a meaningful relationship between the parent and child" by scheduling regular supervised visitation, to no avail (*see* Social Services Law 384-b[7][f]; *Matter of Aliyah Julia N. [Cecelia Lee N.]*, 81 AD3d 519 [2011]).

Clear and convincing evidence supports the determination that respondent permanently neglected the child (*see* Social Services Law § 384-b[7][a]). Notwithstanding her progress during the relevant statutory period, respondent was convicted of attempted murder and arrested for assaulting the child's father after attending two anger management programs. Respondent was also arrested for prostitution. This indicates that she has not sufficiently addressed the initial problems, i.e., the criminal and violent tendencies, "that led to [the child's] foster care placement in the first place" (*Matter of Alpacheta C.*, 41 AD3d 285 [2007], *lv denied* 9 NY3d 812 [2007]; *see also Matter of Violeta P.*, 45 AD3d 352 [2007]). Further, the agency amply

demonstrated, and respondent conceded, that she regularly missed visits with the child, cancelled at the last minute, arrived late, left early, and failed consistently to cancel or confirm appointments, as required (*see Matter of Aisha C.*, 58 AD3d 471, 472 [2009], *lv denied* 12 NY3d 706 [2009]; *see Matter of Kimberly Carolyn J.*, 37 AD3d 174 [2007], *lv dismissed* 8 NY3d 968 [2007]). Moreover, the record demonstrates less than successful visits.

A preponderance of the evidence demonstrates that the child's best interests are served by terminating respondent's parental rights (*see Matter of Mark Eric R. [Juelle Virginia G.]*, 80 AD3d 518 [2011]). The record shows that the child has been living in a well kept and safe home with a foster mother who has tended to his day-to-day needs since 2008. While respondent argues that she has bonded with the child, there is no presumption that the child's best interest lies in placement with a birth parent, and the record demonstrates that the child shares a stronger bond with his foster mother (*see Matter of Male M.*, 210 AD2d 136 [1994]).

Respondent's request for a suspended judgment is unpreserved

and, in any event, unwarranted (*see Matter of Jada Serenity H.*, 60 AD3d 469 [2009]).

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

ENTERED: MAY 10, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5030 Ciampa Estates, LLC, et al., Index 116424/07
Plaintiffs-Appellants,

-against-

Tower Insurance Company of New York,
Defendant-Respondent,

Bellarose Construction Corp., et al.,
Defendants.

_____

Carroll, McNulty & Kull L.L.C., New York (Ann Odelson of counsel), for appellants.

Law Office of Max W. Gershweir, New York (Joshua L. Seltzer of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered March 12, 2010, which, insofar as appealed from as limited by the briefs, denied the motion of plaintiffs Ciampa Estates, LLC (Estates) and Everest National Insurance Company (Everest) for summary judgment and granted defendant's cross motion for summary judgment dismissing the complaint and declaring that defendant has no obligation to defend or indemnify Estates and Everest in the underlying action, unanimously affirmed, without costs.

An insured's failure to comply with the notice of claim provision vitiates a contract of insurance (*see Great Canal*

Realty Corp. v Seneca Ins. Co., 5 NY3d 742, 743 [2005]). Here, the only timely notice of claim was submitted not by Estates, an additional insured under the subject policy, but on behalf of plaintiff Ciampa Management Corp. (Management), Estates' corporate affiliate. Notice from another insured, or from another source, does not satisfy an insured's obligation to provide timely notice (*see Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 43 [2002]). There was no evidence that Management was sending the notice as an agent of Estates (*cf. United States Underwriters Ins. Co. v Falcon Constr. Corp.*, 2007 WL 1040028, *9, 2007 US Dist LEXIS 25391, * 29-30 [SD NY 2007]), and since Management was not even an insured, the two were not similarly situated (*compare Motor Veh. Acc. Indem. Corp. v United States Liab. Ins. Co.*, 33 AD2d 902 [1970]). Furthermore, because defendant sent out its disclaimer of coverage within six days of ultimately receiving a notice of claim on behalf of Estates, the

disclaimer was timely as a matter of law under Insurance Law § 3420 (*see Matter of Temple Constr. Corp. v Sirius Am. Ins. Co.*, 40 AD3d 1109, 1112 [2007] [delay of eight days is not unreasonable as a matter of law]).

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

ENTERED: MAY 10, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5032 In re East 51st Street Crane Collapse Litigation — Index 113754/08, 769000/08

- - - - -

Rite Aid of New York, Inc.,
Plaintiff-Respondent,

-against-

East 51st Street Development Company, LLC, et al.,
Defendants.

- - - - -

[And A Third Party Action]

- - - - -

Lincoln General Insurance Company,
Fourth-Party Plaintiff-Respondent,

-against-

East 51st Street Development Company, LLC, et al.,
Fourth-Party Defendants,

Reliance Construction Group, etc.,
Fourth-Party Defendant-Appellant.

_____

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

Raven & Kolbe, LLP, New York (Michael T. Gleason of counsel), for Rite Aid of New York, Inc., respondent.

Schoenfeld Moreland, P.C., New York (Eric B. Schoenfeld of counsel), for Lincoln General Insurance Company, respondent.

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Order, Supreme Court, New York County (Karen S. Smith, J.), entered February 24, 2010, which, insofar as appealed from as

limited by the briefs, declared Lincoln's settlement with plaintiff Rite Aid and the plaintiff in another consolidated action, entitled *Juan Perez v New York City, et al.* (Supreme Court, New York County, Index No. 104106/09), to be in full satisfaction of its obligations under a commercial general liability policy issued to defendant Joy Contractors, Inc., and declared extinguished Lincoln's obligations to provide a defense for the insured and additional insureds under the Joy policy, unanimously affirmed, with costs.

Fourth-party defendant Reliance Construction Ltd., d/b/a RCG Group, s/h/a Reliance Construction Group and RCG Group, Inc., concedes that it did not object to the Perez and revised Rite Aid settlements. Hence, it failed to preserve the issue whether the motion court properly approved of those settlements (CPLR 5501[a][3]; *see e.g. Sadhwani v New York City Tr. Auth.*, 66 AD3d 405, 406 [2009], *lv denied* 14 NY3d 705 [2010]). Even were the question preserved, we find that the motion court properly exercised its discretion in approving the settlements (*see Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 178 [2008]).

We reject Reliance's argument that the language of the policy issued to Joy requires Lincoln to continue defending the

insureds even after the policy limit is exhausted. While the policy provides that Lincoln "will have the right and duty to defend the insured against any 'suit' seeking [bodily injury or property] damages," it also provides, "Our [the insurer's] right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements . . . "

Construing this commercial general liability policy language "in light of common speech and the reasonable expectations of a businessperson" (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 [2003] [internal quotation marks and citation omitted]), we find that it "makes clear that the [insurer] has no obligation to defend after the liability limits have been exhausted" (*Maryland Cas. Co. v W.R. Grace & Co.*, 794 F Supp 1206, 1220 n 11 [SD NY 1991], *revd on other grounds* 23 F3d 617 [2d Cir 1994], *cert denied* 513 US 1052 [1994]; *see Federal Ins. Co. v Cablevision Sys. Dev. Co.*, 836 F2d 54, 57 [2d Cir 1987]).

Nor are we persuaded that public policy considerations should compel us to override the clear language of the policy to extend Lincoln's duty to defend. We note that there is a New York State Insurance Department regulation that has been construed as requiring automobile insurers to pay all defense costs until a case ends. However, automobile insurers are not

excused from defense obligations by exhaustion of policy limits (*see* 11 NYCRR 60-1.1.[b]; *Haight v Estate of DePamphilis*, 5 AD3d 547, 548 [2004]).

The statutory mandate of a "continuous defense" duty on the part of automobile insurers is sensible in light of the expectations of the everyday consumers who benefit from, and in many instances are required to maintain, automobile insurance policies (*see Continental Ins. Co. v Burr*, 706 A2d 499, 501 [Del 1998] [automobile insurance policy language "will be read in a way that satisfies the reasonable expectations of the average consumer"]). Indeed, "[t]he [automobile liability insurance] regulation recognizes that a significant objective of mandatory insurance is the securing of competent defense counsel and payment of defense costs" (*Delaney v Vardine Paratransit*, 132 Misc 2d 397, 398 [1986]). However, there is no similar statutory

or regulatory authority for the proposition that a similar duty applies in the context of CGL insurance acquired by businesses.

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

ENTERED: MAY 10, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5033-
5033A The People of the State of New York, Respondent, Ind. 54169C/06 4366/06

-against-

Anthony Letterio,
Defendant-Appellant.

_____

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

_____

Judgments, Supreme Court, Bronx County (Harold A. Adler, J.), rendered on or about September 25, 2008, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

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

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

ENTERED: MAY 10, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5038 In re Isaiah W.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.

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Presentment Agency

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

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

_____

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about July 23, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the second degree and obstructing governmental administration in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence established that appellant attempted to cause physical injury to

a school employee (Penal Law § 120.05[10][a]). Appellant grabbed, twisted, and shook his teacher's wrist while threatening to "deck" or "kill" him. This evidence warranted the inference that appellant intended to injure the teacher (*see Matter of Tatiana N.*, 73 AD3d 186, 189-190 [2010]).

The evidence also established that appellant "attempted to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act" (Penal Law § 195.05). Appellant persisted in wearing a hat in a classroom, in violation of a school rule. When the teacher confiscated the hat, he was performing an "official function" under the statute (*see Matter of Sheyna T.*, 79 AD3d 449 [2010]). Appellant used force to prevent the teacher from retaining the hat.

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

ENTERED: MAY 10, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5039 Shu Chi Lam, Index 103695/06
Plaintiff-Appellant,

-against-

Wang Dong, et al.,
Defendants-Respondents.

_____

Morelli Ratner PC, New York (Adam E. Deutsch of counsel), for appellant.

Kelly, Rode & Kelly, LLP, Mineola (Susan M. Ulrich of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 2, 2009, which, in an action for personal injuries sustained when plaintiff pedestrian was struck by a motor vehicle, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by submitting affirmed medical reports of an orthopedist and a neurologist who concluded that plaintiff did not sustain a "permanent consequential limitation of use" or "significant limitation of use" of his head, neck or left knee (Insurance Law § 5102[d]). Defendants also submitted affirmed reports of two radiologists who concluded that the MRIs of plaintiff's neck, left knee and brain revealed preexisting

degenerative conditions in the neck and knee, and a prior stroke in the brain. Defendants further alluded to plaintiff's testimony that he had fractured his left knee 30 years ago.

In opposition, plaintiff failed to raise a triable issue of fact. He presented an affirmed report of his orthopedist, who found limited ranges of motion in the neck and left knee over one year after the accident, and concluded that the injuries were causally related to the accident. However, absent admissible contemporaneous evidence of alleged limitations, plaintiff cannot raise an inference that his injuries were caused by the accident (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660, 662-663 [2010]; *Rivera v Honey Express Cab Corp.*, 70 AD3d 578 [2010]). Plaintiff also failed to submit more recent examination results to rebut the findings of defendants' experts of full ranges of motion more than a year after the orthopedist's examination. Although plaintiff's expert acknowledged that the MRI reports noted degenerative changes in the neck and left knee and a prior stroke in plaintiff's brain, he set forth no objective basis or reason, other than the history provided by plaintiff, for concluding that the injuries resulted from the accident (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]; *Clemmer*, 74 AD3d at 662).

Dismissal of plaintiff's 90/180-day claim was also

appropriate, since plaintiff failed to raise a triable issue of fact as to causation or submit medical proof in support of the claim (*see Amamedi v Archibala*, 70 AD3d 449, 450 [2010], *lv denied* 15 NY3d 713 [2010]; *Valentin* v *Pomilla*, 59 AD3d 184, 186-187 [2009]).

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

ENTERED: MAY 10, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5042 Victoriano Ventura, Index 18594/04
Plaintiff-Appellant,

-against-

Ozone Park Holding Corp., et al.,
Defendants-Respondents.

_____

Gorayeb & Associates, P.C., New York (Mark H. Edwards of counsel), for appellant.

LaRose & LaRose, Poughkeepsie (Keith V. LaRose of counsel), for Ozone Park Holding Corp.; Beer, Inc.; Holland Farms Milk Company, Inc.; Q.F.D. of New York, Inc. and Babylon Dairy Co., Inc., respondents.

Carman, Callahan & Ingham, LLP, Farmingdale (Peter F. Breheny of counsel), for 3 Kings Collision, Inc., respondent.

Camacho Mauro & Mulholland, LLP, New York (Peter J. Lo Palo of counsel), for Reliable Auto Center, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 14, 2009, which, to the extent appealed from as limited by the briefs, granted defendant 3 Kings Collision, Inc.'s cross motion for summary judgment dismissing the common-law negligence claim against it, granted the motions of defendant Reliable Auto Center, Inc. and defendants Ozone Park Holding Corp.; Beer, Inc.; Holland Farms Milk Company, Inc.; Q.F.D. of New York, Inc.; and Babylon Dairy Co, Inc. (collectively, the Ozone defendants) for summary judgment dismissing plaintiff's

Labor Law §§ 200, 240(1), and common-law negligence claims against them, and denied plaintiff's cross motion to strike 3 Kings's answer, stay the summary judgment motions of Reliable and the Ozone defendants and compel the deposition of Reliable's principal, or for partial summary judgment on his Labor Law § 240(1) claim against Babylon, unanimously affirmed, without costs.

It is undisputed that the Workers' Compensation Board found Reliable to be plaintiff's employer. Summary judgment was properly granted in Reliable's favor on the ground that plaintiff's claims against Reliable are barred by Workers' Compensation Law § 11 (*see Hughes v Solovieff Realty Co., L.L.C.*, 19 AD3d 142, 143 [2005]). Given the foregoing, there was no basis to stay Reliable's motion.

Supreme Court also properly granted the Ozone defendants' motion for summary judgment and denied plaintiff partial summary judgment on his Labor Law § 240(1) claim against Babylon. Contrary to plaintiff's contention, the work he was performing at the time of the accident - attempting to remove a garage door motor from its box - does not amount to an alteration under Labor Law § 240(1) (*see Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 432 [2007]). Nor did plaintiff's work constitute a repair.

Rather, we find that it was routine maintenance, which is not a protected activity under Labor Law § 240(1) (*see Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53 [2004]; *Cordero v SL Green Realty Corp.*, 38 AD3d 202 [2007]).

Plaintiff's common-law negligence and Labor Law § 200 claims against the Ozone defendants were properly dismissed as well. There was no evidence, or even an allegation, that the Ozone defendants had the authority to supervise and control plaintiff's work (*see Brown v VJB Constr. Corp.*, 50 AD3d 373, 377 [2008]). Nor was there evidence that they had actual or constructive notice of the alleged defective ladder (*cf. Chowdhury v Rodriguez,* 57 AD3d 121, 132 [2008]).

Although an issue of fact exists as to whether the subject ladder belonged to 3 Kings or Reliable, Supreme Court properly granted 3 Kings's motion for summary judgment dismissing plaintiff's common-law negligence claim against it. There is no evidence that 3 Kings had actual or constructive notice of any defect in the ladder, nor is there any allegation that 3 Kings directed or controlled plaintiff's work (*see Owusu v Hearst Communications, Inc.*, 52 AD3d 285, 286 [2008]; *Ramos v HSBC Bank*, 29 AD3d 435, 436 [2006]). Further, even assuming that 3 Kings gave the ladder to plaintiff, as a gratuitous bailor, 3 Kings

only had a duty to warn of a known defect that was not readily discernible (*see Acampora v Acampora*, 194 AD2d 757, 758 [1993], *lv denied* 82 NY2d 664 [1994]*; Sofia v Carlucci*, 122 AD2d 263 [1986]). Plaintiff alleges that the subject ladder had no slip-resistant feet. We find that such a defect is readily discernible, and thus 3 Kings had no duty to warn (*see generally Sofia*, 122 AD2d at 263).

Although 3 Kings failed to provide a witness for deposition, there was sufficient evidence to determine its motion. Accordingly, there was no basis to stay its motion.

The court providently exercised its discretion in refusing to strike 3 Kings's answer (*see* CPLR 3126). Plaintiff failed to establish that 3 Kings engaged in willful and contumacious conduct (*see Pezhman v Department of Educ. of the City of N.Y.*, 79 AD3d 543 [2010]).

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

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

ENTERED: MAY 10, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5043 GS Plasticos Limitada, Index 650242/09
Plaintiff-Respondent,

-against-

Bureau Veritas,
Defendant,

Bureau Veritas Consumer
Products Services, Inc.,
Defendant-Appellant.

_____

Kilpatrick Townsend & Stockton LLP, New York (Jonathan E. Polonsky of counsel), for appellant.

AbdulJaami, PLLC, New York (Saboor H. AbdulJaami of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 14, 2010, which granted plaintiff's motion to dismiss defendants' counterclaim for libel, unanimously affirmed, with costs.

Plaintiff, a manufacturer of plastic "premiums" for promotional markets, claims that it lost business as a result of false reports of unusually high levels of arsenic in its product by defendant, a provider of consumer product testing services. Defendant answered and counterclaimed that plaintiff had committed libel per se in a May 28, 2005 letter to a non-party entity, which provided laboratory accreditation to defendant.

The statements at issue were not actionable to the extent the May 28 letter constituted "the publication of a fair and true report of [a] judicial proceeding," and were therefore protected by section 74 of the Civil Rights Law (*see Fishof v Abady*, 280 AD2d 417, 417 [2001]). The statements contained in the May 28 letter regarding "deficient practices, sheer lack of competence or other behavior" reflected the substance of plaintiff's complaint against defendants. In that complaint, plaintiff alleged, among other things, that it was "impossible for [defendant] to argue that it had responsibly conducted its analyses with due care and taken appropriate steps to perform its services in a skillful and competent manner," and did not suggest more serious conduct than was alleged in the complaint (*Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 436 [1995] [citations omitted]).

A statement "should not be dissected and analyzed with a lexicographer's precision" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 68 [1979]), and in the context of the nonparty's accreditation of defendant "for technical competence," the statement that such nonparty "should demonstrate that it is not complicit in [defendant's] behavior," was a substantially accurate report of the complaint

and subject to the Civil Rights Law § 74 absolute privilege.

While the statements that "it is likely that [defendant] has conducted many deficient and wrongful assessments" and that defendant "may continue in these practices," appear to go beyond the allegations in the complaint, we agree with the motion court that such statements are nonactionable expressions of opinion (*see Gross v New York Times Co.*, 82 NY2d 146, 153 [1993], citing *Steinhilber v Alphonse*, 68 NY2d 283, 292 [1986]). Based on use of the words "it is likely" and "may" when describing defendant's purported misconduct, an average reader would understand these words "'as mere *allegations* to be investigated rather than as *facts*'" (*Vengroff v Coyle*, 231 AD2d 624, 625 [1996] [citation omitted]). "[C]onsider[ing] the content of the communication as a whole, as well as its tone and apparent purpose" (*Brian v Richardson*, 87 NY2d 46, 51 [1995]), it was reasonable to conclude that if defendant used deficient testing with respect to plaintiff's products, further investigation was warranted.

There is no implication that the May 28 letter was based on any facts other than those included within the four corners of

the complaint, thus, the statements are not actionable as "mixed opinion" based on undisclosed facts (*Steinhilber v Alphonse*, 68 NY2d 283, 289-290 [1986]; *cf. Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 [2004]).

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

ENTERED: MAY 10, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5044N- Sean Nielsen, et al., Index 106040/08
5045N- Plaintiffs-Appellants,
5046N

-against-

New York State Dormitory Authority, et al.,
Defendants-Respondents.

- - - - -

New York State Dormitory Authority,
Third-Party Plaintiff-Respondent,

-against-

Metropolitan Steel Industries,
Inc., et al.,
Third-Party Defendants-Respondents.

- - - - -

Metropolitan Steel Industries,
Inc., et al.,
Fourth-Party Plaintiffs-Respondents,

-against-

The Crosby Group, Inc.,
Fourth-Party Defendant.

_____

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

Brill & Associates, P.C., New York (Corey M. Reichardt of counsel), for New York State Dormitory Authority, respondent.

Malapero & Prisco, LLP, New York (Mark A. Bethmann of counsel), for McKissack Turner Construction/JV, respondent.

Law Offices of Michael Pressman, New York (Howard Greenwald of counsel), for Metropolitan Steel Industries, INC. and Midlantic Erectors, Inc., respondents.

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Orders, Supreme Court, New York County (Paul Wooten, J.), entered October 25, 2010, which, to the extent appealed from, granted defendant New York State Dormitory Authority's motion to vacate plaintiffs' note of issue and denied the motions of plaintiffs and fourth-party defendant to sever the fourth-party action, unanimously affirmed, without costs.

The denial of plaintiffs' motion to sever the fourth-party action was a provident exercise of discretion, notwithstanding any delay in commencing the action (*see* CPLR 1010*; see also Escourse v City of New York*, 27 AD3d 319 [2006]). The main action will not be delayed to the prejudice of plaintiffs, the fourth-party defendant's discovery rights can be accommodated, and common questions of fact are present (*see Erbach Fin. Corp. v Royal Bank of Canada*, 203 AD2d 80 [1994]).

Plaintiffs never appealed from the order, same court and Justice, entered August 23, 2010, which, among other things, denied plaintiffs' cross motion to sever the third-party action. In any event, for the same reasons given with respect to the motion to sever the fourth-party action, the court providently exercised its discretion in denying the cross motion.

The court also providently exercised its discretion in granting the Dormitory Authority's motion to vacate plaintiffs'

note of issue. A note of issue should be vacated where, as here, it is based upon a certificate of readiness that incorrectly states that all discovery has been completed (*see Ortiz v Arias*, 285 AD2d 390, 390 [2001]; *Savino v Lewittes*, 160 AD2d 176, 177-178 [1990]).

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

ENTERED: MAY 10, 2011

CLERK