SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 2, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Andrias, Acosta, Moskowitz, Abdus-Salaam, JJ.

7887 In re Marie Perrette, Petitioner, Index 107706/10

-against-

New York City Department of Housing Preservation and Development, Respondent.

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Vincent J. Licata, New York, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondent.

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Determination of respondent New York City Department of Housing Preservation and Development (HPD), dated February 24, 2010, which, after a hearing, terminated petitioner's section 8 rent subsidy, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Cynthia S. Kern, J.], entered October 20, 2010), dismissed, without costs.

The Hearing Officer's finding that petitioner intentionally failed to report approximately $30,000 of income earned by her daughter during a three-year period is supported by substantial

evidence (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). He also found that while petitioner would not be able to afford the apartment without assistance, she will not be rendered homeless as a result of the termination of the subsidy, and that there are no mitigating circumstances sufficient to warrant reversal of HPD's termination of the benefits. Here, as in *Matter of Perez v Rhea* (__ NY3d __, 2013 NY Slip Op 00953 [2013]), "termination of plaintiff's tenancy was not 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.'" As noted by the Court in *Perez*, "[a] vital public interest underlies the need to enforce income rules pertaining to public housing. . . . The deterrent value of eviction [ ] is clearly significant and supports the purposes of the limited supply of publicly-supported housing." Notwithstanding the hardship to petitioner, the penalty of termination is confirmed (*see Matter of Cubilete v Morales*, 92 AD3d 470 [1st Dept 2012]).

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

ENTERED: APRIL 2, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9219 Jerzy Nacewicz, Index 301668/10
Plaintiff-Appellant-Respondent,

-against-

The Roman Catholic Church
of the Holy Cross,
Defendant-Respondent-Appellant.

_____

Block O'Toole & Murphy, LLP, New York (David L. Scher of counsel), for appellant-respondent.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Steven DiSiervi of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 23, 2012, which denied plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1) and defendant's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant plaintiff's motion, and otherwise affirmed, without costs.

Vlad Restoration, Ltd. was hired by defendant to perform a complete renovation of defendant's church. Plaintiff, a bricklayer's assistant employed by Vlad Restoration, was performing brickwork on the exterior of the church as part of the renovation. The "sidewalk bridge," or first tier, of a four-tiered exterior scaffold was accessible from the ground via a number of secured extension ladders. Plaintiff was working on

the ground level when the bricklayer told him to ask Zenon Bogucki, who was acting as substitute foreman for the day, a question. Plaintiff ascended to the sidewalk bridge using one of the properly secured ladders. When Bogucki still could not hear plaintiff from the sidewalk bridge, plaintiff began ascending a second extension ladder that was not properly secured. The ladder slid, causing plaintiff to fall to the sidewalk bridge approximately 10 feet below.

Labor Law § 240(1) imposes liability on contractors and owners for the existence of certain elevation-related hazards and the failure to provide an adequate safety device of the kind enumerated in the statute (*see Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). To establish a claim under this provision, a plaintiff must "show that the statute was violated and that the violation proximately caused his injury" (*Cahill*, 4 NY3d at 39). Accordingly, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*id.*). To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably

chose not to do so, causing the injury sustained (*see id.* at 40; *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

"It is well settled that failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)" (*Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 [1st Dept 1996]). Here, plaintiff has adduced sufficient evidence to show that he fell 10 feet from an unsecured extension ladder which slid. Plaintiff testified that the ladder was already set up for usage when he arrived on the sidewalk bridge. Defendant has not contradicted this claim, advancing only Bogucki's testimony that he saw the ladder lying on its side earlier in the day. Defendant's argument that plaintiff should have checked the ladder does not show intentional misuse or other egregious misconduct and amounts, at most, to contributory negligence, a defense inapplicable to a Labor Law § 240(1) claim (*see Hernandez v 151 Sullivan Tenant Corp.*, 307 AD2d 207, 208 [1st Dept 2003]).

Defendant also argues that plaintiff was the sole proximate cause of his injuries because he did not use the fire escape to ascend to the scaffold's second tier. However, the evidence fails to raise a question of fact as to whether plaintiff knew he was expected to use this alternate means of ascending to the second tier and unreasonably chose not to use it. To the

contrary, when asked at his deposition whether he ever told plaintiff to use the fire escape, Bogucki responded that plaintiff had just returned from Poland three days earlier and was new to this site, and Bogucki believed "there was no need to give such [an] explanation to him" because plaintiff was supposed to be assigned "to just do the cement job at the bottom."

Bogucki also testified that the foreman told "all the workers that the fire escape is the standard way of moving between the platforms," but admitted that this was weeks earlier, before plaintiff's return from Poland, and this instruction was not given every day. Tellingly absent from the record is any affidavit or testimony from the foreman, Marek Kraszewsky, who allegedly gave such instruction. Assuming, although it is not established by admissible evidence, that this instruction was ever given to plaintiff, it would not suffice to create an issue as to whether plaintiff was the sole proximate cause of his accident. The instruction, as related in Bogucki's testimony, does not establish that plaintiff was ever told the use of the extension ladder was forbidden, or, put differently, that use of the fire escape was not only the "standard way," but the *exclusive* way to move between tiers. As defendant has noted, plaintiff did not work on the scaffold and had not accessed its tiers prior to this occasion, as he had previously only worked on

the ground and roof. Therefore, defendant has not shown that plaintiff knew he was expected to *only* use the fire escape rather than an extension ladder to access the second scaffold tier and unreasonably chose not to do so (*see Gallagher v New York Post*, 14 NY3d at 88-89; *cf. Cahill*, 4 NY3d at 39-40 [the plaintiff received specific instructions that he chose to disregard]). In short, there is no reasonable view of the evidence by which a factfinder could conclude that plaintiff was the sole proximate cause of his own accident.

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

ENTERED: APRIL 2, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9295 Samuel Caines, Index 310689/08
Plaintiff-Respondent,

-against-

Sandouchi Diakite,
Defendant-Appellant.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for appellant.

Law Office of Vel Belushin, P.C., Brooklyn (Georgette Hamboussi of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered November 14, 2011, which denied defendant's motion for summary judgment dismissing the complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant established prima facie his entitlement to judgment by showing that the injuries the 60-year-old plaintiff allegedly sustained to his cervical and lumbar spine and left knee were not serious injuries within the meaning of Insurance Law § 5102(d). Plaintiff, however, has raised a triable issue of fact as to whether he sustained a serious injury of the left knee sufficient to defeat the motion. Plaintiff had no history of injury to the knee prior to the accident. The MRI of plaintiff's knee, taken shortly after the accident in March 2006, revealed

"an oblique tear of the posterior horn of the medial meniscus contacting the inferior surface." Plaintiff's expert orthopedist, Dr. Lubliner, opined in a January 2011 report that the subject accident was the competent cause for injuries to plaintiff's left knee and the medial meniscal tear. He concluded that "[d]ue to the longevity of the symptomatology, the positive clinical findings and the positive MRI report," that arthroscopic surgery was necessary to repair the torn medial meniscus. Five years after the accident, plaintiff experiences buckling of the knee with walking, and complains of difficulty going up and down stairs and in standing up from a seated position. By ascribing plaintiff's left knee injury to a different, yet equally plausible cause, the affirmations of plaintiff's experts suffice to raise an issue of triable fact (*see Perl v Meher*, 18 NY3d 208, 219 [1st Dept 2011]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [2011]; *Biascochea v Boves*, 93 AD3d 548 [1st Dept 2012]; *Williams v Perez*, 92 AD3d 528 [1st Dept 2012]; *Grant v United Pavers Co., Inc.*, 91 AD3d 499 [1st Dept 2012]).

We need not address plaintiff's additional injuries since he raised a triable question of fact as to whether he suffered a serious injury that was causally related to the accident (*see Delgado v Paper Tr., Inc.*, 93 AD3d 457, 458 [1st Dept 2012]).

Plaintiff's loss of time from work for, at most, two weeks

was not sufficient to raise an issue of fact as to his 90/180-day claim (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]; *Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522, 522–523 [1st Dept 2010]).

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

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

ENTERED: APRIL 2, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9528- Index 112251/08
9529 Ana Vega,
Plaintiff-Appellant,

-against-

103 Thayer Street, LLC,
Defendant,

The City of New York,
Defendant-Respondent.

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Levine and Wiss, PLLC, Mineola (Anthony A. Ferrante of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about June 23, 2011, which, to the extent appealed from, granted defendant City's cross motion for summary judgment dismissing the complaint, and order, same court and Justice, entered January 17, 2012, which, upon reargument, adhered to the original determination, reversed, on the law, without costs, and the City's cross motion denied.

In this personal injury action, plaintiff alleges that she tripped and fell as a result of a hole in a pedestrian ramp. The City failed to make a prima facie showing of entitlement to judgment as a matter of law, because the markings on the Big Apple map it submitted in support of its cross motion raise an

issue of fact as to whether it had prior written notice of the alleged defect (*see Cruzado v City of New York*, 80 AD3d 537, 538 [1st Dept 2011]; *Burwell v City of New York*, 97 AD3d 617, 618-619 [2d Dept 2012], *lv denied* __NY3d__,2013 NY Slip Op 64878 [2013]).

All concur except Andrias, J.P. and Freedman, J. who dissent in a memorandum by Andrias, J.P. as follows:

ANDRIAS J.P. (dissenting)

Plaintiff seeks to recover for personal injuries she allegedly sustained when she tripped and fell as a result of a hole on the pedestrian ramp located at the northeast corner of Broadway and Thayer Street. The City moved for summary judgment on the ground that plaintiff could not prove prior written notice to the City as required under Administrative Code of the City of New York § 7-201(c)(2) because the Big Apple map received by the Department of Transportation on October 23, 2003 did not indicate the specific marking (a circle) for a "hole or other hazardous depression" at the location of the accident. Supreme Court granted the motion and, upon reargument, adhered to its original determination.

The majority would reverse on the ground that the City failed to make a prima facie showing of entitlement to judgment as a matter of law because the markings on the Big Apple map it submitted raise an issue of fact as to whether it had prior written notice of the alleged defect. Because I believe that the Big Apple map did not provide the City with notice of the condition on the pedestrian ramp which plaintiff alleges caused her to trip and fall, I dissent.

When a Big Apple map is used to satisfy the prior written notice requirement, the type and location of the defect must be

precisely noted on the map (*see D'Onofrio v City of New York*, 11 NY3d 581 [2008]; *Roldan v City of New York*, 36 AD3d 484 [1st Dept 2007] [marking on the Big Apple map indicating a cracked sidewalk was not prior written notice of round hole in the same location]).

In *D'Onofrio*, and its companion case, *Shaperonovitch v City of New York*, the Court of Appeals found the Big Apple maps did not give the City notice of the claimed defect. In *D'Onofrio*, the symbol on the map was a straight line, indicating a "raised or uneven portion of sidewalk" (11 NY3d at 584). The Court of Appeals held that the verdict in D'Onofrio's favor had been correctly set aside since there was no evidence that he walked across a raised or uneven portion of the sidewalk. In *Shaperonovitch*, the Court of Appeals explained:

> "The problem in *Shaperonovitch* is in a way the reverse of that in *D'Onofrio*: the nature of the defect that caused the accident is clear, but the symbol on the Big Apple map is not. Ms. Shaperonovitch testified that she tripped over an 'elevation on the sidewalk.' No unadorned straight line, the symbol for a raised portion of the sidewalk, appears on the Big Apple map at the relevant location. The *Shaperonovitch* plaintiffs rely on a symbol that does appear there: it is a line with a diamond at one end and a mark at the other that has been variously described as a poorly drawn X, the Hebrew letter shin, or a pitchfork without the handle. No symbol resembling this appears in the legend to the map" (*id.* at 585).

The Court of Appeals rejected Shaperonovitch's argument that the symbol on the map was "ambiguous" and that its interpretation is for the jury, stating, "[W]e do not see how a rational jury could find that this mark conveyed any information at all. Because the map did not give the City notice of the defect, the City was entitled to judgment as a matter of law" (*id.*).

This case is analogous to *Shaperonovitch*. There are no factual issues as to the precise location or nature of the defect that purportedly caused plaintiff's fall - plaintiff tripped on a hole on the pedestrian ramp. A record searcher for DOT stated that the symbol on the map that is most proximate to the location of plaintiff's accident (the northeast corner of Thayer and Broadway) is a horizontal line connecting two perpendicular lines that also purports to have a circle superimposed where the horizontal and perpendicular lines meet on each end. This ambiguous symbol does not match the symbol for an "[e]xtended section of holes or hazardous depressions," which is depicted by a horizontal line connecting two circles. Nor does it match the symbol for a "[h]ole or hazardous depression," which is depicted by a single circle.

At oral argument, plaintiff identified another symbol on the map, which may be a circle. However, that symbol, which may also be a small rectangle, is ambiguous. In any event, the symbol

appears in the middle of the intersection and does not relate to the location on the pedestrian ramp where plaintiff's accident occurred (*see Belmonte v Metro. Life Ins. Co.*, 304 AD2d 471 [lst Dept 2003] [symbol which denoted an "extended section of raised or uneven sidewalk," which ran parallel to the curb was insufficient to constitute prior written notice because the defect at issue was perpendicular to the curb]).

Because the ambiguous symbol depicted at the location of the accident did not give the City notice of the defect which caused plaintiff to trip an fall, the City established its prima facie entitlement to summary judgment. In opposition, plaintiff failed to raise a triable issue of fact. Accordingly, the City is entitled to summary judgment dismissing the complaint insofar as asserted against it.

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9665 The People of the State of New York, Respondent, Ind. 4671/08

-against-

Deshorn Mullings, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Nancy Killian of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered May 10, 2010, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of seven years, unanimously affirmed.

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]). The evidence established the element of physical injury (*see* Penal Law § 10.00[9]; § 160.10[2][a]). That element only requires proof that a victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]).

The evidence supports the inference that the victim sustained substantial pain as a result of defendant's violent attack (*see People v Rojas*, 61 NY2d 726 [1984]). Among other

things, defendant shoved the victim into a fence and repeatedly punched him in the face in an effort to steal his property. This caused bruising, pain and swelling, which made it difficult for the victim to eat and sleep. The jury could have reasonably concluded that these actions caused "more than slight or trivial pain" (*see People v Chiddick*, 8 NY3d 445, 447 [2007]), even though the victim did not seek medical attention (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9666-
9667 Index 300559/09

Alexis Cruz,
Plaintiff-Appellant,

-against-

Metropolitan Transportation Authority,
Defendant-Respondent.

_____

Alan D. Levine, Kew Gardens, for appellant.

Hoguet Newman Regal & Kenney, LLP, New York (Juan A. Skirrow of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered January 17, 2012, which granted plaintiff's motion to vacate an order, same court and Justice, entered November 9, 2011, on default, granting defendant's motion for summary judgment dismissing the complaint, and thereupon granted defendant's motion on the merits, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 30, 2012, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

Plaintiff, a Metropolitan Transportation Authority (MTA) police officer, brought this action against the MTA pursuant to the Federal Employers' Liability Act (45 USC § 51 *et seq.*), alleging that he was injured, as a result of the MTA's negligence, while responding to a report of an assault in

progress at the Fordham Station of the Metro-North Railroad. His vehicle, with emergency lights and siren engaged, was struck by another vehicle that failed to yield the right of way.

There is no reasonable basis for finding that there was any negligence on the MTA's part that contributed to plaintiff's injuries (*see e.g. Murphy v Metropolitan Transp. Auth.*, 548 F Supp 2d 29, 39-40 [SD NY 2008]). The MTA's police department manual identifies an assault in progress as a "Code 3" emergency, and plaintiff concedes that "Code 3" was the proper designation. The fact that the New York Police Department, which was also summoned to the scene, maintained a precinct in closer proximity to the scene of the assault than the station from which plaintiff was dispatched is not evidence of negligence on the MTA's part.

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

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9668-
9668A In re Brandon H., etc., and Another,

Children Under Eighteen Years
of Age, etc.,

Maythe H.,
Respondent-Appellant,

Episcopal Social Services, Inc.,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the children.

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Orders of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about April 12, 2012, which, upon a fact-finding determination that appellant-mother had permanently neglected her children, terminated her parental rights and committed custody and guardianship of the children to petitioner agency and the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The court properly determined that the agency exerted diligent efforts to reunite the mother with the children, but that she failed to effectively address her mental health and other issues, which had led to the children's placement into

foster care in the first place. The social work supervisor testified that the mother had received numerous referrals for mental health services, but elected to receive treatment from a social worker, which did not address her problems. The evidence demonstrated numerous incidents where the mother screamed, cursed, and threatened agency staff and the children, and that she was not successful in controlling her temper or the children, despite her testimony that the visits were "going well" (*see Matter of Victor B. [Yvonne B.]*, 91 AD3d 458 [1st Dept 2011]).

The court's determination that it was in the best interests of the children to terminate the mother's parental rights was also supported by the record. A suspended judgment was not warranted where the mother could not demonstrate substantial progress toward overcoming the problems that led to the children's placement, and where the children required stability, which they had obtained in the foster home.

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9669 Lori A. Fazzolari, Index 102157/06
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Kaplan & Kaplan, Brooklyn (Cary H. Kaplan of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about September 21, 2011, which, in this personal injury action, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, while on duty as a Sergeant in the Detective Bureau of the New York City Police Department, sustained injuries when she stepped off the curb onto the roadway to assist a motorist with directions. Although plaintiff was in the course of walking to a nearby deli to retrieve her lunch when she stopped to give directions, she is barred by the firefighter's rule from recovering on her common-law negligence claims because

"the acts undertaken in the performance of police duties placed . . . her at increased risk for that accident to happen" (*Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 440 [1995]; *Simons v City of New York*, 252 AD2d 451, 451-452 [1st Dept 1998]). Indeed, she applied for and received a line-of-duty accident disability retirement pension.

In any event, even if the common-law negligence claims were not barred by the firefighter's rule, defendant presented prima facie evidence that it had no prior written notice of any defective condition of the curb and that the curb was not defective or dangerous by reason of its height, and plaintiff failed to raise an issue of fact (*see Katz v City of New York*, 87 NY2d 241, 243 [1995]; *Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 60-61 [1st Dept 2006]).

Defendant also was entitled to summary judgment dismissing the cause of action pursuant to General Municipal Law § 205-e. 34 RCNY 2-09(a)(2), and the publications cited in that subdivision, are insufficient to support such a cause of action,

because they do not contain "a particularized mandate or a clear legal duty" (*Gonzalez v Iocovello*, 93 NY2d 539, 551 [1999] [emphasis omitted]; *see Desmond v City of New York*, 88 NY2d 455, 464 [1996]).

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9670- Index 113389/08
9671 Alan Sassen,
Plaintiff-Appellant,

-against-

Dr. Jeffrey Lazar, et al.,
Defendants-Respondents,

St. Vincent's Hospital, et al.,
Defendants.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for Dr. Jeffrey Lazar, respondent.

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for Dr. Christina Drafta, respondent.

_____

Orders, Supreme Court, New York County (Alice Schlesinger, J.), entered April 24, 2012, which, in this medical malpractice action, granted defendants-respondents' motions' for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff initially claimed that defendants failed, on December 11 and 12, 2007, to diagnose a stroke that occurred on December 27, 2007. Plaintiff, on appeal, claims a failure to diagnose and detect a cardiac thrombus (blood clot) in plaintiff's artificial heart valve.

Defendants made a prima facie showing of their entitlement to judgment as a matter of law, since their experts' affirmed reports established that they did not deviate from accepted standards of medical practice (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The expert on behalf of defendant Dr. Jeffrey Lazar, the emergency room physician at St. Vincent's Hospital, reached this conclusion since, on December 11, 2007, Dr. Lazar treated plaintiff, ordered appropriate tests, and discharged him with instructions to see his internist and a neurologist (*see Cupelli v Lawrence Hosp.*, 71 AD3d 496, 496-497 [1st Dept 2010], *lv denied* 16 NY3d 703 [2011]). In addition, Dr. Lazar's expert opined that since the stroke plaintiff ultimately suffered on December 27 would not have been detected in a typical 24- to 72-hour hospital stay, any departure was not proximately related to the injuries he eventually suffered. Defendant Dr. Christina Drafta's expert opined that, since her neurological examination of plaintiff was normal, and since plaintiff was under the care of an internist, Dr. Drafta, as a neurologist, would not be responsible for any care or treatment of plaintiff's heart or blood pressure condition (*see Witt v Agin*, 112 AD2d 64, 66 [1st Dept 1985], *affd* 67 NY2d 919 [1986]). Both experts further found that defendants' decision not to admit plaintiff to the hospital after they saw him on December 11 and 12,

respectively, was not a departure from accepted standards of care.

In opposition, plaintiff failed to show, by expert medical evidence, a departure from the accepted standard of medical practice, and that this departure was a proximate cause of his injuries (*see Alvarez*, 68 NY2d at 324-325; *Rivera v Greenstein*, 79 AD3d 564, 568 [1st Dept 2010]). Plaintiff's argument that defendants failed to diagnose and detect a blood clot (thrombus) on his artificial heart valve, which led to his stroke 17 days later, is not properly before this Court as it was advanced for the first time on appeal (*see On the Level Enterprises, Inc v 49 East Houston LLC*, 100 AD3d 473 [1st Dept 2012]). Plaintiff's argument that we may review the issue as it is a legal one, clear from the face of the record, is unavailing. The facts necessary to support plaintiff's position, namely that a cardiac thrombus existed in plaintiff's artificial heart valve, are not part of the record, and defendants and their medical experts had no opportunity to respond to plaintiff's claim (*compare DeRosa v Chase Manhattan Mtge. Corp.*, 10 AD3d 317, 319-320 [1st Dept 2004], *with Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]). In any event, plaintiff's theory is without expert or record support,

since heart studies performed at Columbia Presbyterian Hospital revealed no blood clots on plaintiff's artificial heart valve (*see Roques v Noble*, 73 AD3d 204, 207 [1st Dept 2010]; *Richardson v New York City Health & Hosps. Corp.*, 191 AD2d 376, 377 [1st Dept 1993]).

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9672 MBIA Insurance Corporation, Index 602825/08
Plaintiff-Respondent-Appellant,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants-Appellants-Respondents,

Bank of America Corp.,
Defendant.

- - - - -

The Securities Industry and Financial Markets Association and The Association of Financial Guaranty Insurers,
Amici Curiae.

_____

Simpson Thacher & Bartlett, New York (Barry R. Ostrager of counsel), for appellants-respondents.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Philippe Z. Selendy of counsel), for respondent-appellant.

Orrick, Herrington & Sutcliffe LLP, New York (John Ansbro and Barry S. Levin of the bar of the State of California, admitted pro hac vice, of counsel), for The Securities Industry and Financial Markets Association, amici curiae.

Axinn, Veltrop & Harkrider LLP, New York (Donald W. Hawthorne of counsel), for The Association of Financial Guaranty Insurers, amicus curiae.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 3, 2012, which granted plaintiff MBIA Insurance Corporation's motion for partial summary judgment to the extent of concluding that: (1) pursuant to Insurance Law §§ 3105 and 3106, plaintiff was not required to establish causation in order

to prevail on its fraud and breach of contract claims; and (2) plaintiff was entitled to rescissory damages; and denied the motion to the extent it sought a finding that the parties' repurchase agreement required defendants Countrywide Home Loans, Inc., Countrywide Securities Corp., Countrywide Financial Corp., Countrywide Home Loans Servicing, L.P. and Bank of America to repurchase loans that were not in default, unanimously modified, on the law, that portion of the motion seeking summary judgment on the claim for rescissory damages denied, summary judgment on the issue of the repurchase obligation granted, and otherwise affirmed, without costs.

Contrary to defendants' arguments, the motion court was not required to ignore the insurer/insured nature of the relationship between the parties to the contract in favor of an across the board application of common law (*see* Insurance Law §§ 3105 and 3106). Although the Insurance Law provides for "avoid[ing]" an insurance policy (or rescission), it also mentions "defeating recovery thereunder" (*id.*), which, logically, means something other than rescission. Neither defendants, nor the federal cases on which they rely (*see GuideOne Specialty Mut. Ins. Co. v Congregation Adas Yereim*, 593 F Supp2d 471, 486 [EDNY 2009], *Gluck v Exec. Risk Indem., Inc.*, 680 F Supp2d 406, 418 n 9 [EDNY 2010]), explain why "defeating recovery thereunder" cannot refer

to the recovery of payments made pursuant to an insurance policy without resort to rescission. Moreover, both cases, which are from the Eastern District of New York, are flatly contradicted by two from the Southern District of New York (*see Syncora Guar. Inc. v EMC Mortg. Corp.*, 874 F Supp 2d 328, 337 [SDNY 2012] [citing the Supreme Court's opinion in this case (34 Misc 3d 895 [Sup Ct, NY County 2012]) regarding sections 3105 and 3106 approvingly and finding that "[t]he same reasoning applie[d] in th[at] case"]; *Assured Guar. Mun. Corp. v Flagstar Bank, FSB*, 2012 WL 4373327 at *4-5, 2012 US Dist LEXIS 138296, at *10-11 [SDNY 2012] [agreeing with *Syncora*]).

The court erred, however, in granting summary judgment on the issue of rescissory damages. Here, rescission is not warranted. Plaintiff voluntarily gave up the right to seek rescission – *under any circumstances*; and in fact, plaintiff does not actually seek rescission. Plaintiff should not be permitted to utilize this very rarely used equitable tool (*see Gotham Partners, L.P. v Hallwood Realty Partners, L.P.*, 855 A2d 1059, 1072 [Del Ch 2003]) to reclaim a right it voluntarily contracted away or to obtain relief it never actually requested. Nor is rescission impracticable. Impracticability refers to a scenario in which rescission is impracticable or impossible because the subject of the contract sought to be rescinded no longer exists,

or is otherwise impossible or impractical to recover. Here, rescission is not impracticable in any relevant sense; rather, it is legally unavailable.

Finally, plaintiff is entitled to a finding that the loan need not be in default to trigger defendants' obligation to repurchase it. There is simply nothing in the contractual language which limits defendants' repurchase obligations in such a manner. The clause requires only that "the inaccuracy [underlying the repurchase request] materially and adversely affect[] the interest of" plaintiff. Thus, to the extent plaintiff can prove that a loan which continues to perform "materially and adversely affect[ed]" its interest, it is entitled to have defendants repurchase that loan *(see Syncora Guar. Inc.*, 874 F Supp 2d 328; *Assured Guar. Mun. Corp.*, 2012 WL 4373327, 2012 US Dist LEXIS 138296). Whether or not such proof is actually possible is irrelevant to plaintiff's summary judgment motion.

It also bears noting that, had these very sophisticated parties desired to have an event of default or non-performance trigger the repurchase agreement, they certainly could have included such language in the contracts. They did not do so, and this Court will not do so now "under the guise of interpreting

the writing" (*see Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]).

As plaintiff recognizes, however, because it introduced Transaction Documents only for the Securitization known as Revolving Home Equity Loan Asset Backed Notes, Series 2006-E, summary judgment on this issue is granted as to that Securitization only.

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

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9673 In re Randolph W.,
Petitioner-Appellant,

-against-

Commissioner of Social Services,
on behalf of Ana B.,
Respondent-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

_____

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about April 30, 2012, which denied petitioner father's objection to a prior order, same court (Robert Ross, Support Magistrate), entered on or about March 19, 2012, marking as withdrawn the father's petition to modify or vacate an order setting the amount of child support arrears at $714, unanimously affirmed, without costs.

There is no basis for modifying the May 2001 arrears order. The father failed to submit evidence showing that his income was less than or equal to the poverty income guidelines prior to the issuance of the order (Family Ct Act § 413[1][g]). The letter from the Social Security Administration, dated November 2010, confirms only that he had been receiving $761 in Supplemental Social Security Income as a disabled individual since September

2010, more than nine years after the order. Further, the cash withdrawals from the bank account that he held jointly with the mother, which the father claims prove that she received payments to care for the child, are dated from approximately October 2004 to September 2006, well after the relevant time period of the arrears determination. Moreover, this is not a case where application of the statutory prohibition against modification of an arrears determination would result in a grievous injustice (Family Ct Act § 451[1]; *see Matter of Commissioner of Social Servs. of City of N.Y. v Gomez*, 221 AD2d 39, 42 [1st Dept 1996]; *see also Matter of Dox v Tynon*, 90 NY2d 166, 173-174 [1997]).

The record shows that, at the March 19, 2012 proceeding, the Support Magistrate adequately advised the father of his right to consult or retain a lawyer, or to request an adjournment for that purpose. The Magistrate was not required to advise the father of the dangers of proceeding pro se, since he was not entitled to

counsel (*see* Family Ct Act § 262; *cf. Matter of Storelli v Storelli*, 101 AD3d 1787 [4th Dept 2012]).

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

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9674 Young Kyu Kim, Index 102303/11
Plaintiff-Respondent,

-against-

Robert Gomez,
Defendant-Appellant.

_____

Martin, Fallon & Mullé, Huntington (Michael P. Jones of counsel), for appellant.

Sim Park, LLP, New York (Haesun A. Kim of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered August 13, 2012, which, to the extent appealed from, denied defendant's motion for summary judgment insofar as it sought dismissal of plaintiff's claims alleging serious injuries under the "permanent consequential" and "significant" limitation of use categories of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant made a prima facie showing of the lack of a serious injury to the cervical and lumbar spine by submitting the affirmed report of an orthopedic surgeon finding full range of motion in both parts of the spine, and a radiologist's report finding that MRI and X-ray films taken shortly after the accident showed bulging discs attributable to diffuse multilevel degenerative disc disease and an absence of traumatic injuries

(*see Paduani v Rodriguez*, 101 AD3d 470, 470 [1st Dept 2012]; *Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [1st Dept 2011]). Defendant further argued that plaintiff had ceased treatment four months after the accident, without explanation (*Pommells v Perez*, 4 NY3d 566, 574 [2005]).

In opposition, plaintiff raised a triable issue of fact by submitting the affirmed report of his treating physician who found contemporaneous and persisting limitations in range of motion, and explained his basis for concluding that the disc herniations and bulges shown on the MRI films were caused by the trauma of the accident, as opposed to degeneration (*see Perl v Meher*, 18 NY3d 208, 217-219 [2011]; *Mercado-Arif v Garcia*, 74 AD3d 446, 446-447 [1st Dept 2010]). Plaintiff adequately addressed the gap in treatment by submitting an affidavit asserting that he stopped treatment because he could not afford to pay for it after the expiration of his no-fault benefits (*see Pindo v Lenis*, 99 AD3d 586, 57 [1st Dept 2012]). Further, plaintiff's physician opined that plaintiff had failed to make a full recovery despite undergoing a comprehensive physical therapy

program, which suggested that further treatment would have been only palliative (*see Ayala v Cruz*, 95 AD3d 699, 700 [1st Dept 2012]).

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9675 The People of the State of New York, Respondent, Ind. 1406/09

-against-

Quavas Sims, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered November 8, 2010, convicting defendant, after a nonjury trial, of rape in the first degree, criminal sexual act in the first degree, assault in the third degree (two counts), menacing in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 25 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its assessment of the victim's delay in reporting.

Defendant did not preserve his claim that the court deprived him of the right to continued representation by assigned counsel with whom he had allegedly formed an attorney-client relationship (*see People v Tineo*, 64 NY2d 531, 535-536 [1985]), and we decline to review it in the interest of justice. During a colloquy over whether it would be appropriate for defendant's assigned counsel to stay on the case, defendant never told the court he wanted to continue being represented by this attorney. On the contrary, defendant expressed his dissatisfaction with the attorney, and at the end of the colloquy defendant stated his acceptance of the court's decision to take the attorney off the case. Furthermore, neither defendant nor his counsel ever raised any constitutional claim. The record does not support defendant's assertion that a protest would have been futile (*compare People v Mezon*, 80 NY2d 155, 161 [1992]). The prosecutor's suggestion that the court proceed with caution did not satisfy the preservation requirement (*see* CPL 470.05[2]; *People v Turriago*, 90 NY2d 77, 83-84 [1997]; *People v Colon*, 46 AD3d 260, 263 [1st Dept 2007]).

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]), and his pro se arguments on this issue are without

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

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9676 Walter S. McNaughton, Index 251040/11
Plaintiff-Appellant,

-against-

RY Management, Inc., et al.,
Defendants-Respondents.

_____

Walter S. McNaughton, appellant pro se.

Gutman, Mintz, Baker & Sonnenfeldt, P.C., New Hyde Park (Arianna Gonzalez-Abreu of counsel), for RY Management, Inc., respondent.

Kelly D. MacNeal, New York (Seth E. Kramer of counsel), for New York City Housing Authority Section 8, respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered March 5, 2012, which denied plaintiff's motion for a default judgment against defendants, and granted defendant RY Management, Inc.'s cross motion to dismiss the complaint on the ground of lack of service, unanimously affirmed, without costs.

The court properly dismissed the action, as plaintiff failed to offer any proof of service of process (*see Security Pac. Natl. Trust (N.Y.) v Chunassamy*, 289 AD2d 151 [1st Dept 2001]).

Nor has plaintiff shown any reason why the stipulation of discontinuance with prejudice entered into with defendant New

York City Housing Authority should not be enforced (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *Lukaszuk v Lukaszuk*, 304 AD2d 625, 625 [2d Dept 2003]).

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9677 The People of the State of New York, Ind. 1952/10
Respondent,

-against-

Rodney Dingle,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J.), rendered on or about October 14, 2010,

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

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

ENTERED: APRIL 2, 2013

CLERK

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

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9678 Esther Salgado, Index 108695/06
Plaintiff-Respondent,

-against-

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

American Airlines,
Defendant-Appellant.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for appellant.

Arnold E. DiJoseph, III, New York, for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 7, 2011, which, insofar as appealed from, denied the motion of defendant American Airlines for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

American failed to establish its entitlement to judgment as a matter of law in this action where plaintiff alleges that she slipped and fell on a wet floor. American did not affirmatively demonstrate that its agent was not responsible for creating the defective condition that caused plaintiff's fall. Rather, American attempted to establish the absence of negligence by merely pointing to gaps in plaintiff's account of the accident

(*see Dabbagh v Newmark Knight Frank Global Mgt. Servs., LLC*, 99 AD3d 448, 450 [1st Dept 2012]). Although American's facilities manager did testify that the cleaning company usually mopped the terminal floor during the night when passenger traffic was lighter, he also noted that the company performed spot cleaning when notified of a need.

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

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9679 The People of the State of New York, Respondent, Ind. 2051/08

-against-

Carlos Tamayo, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered November 13, 2009, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

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]). The evidence supports the inference that when defendant broke two reinforced glass doors in order to gain entry into secured portions of an apartment building, he did so with the intent to commit a crime therein.

The jury's mixed verdict does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]; *People v Yanayaco*, 99 AD3d 416 [1st Dept 2012]). To the extent that defendant is arguing that his acquittal of a weapon charge

requiring unlawful intent rendered the evidence legally insufficient with respect to the intent element of burglary, that argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Contrary to defendant's argument, to convict him of burglary the People were not required to prove that he intended to use the knife in his possession to threaten, scare or stab anyone. The indictment charged defendant with entering the apartment building with intent to commit an unspecified crime therein, and the People never limited their theory of the case to a particular intended crime (*see People v Romero*, 84 AD3d 695, 695 [1st Dept 2011], *lv denied* 17 NY3d 955 [2011]; *see also People v Smalls*, 92 AD3d 420, 420 [1st Dept 2012], *lv denied* 18 NY3d 998 [2012]).

Defendant did not preserve his challenge to the court's supplemental jury charge, and we decline to review it in the interest of justice. As an alternative holding, we find that the

court provided a meaningful and correct response to the deliberating jury's request for information (*see People v Santi*, 3 NY3d 234, 248-249 [2004]; *People v Malloy*, 55 NY2d 296 [1982], *cert denied* 459 US 847 [1982]).

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9681 The People of the State of New York, Ind. 3996/09
Respondent,

-against-

Ross Atherly,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee White, J.), rendered on or about March 23, 2010,

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

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

ENTERED: APRIL 2, 2013

CLERK

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

CORRECTED ORDER - APRIL 2, 2013

Mazzarelli, J.P. Moskowitz, DeGrasse, Feinman, Clark, JJ.

9680 Shameka Williams, Index 303035/09
Plaintiff-Respondent,

-against-

C&M Auto Sales Corporation,
Defendant-Appellant,

Autorama Enterprises of
Bronx, Inc., et al.,
Defendants.

Marcus, Ollman & Kommer LLP, New Rochelle (Rachel F. Ciccone of counsel), for appellant.

Edelman, Krasin & Jaye, PLLC, Carle Place (Donald Mackenzie of counsel), for respondent.

Order, Supreme Court, **Bronx** County (Howard H. Sherman, J.), entered July 19, 2012, which, sua sponte, vacated the note of issue, and denied defendant C&M Auto Corp.'s motion for summary judgment with leave to renew within 60 days of the filing of a new note of issue upon the completion of all necessary discovery with respect to the alleged causative defect in plaintiff's motor vehicle, unanimously modified, on the law, to grant the motion for summary judgment only to the extent of dismissing plaintiff's claim for breach of express warranty, and otherwise affirmed, without costs.

We find that the court providently exercised its discretion in sua sponte vacating the note of issue, pursuant to 22 NYCRR

202.21(e). Plaintiff, the purchaser of a pre-owned vehicle from defendant C&M Auto, testified that her forensic investigator told her that the accident was caused by the fact that the car was in a previous accident and that the right front tire was never connected to the axle. However, plaintiff's expert's actual finding was that the vehicle revealed the existence of a "twisted rear suspension cross member" which resulted in a rear suspension misalignment that adversely effected vehicle response, both in normal and crash avoidance maneuvers. Although plaintiff failed to submit her expert's findings during pretrial disclosure, which would generally warrant preclusion of the expert affidavit (*see Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 [1st Dept 2012]), the court cured any prejudice to C&M Auto by vacating the note of issue and affording it the opportunity to conduct further discovery on the alleged causative defect.

We dismiss plaintiff's claim for breach of express warranty since there was no express warranty binding C&M Auto in the contract of sale (*see Cayuga Harvester v Allis-Chalmers Corp.*, 95 AD2d 5, 19 [4th Dept 1983]). The "Limited Warranty" given to

plaintiff at the time of the sale specifically provided that such warranty was not applicable to vehicles having mileage in excess of 100,000 miles.

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9682 Kennedy Brown, Index 114574/04
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent,

Empire City Subway Company (Limited), et al.,
Defendants.

_____

Brian J. Isaac, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered November 21, 2011, which, in this personal injury action, denied plaintiff's motion to vacate the dismissal of the action and restore it to the trial calendar, unanimously reversed, on the law, without costs, and the motion granted.

The court had dismissed the action based upon plaintiff's failure to appear for trial on its second scheduled date (Uniform Rules for Trial Cts [22 NYCRR] § 202.27[b]).

The court improvidently exercised its discretion in denying plaintiff's motion to vacate the dismissal. Plaintiff provided a reasonable excuse for his failure to appear for trial — namely, that he was incarcerated (*see Jackson v New York City Auth.*, 259

AD2d 383 [1st Dept 1999]). Further, plaintiff's prior successful defense of defendant's summary judgment motion demonstrated merit to this action (*see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 293 AD2d 324, 325 [1st Dept 2002]). Defendant's claim of prejudice, based upon conclusory and unsupported assertions that unidentified witnesses have become unavailable, is unavailing (*see Plaza v New York Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 97 AD3d 466, 471 [1st Dept 2012]).

Given the foregoing determination, we need not reach plaintiff's argument regarding the propriety of the court so-ordering the dismissal transcript of the Judicial Hearing Officer, after plaintiff filed his motion, and after the court previously refused to so-order it.

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9683- Index 600282/08
9684 Echostar Satellite L.L.C.,
Plaintiff-Appellant,

-against-

ESPN, Inc., et al.,
Defendants-Respondents.

_____

Orrick, Herrington & Sutcliffe LLP, New York (E. Joshua Rosenkranz of counsel), for appellant.

Weil, Gotshal & Manges, LLP, New York (David L. Yohai of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 18, 2011, which denied plaintiff's motion for judgment notwithstanding the verdict, and order, same court and Justice, entered December 16, 2011, which denied plaintiff's motion to set aside the verdict and for a new trial, unanimously affirmed, without costs.

The court properly denied the motion to set aside the verdict on the ground of juror misconduct. Although the court did not authorize the jurors to take notes during trial, plaintiff failed to demonstrate that it had suffered any prejudice resulting from one juror's preparation of notes at home and use of those notes during deliberations (*see Alford v Sventek*, 53 NY2d 743, 745 [1981]). Indeed, plaintiff failed to

submit an affidavit from any juror regarding the effect of the notes. Although plaintiff's counsel's affirmation stated that other jurors indicated that one juror had used her notes during deliberations, the jurors did not indicate that the notes had swayed the jury's decision. The court properly denied plaintiff's request for a hearing to assess the effect, if any, the notes had on the deliberations. Such a hearing should "not be undertaken except in extraordinary circumstances" (*People v Rodriguez*, 71 NY2d 214, 218 n 1 [1988]), which are not present here.

Plaintiff's claim that the court erred in delivering a confusing response to a jury question is unpreserved (*see* CPLR 4110-b; *Martinez v Te*, 75 AD3d 1, 5 [1st Dept 2010]), and we decline to review it in the interests of justice. Were we to review it, we would reject it. By reading the instructions previously given to the jury on the issue, the court conveyed the germane legal principles to be applied in the case (*see e.g. Mercy Community Hosp. v Cannon Design*, 235 AD2d 405, 405-406 [2d Dept 1997]). Moreover, plaintiff made no showing that the jury

was substantially confused by the court's response, especially since the jury made no further requests for clarification after the court had answered the question (*see Martinez*, 75 AD3d at 7).

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9685 Frank DeSario, Index 103530/10
Plaintiff-Respondent,

against-

SL Green Management LLC, et al.,
Defendants-Appellants.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Nicole M. Gill of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered May 17, 2012, which, in this personal injury action, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was allegedly injured after he attempted to maneuver defendants' lift, which weighed approximately 740 pounds, under a low-hanging pipe, in order to move it up a ramp to a location where he was scheduled to repair a security camera on defendants' property. Given the conflicting deposition testimony as to what was said and to whom, any determination would be based upon the credibility of the parties, which is to be resolved at trial, not on a motion for summary judgment (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Carrozzi v Gotham Meat Corp.*, 181 AD2d 587 [1st Dept 1992]).

Indeed, a question of fact exists as to whether defendant SL Green Realty's engineer violated a duty to impart correct information, by allegedly telling plaintiff that it was "not a big deal" to tilt the lift, and that the maneuver was done "all the time," without telling him that at least three people were required to move the machine safely (*see Heard v City of New York*, 82 NY2d 66, 73-74 [1993]; *Hudson Riv. Club v Consolidated Edison Co. of N.Y.*, 275 AD2d 218, 220 [1st Dept 2000]). Plaintiff's testimony on this point was not inadmissable hearsay, as it was not offered for the truth of the matter asserted. Rather, it was offered only as evidence that the statements were in fact made (*see Giardino v Beranbaum*, 279 AD2d 282 [1st Dept 2001]).

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

ENTERED: APRIL 2, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9688 Index 301880/08

[M-966] In re Hamilton Equities, Inc., et al.,
Petitioners,

-against-

Hon. Lucindo Suarez, etc.,
Respondent.

_____

The above-named petitioners having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

And said proceeding having been argued by counsel for the respective parties, and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 20, 2013,

It is unanimously ordered that the application be and the same hereby is deemed withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9689 The People of the State of New York, Respondent, Ind. 8335/02

-against-

Dorom Yomtov, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee of counsel), for respondent.

_____

Order, Supreme Court, New York County (John Cataldo, J.), entered on or about December 18, 2008, which adjudicated defendant a level two sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 10 points under the risk factor for failing to accept responsibility. Defendant made efforts to shift blame to the child victim that evinced a lack of genuine acceptance of responsibility (*see People v Teagle*, 64 AD3d 549 [2d Dept 2009]; *People v Baker*, 57 AD3d 1472 [4th Dept 2008], *lv denied* 12 NY3d 706 [2009]).

In any event, the record supports the court's determination that, regardless of whether defendant's correct point score should be 65 or 75, an upward departure to level two is

warranted, based on the seriousness of defendant's course of conduct toward a child and of the surrounding circumstances (*see e.g. People v Mantilla*, 70 AD3d 477, 478 [2010], *lv denied* 15 NY3d 706 [2010]). This egregiousness of defendant's behavior was an "aggravating...factor of a kind, or to a degree, that [was] not otherwise adequately taken into account by the guidelines" (*People v Johnson*, 11 NY3d 416, 421 [2008]).

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9690 Norbert Rijos, Index 304452/10
Plaintiff-Respondent,

-against-

Riverbay Corporation,
Defendant-Appellant.

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Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Harriet Wong of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about March 7, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish its entitlement to judgment as a matter of law in this action where plaintiff alleges that he was injured when he slipped and fell on an accumulation of rainwater that was approximately one inch deep in the lobby of the building where he lived. Plaintiff testified, and meteorological records showed, that it was raining heavily on the day of the accident and that the rain was accompanied by strong winds. Plaintiff also stated that when he arrived at his building the lobby doors had been blown open by the wind, causing the rain to come indoors.

Defendant seeks to rely on the "storm in progress" doctrine to relieve itself of liability. However, the condition described by plaintiff, namely the flooding of the building's lobby, is distinguishable from those instances where the doctrine is typically applied (*compare Richardson v S.I.K. Assoc.*, L.P., 102 AD3d 554 [1s Dept 2013]; *Hussein v New York City Tr. Auth.*, 266 AD2d 146 [1st Dept 1999]). Moreover, even where the doctrine is available for such indoor accidents, "all of the circumstances regarding a defendant's maintenance efforts must be scrutinized in ascertaining whether the defendant exercised reasonable care in remedying a dangerous condition" (*Pomahac v TrizecHahn 1065 Ave. of the Ams., LLC*, 65 AD3d 462, 465-466 [1st Dept 2009]). Here, defendant failed to present sufficient evidence to establish that it took reasonable measures to remedy the allegedly dangerous condition. Defendant's witnesses did not aver that any such action was taken during their shifts, and they offered no knowledge of any action taken after their shifts ended, which was several hours before plaintiff's fall.

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9691 In re Raven L.,

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

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Lisa H. Blitman, New York, for appellant.

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

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Appeal from order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about September 8, 2011, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree, and placed her on probation for a period of 15 months, with restitution of $200, unanimously dismissed, without costs.

Since appellant seeks to replace her juvenile delinquency adjudication with an adjournment in contemplation of dismissal, the fact that her term of probation has expired does not render this appeal moot. However, we dismiss the appeal "upon the ground that the dispositional order was entered upon appellant's

consent and thus [s]he is not an aggrieved party within the meaning of CPLR 5511" (*Matter of Desmond S.*, 97 NY2d 693, 693 [2002]). In any event, the disposition was the least restrictive alternative and was a proper exercise of discretion.

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9692-
9692A Driss Chaouni, Index 306491/09
Plaintiff-Respondent,

-against-

Shajahan Ali,
Defendant,

Dial 7 Car and Limousine Service, Inc.,
Defendant-Appellant.

_____

The Shanker Law Firm, P.C., New York (Steven J. Shanker of counsel), for appellant.

Wingate, Russotti Shapiro & Halperin, LLP, New York (David M. Schwarz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered March 1, 2012, which, insofar as appealed from, denied defendant Dial 7 Car and Limousine Service, Inc.'s (Dial 7) motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. Appeal from order, same court and Justice, entered on or about May 15, 2012, which denied Dial 7's motion for leave to reargue, unanimously dismissed, without costs, as taken from a nonappealable order. The Clerk is directed to enter judgment accordingly.

Supreme Court should have granted Dial 7's motion to dismiss because it established that it could not be held liable for

defendant Shajahan Ali's conduct, as he was an independent contractor and not Dial 7's employee. Dial 7 submitted a host of evidence showing that it did not control the method or means by which Ali's work was to be performed (*see Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006]; *Anikushina v Moodie*, 58 AD3d 501, 504 [1st Dept 2009], *lv dismissed* 12 NY3d 905 [2009]). The undisputed evidence showed that Dial 7's drivers own their own vehicles, were responsible for the maintenance thereof, paid for the insurance, and had unfettered discretion to determine the days and times they worked, with no minimum or maximum number of hours or days imposed by Dial 7. Dial 7 does not require its drivers to wear a uniform nor does it have a dress code, and its drivers are free to accept or reject any dispatch as they like, can take breaks or end their shifts whenever they want, and are even permitted to work for other livery base stations. Dial 7's drivers kept a fixed percentage of all fares and 100% of all tips, and Dial 7 did not withhold taxes and issued 1099 forms, not W-2 forms, to its drivers (*see Barak v Chen*, 87 AD3d 955 [2d Dept 2011]; *Abouzeid v Grgas*, 295 AD2d 376, 377-378 [2d Dept 2002]).

While there was evidence that Dial 7 would inspect Ali's vehicle on a weekly basis, and that it could accept credit card payments via telephone, this is insufficient to raise an issue of

fact and is indicative of mere incidental or "general supervisory control" that does not rise to the level of an employer-employee relationship (*Bizjak v Gramercy Capital Corp.*, 95 AD3d 469, 470 [1st Dept 2012]; *see Matter of Hertz Corp. [Commissioner of Labor]*, 2 NY3d 733, 735 [2004]; *Holcomb v TWR Express, Inc.*, 11 AD3d 513, 514 [2d Dept 2004]).

We dismiss the appeal from the May 15, 2012 order since no appeal lies from the denial of reargument, and the appeal is otherwise academic in light of our reversal of the prior order.

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9693 Born to Build LLC, Index 108128/11
Petitioner-Respondent,

-against-

1141 Realty LLC,
Respondent-Appellant,

Kuang Chih Li, etc., et al.,
Respondents.

_____

Ronald Francis, New York, for appellant.

Kazlow & Kazlow, New York (Stuart L. Sanders of counsel), for respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered February 9, 2012, which, to the extent appealed from, denied respondent 1141 Realty LLC's cross motion to dismiss Born to Build's petition based on the documentary evidence, unanimously reversed, on the law, without costs, the cross motion granted, and the petition dismissed. The Clerk is directed to enter judgment accordingly.

Petitioner failed to raise an issue of fact as to the authenticity of the operating agreement, and the motion to dismiss should have been granted. The affidavits at issue here do little more than assert that the affiants were told by Ibrahim Saleh, a former manager of 1141 Realty, that he was actually an owner, and the petition makes assertions premised only upon

information and belief. Both the affidavits and the assertions are contradicted by the operating agreement (*Gould v McBride*, 36 AD2d 706, 706-707 [1st Dept 1971], *affd* 29 NY2d 768 [1971] ["Where, as here, the cause of action is based on documentary evidence, the authenticity of which is not disputed, a general denial, without more, will not suffice to raise an issue of fact"]; *see also First Interstate Credit Alliance v Sokol*, 179 AD2d 583, 584 [1st Dept 1992] [where there were "affidavits . . . from a corporate officer who averred to the genuineness and authenticity of the documentary evidence[, t]he unsubstantiated allegations and assertions raised by defendants were insufficient to withstand the motion"]).

Moreover here, petitioner itself submitted evidence that there were no documents in Ibrahim's name because he used other people's names to conceal his holdings. This being an action for dissolution, and not one for fraud, these assertions are insufficient to raise questions of fact as to the authenticity of the operating agreement.

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

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9694-
9694A Luis Amendola,
Plaintiff-Appellant,

Index 102189/07
590190/08
590694/09

-against-

Rheedlen 125th Street, LLC, et al.,
Defendants-Respondents,

Hellman Construction Co., Inc.,
Defendant.

- - - - -

(And Third-Party Actions)

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Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Shearman & Sterling LLP, New York (Casey O'Neill of counsel), for Rheedlen 125th Street, LLC and Harlem Children's Zone, Inc., respondents.

Burns, Russo, Tamigi & Reardon, LLP, Garden City (Jeffrey M. Burkhoff of counsel), for Tishman Construction Corporation, Tishman Construction Corporation of New York and Tishman Construction of Manhattan, respondents.

_____

Orders, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 18, 2012, which, insofar as appealed as limited by the briefs, granted defendants-respondents' motions for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as asserted against them, unanimously affirmed, without costs.

Plaintiff sustained injuries when he fell from a ladder

while installing window shades in a building owned by defendant Rheedlen 125th Street, LLC (Rheedlen) and leased by defendant Harlem Children's Zone, Inc. (HCZ). HCZ retained the Tishman defendants (Tishman) as a construction manager to construct a charter school and community center, and Tishman retained third-party defendants City View Blinds of NY Inc. and Abalene Decorating Inc. (collectively City View), plaintiff's employer, for window treatment and window shade work.

The court properly dismissed the Labor Law § 240(1) claims as asserted against defendants-respondents. Contrary to plaintiff's contention, his work of hanging window shades at the time of the accident does not constitute "altering" within the meaning of Labor Law § 240(1). The evidence shows that the shade installation work essentially entailed securing brackets with screws to the ceiling or pan protruding from the wall, and inserting the shades into the bracket. This work does not amount to a "significant physical change to the configuration or composition of the building or structure" (*Joblon v Solow*, 91 NY2d 457, 465 [1998] [emphasis omitted]; *cf. Belding v Verizon N.Y., Inc.*, 65 AD3d 414, 415-416 [1st Dept 2009], *affd* 14 NY3d 751 [2010]). Plaintiff's contention that the work constitutes "repairing" under the statute is unsupported by the record. Indeed, plaintiff and the witnesses all testified that new shades

were being installed at the time of the accident.

Nor was the shade work performed in the context of the larger construction project (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881 [2003]; *Martinez v City of New York*, 93 NY2d 322 [1999]). Although HCZ and Tishman commenced discussions about the subject work while Tishman was still on site carrying out its obligations under the construction management agreement with HCZ, and Tishman sought pricing information from City View under its subcontract with City View, the evidence also shows that Tishman and HCZ ultimately decided that it would be more efficient if HCZ contacted City View directly for the work, given that the construction project and Tishman's construction management obligations were coming to an end. The documentary evidence shows that City View then directly sent HCZ, as opposed to Tishman, proposals and invoices for the subject work, and that HCZ paid City View directly for the services. Accordingly, given the circumstances here, we find that the shade work was not "ongoing and contemporaneous with the other work that formed part of a single contract"; rather, it fell "into a separate phase easily distinguishable from other parts of the larger construction project" (*Prats*, 100 NY2d at 881).

Because the shade work is distinct from the construction work, Labor Law § 241(6) also does not apply (*see Nagel v D & R Realty Corp.*, 99 NY2d 98 [2002]; *Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 595 [1st Dept 2010]).

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9695 In re Thailique Nashean S., etc.,

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

Sean L.,
Respondent-Appellant,

Graham-Windham Services to
Families and Children,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the child.

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about June 20, 2012, which, after a hearing, inter alia, determined that respondent father's consent is not required before freeing the child for adoption, and, in the alternative, that pursuant to Social Services Law § 384-b, respondent abandoned the subject child, unanimously affirmed, without costs.

The record contains clear and convincing evidence that respondent failed to satisfy the requirements of Domestic Relations Law § 111(d)(1) that he maintain substantial and continuous or repeated contact with the child (*see Matter of Maxamillian*, 6 AD3d 349, 351 [1st Dept 2004]).

The record also demonstrates by clear and convincing evidence that respondent abandoned the child because during the six-month period preceding the filing of the petition, he did not contact the agency or visit his son (Social Services Law § 384-b[4][b]; *see Matter of Annette B.*, 4 NY3d 509, 513-514 [2005]). Although respondent filed two custody and/or visitation petitions regarding the child, they were not filed within the applicable look-back period, and were dismissed upon respondent's default. Respondent's testimony that, prior to the relevant time period, he had chance encounters with the child during which he "would stop, talk with him, give him money and then leave," is insufficient to demonstrate consistent contact as these encounters were too sporadic and minimal to avoid the presumption of abandonment (*see Matter Ravon Paul H.*, 161 AD2d 257, 257 [1st Dept 1990]).

Respondent failed to show that there were circumstances rendering contact with the child or agency infeasible, or that he was discouraged from contacting the child by the agency (Social Services Law § 384-b[5][b]; *see Matter of Isaiah Johnathan S.*, 33 AD3d 459, 459 [1st Dept 2006]).

The Family Court correctly determined that a dispositional hearing was not required. There is no statutory mandate

requiring a dispositional hearing after a finding of abandonment pursuant to Social Services Law § 384-b. The court also properly determined that the termination of parental rights to allow for adoption is in the best interests of the child.

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9696 Adam Pratt, Index 107761/07
Plaintiff-Respondent,

-against-

Gregory Haber, M.D., et al.,
Defendants-Appellants,

Boston Scientific Corporation,
Defendant.

_____

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for appellants.

Okun, Oddo & Babat, P.C., New York (Darren Seilback of counsel), for respondent.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about February 6, 2012, which, in this medical malpractice action, denied defendants-appellants' motion for summary judgment dismissing all claims against defendant Lenox Hill Hospital, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing all claims against Lenox Hill.

Defendants made a prima facie showing that defendant Gregory Haber, M.D., was not an employee or agent of Lenox Hill and that Lenox Hill was therefore not liable for Dr. Haber's alleged malpractice (*see Hill v St Clare's Hosp.*, 67 NY2d 72, 79 [1986]).

In opposition, plaintiff failed to raise a triable issue of

fact. There is no evidence that Dr. Haber was an employee of Lenox Hill. Dr. Haber's affiliation with Lenox Hill is insufficient to hold the hospital liable for the doctor's alleged malpractice (*see Ruane v Niagara Falls Mem. Med. Ctr.*, 60 NY2d 908, 909 [1983]). Further, plaintiff failed to provide evidence sufficient to raise a triable issue of fact concerning whether Dr. Haber was acting on behalf of the hospital, or whether plaintiff reasonably believed that Dr. Haber was acting at the hospital's behest (*see Sarivola v Brookdale Hosp. & Med. Ctr.*, 204 AD2d 245, 245-246 [1st Dept 1994], *lv denied* 85 NY2d 805 [1995]). Plaintiff testified that his private physician referred him to Dr. Haber based on Dr. Haber's expertise and "pioneering" cure for acid reflux disease. Accordingly, plaintiff's testimony demonstrates that plaintiff specifically sought Dr. Haber's services and did not seek treatment from the hospital directly (*see Sarivola*, 204 AD2d at 246). Plaintiff's citation to a television "blurb" about Dr. Haber and the procedure, which he saw before he consulted Dr. Haber, is insufficient to raise an issue as to whether Dr. Haber was the hospital's agent. In order to impose liability on the hospital under a theory of apparent agency, there must be words or conduct by the hospital that give rise to the appearance and belief that the doctor possesses

authority to act on behalf of the hospital (*see Sullivan v Sirop*, 74 AD3d 1326, 1328 [2d Dept 2010]). Here, plaintiff did not provide evidence that the television broadcast contained statements by the hospital concerning Dr. Haber, or that the hospital had any role in the preparation of the broadcast.

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

ENTERED: APRIL 2, 2013

CLERK

Sweeny, J.P., Renwick, Richter, Román, JJ.

9698 Rubin Schron, et al., Index 650702/10
Plaintiffs-Respondents,

-against-

Leonard Grunstein, et al.,
Defendants-Appellants,

Troutman Sanders LLP, et al.,
Defendants.

_____

Zuckerman Spaeder LLP, New York (Paul Shechtman of counsel), for appellants.

Dechert LLP, New York (Andrew J. Levander of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 6, 2012, which, after a nonjury trial pursuant to CPLR 3212(c), directed, among other things, that defendants-appellants (defendants) proceed to closing and deliver the membership units of defendant SVCare Holdings LLC to plaintiffs pursuant to their exercise of the option to purchase such units, unanimously affirmed, with costs.

Plaintiffs made a prima facie case against defendants by producing the notes and asserting without contradiction that the loan they evidenced had not been repaid (*UrbanAmerica, L.P. II v Carl Williams Group, L.L.C.*, 95 AD3d 642, 643 [1st Dept 2012]).

Defendants failed to carry their burden of demonstrating, in

support of their defense of lack of consideration, that plaintiffs failed to fund the loan (*see Carlin v Jemal*, 68 AD3d 655, 656 [1st Dept 2009]). Defendants' defense is barred by the provision in the 2006 restated loan agreement waiving "any defenses" to and "reduction" in the loan obligation (*see Banque Nationale de Paris v 1567 Broadway Ownership Assoc.*, 214 AD2d 359, 361 [1st Dept 1995]). The defense also is barred by the provisions in the loan documents rendering the inclusion of the loan on a plaintiff's books and records conclusive in the absence of a showing of "manifest error." Further, there is no basis for disturbing the court's findings of fact, based largely on credibility determinations (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). Given the foregoing bases for the court's determination, we decline to address defendants' contentions regarding certain legal conclusions of the court, which do not alter the decision we are reaching here.

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

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9699 The People of the State of New York, Respondent, Ind. 4682/10 1460/11

-against-

Akuudo Petrie, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about June 8, 2011,

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

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

ENTERED: APRIL 2, 2013

CLERK

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

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9700 The People of the State of New York, Respondent, Ind. 58/07

-against-

Andrew Blake,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Rahul Sharma of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Rivellese of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered April 7, 2009, convicting defendant, after a jury trial, of attempted murder in the second degree (three counts), assault in the first degree (two counts), assault in the second degree, criminal possession of a weapon in the second degree (two counts), reckless endangerment in the first degree and bribery in the second degree, and sentencing him to an aggregate term of 25 years, unanimously affirmed.

Defendant did not preserve his claim that the court should have given an adverse inference charge regarding the loss of a police-made surveillance videotape. As an alternative holding, we find that although such an instruction would have been appropriate, its absence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). For related reasons, we also find that trial

counsel's failure to request the instruction did not deprive defendant of effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

The jury was fully aware of the loss of the tape and its surrounding circumstances. Furthermore, the court permitted defense counsel to assert in summation that the missing tape would have actually supported defendant's claim of self defense, by showing the "aggressors" attacking the "terrified" defendant, who was "defending himself" and trying to get away. The court also permitted counsel to insinuate that the tape was deliberately suppressed because of its exculpatory value, rather than being negligently lost.

However, there was overwhelming evidence that directly refuted defendant's self-defense claim, including, among other things, another videotape. In addition, there was extensive evidence of conduct by defendant that was inconsistent with that of a person who had acted in self-defense, including interstate flight, an attempt to destroy evidence, a false initial statement to the police, and a bribe offer. For these reasons, we find there is no reasonable possibility that an adverse inference charge would have resulted in a different verdict.

As for defendant's ineffective assistance claim, the present

unexpanded record is insufficient to determine whether counsel's failure to request an adverse inference charge fell below an objective standard of reasonableness. Counsel may have had strategic reasons for that course of action, including a concern that the language of such an instruction might undermine her summation argument. In any event, regardless of whether counsel should have requested the instruction, we find, for the reasons already stated, no reasonable possibility that the lack of an adverse inference charge deprived defendant of a fair trial or affected the outcome (*see Strickland*, 466 US at 694).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9701 1626 Second Avenue LLC, Index 603492/09
Plaintiff-Respondent,

-against-

Steven Salsberg,
Defendant-Respondent-Appellant,

Nick Camaj,
Defendant-Appellant-Respondent.

_____

Stern & Zingman, LLP, New York (Mitchell S. Zingman of counsel), for appellant-respondent.

Joshua E. Abraham, New York, for respondent-appellant.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 23, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment dismissing defendant Steven Salsberg's counterclaim, denied defendants' cross motions for summary judgment dismissing the complaint, and denied defendant Nick Camaj's cross motion for summary judgment dismissing Salsberg's cross claim, unanimously modified, on the law, without costs, plaintiff's motion denied, defendant Camaj's cross motion granted, and otherwise affirmed, without costs.

In this dispute between plaintiff landlord and defendants, the principals of a corporation that was landlord's former tenant, the lease guaranty does not violate the statute of frauds

(General Obligations Law § 5-701[a][2]); it is in writing and signed by both defendants. Where, as here, there is a written and signed, but ambiguous, guaranty, parol evidence is admissible to clarify it (*see e.g. Sound Distrib. Corp. v Richmond*, 213 AD2d 178, 179 [1st Dept 1995], *lv denied* 86 NY2d 702 [1995]; *Korff v Corbett*, 18 AD3d 248, 251 [1st Dept 2005]).

The lease to which the guaranty refers says that defendant Salsberg is the guarantor. The guaranty consistently states that Salsberg is the guarantor. Although it also refers to tenant as the guarantor and it is signed by both defendants, when reading the guaranty and the lease together, Salsberg is certainly not entitled to summary judgment (*see e.g. White Rose Rood v Saleh*, 99 NY2d 589, 591 [2003]).

Defendant Camaj is also not entitled to summary judgment. Evidence that plaintiff's agent insisted that he sign the guaranty because he was a principal of the tenant raises an issue of fact as to whether Camaj was meant to be a guarantor (*see Schonberger v Culbertson*, 231 App Div 257, 258-259 [1st Dept 1931]). Camaj's argument that the guaranty is not binding on him because he signed it by mistake and the parties did not intend for him to be bound is unavailing. His signature on the guaranty is evidence of his intent to be bound by its terms (*People v Inserra*, 4 NY3d 30, 33 [2004]) and he does not allege fraud or

wrongdoing by plaintiff (*Da Silva v Musso*, 53 NY2d 543, 550 [1981]).

Salsberg's cross claim alleging that if the guaranty is enforceable against him, he is entitled to contribution from Camaj, should be dismissed. Salsberg did not oppose dismissal of the cross claim either before the motion court or on appeal.

Salsberg's counterclaim is not barred by res judicata. In the prior action for non-payment of rent commenced by landlord, the court expressly reserved defendant's right to maintain the instant action (*1626 Second Ave., LLC v Notte Restaurant Corp.*, 27 Misc 3d 138(A), 2010 NY Slip Op 50910[U] [App Term, 1st Dept 2010]; *see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]). Nor is the counterclaim barred by collateral estoppel. Whether plaintiff violated the lease by failing to provide a letter of no objection in a timely manner was neither necessarily decided nor material in the prior proceeding (*id.*).

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9702 The People of the State of New York, Respondent, Ind. 3988N/11

-against-

Manuel West, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J. at plea; Michael R. Sonberg, J. at sentencing), rendered on or about November 1, 2011, 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: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9703 Edward Bodtman, Index 113921/08
Plaintiff-Respondent,

-against-

Living Manor Love, Inc., et al.,
Defendants-Appellants,

Motel Management Corp., etc.,
Defendant.

_____

Kafko Schnitzer, LLP, Bronx (Neil R. Kafko of counsel), for Living Manor Love, Inc., appellant.

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for RM Farm Real Estate Inc. and Gina Molinet, appellants.

Reed S. Grossman, Brooklyn (Richard Galeota of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered February 23, 2012, which, insofar as appealed from as limited by the briefs, denied the motion of defendant RM Farm Real Estate Inc. (RM Farm) and the cross motion of defendant Living Manor Love, Inc. (Living Manor) for summary judgment dismissing the Labor Law § 240 and § 200 and common-law negligence claims as against them, unanimously reversed, on the law, without costs, and the motion and cross motion granted. The Clerk is directed to enter judgment in favor of RM Farm and Living Manor dismissing the complaint as against them.

Dismissal of the Labor Law § 240(1) claim is warranted since

plaintiff's work was outside the scope of activity protected by the statute. Plaintiff testified that on the day of the accident, he was to drill several holes in the roof of a motel in order to attach a temporary sign. After ascending to the motel's roof, but prior to performing such work, plaintiff slipped off the roof and fell to the ground. The record demonstrates that the work plaintiff was to perform would have entailed making only a slight change to the building by drilling a few holes in the roof and did not constitute "altering" for the purposes of Labor Law § 240(1) (*see Munoz v DJZ Realty, LLC*, 5 NY3d 747 [2005]; *Joblon v Solow*, 91 NY2d 457, 465 [1998]; *Della Croce v City of New York*, 297 AD2d 257 [1st Dept 2002]). Although RM Farm raised this argument for the first time in its reply affirmation in support of its motion, the issue was sufficiently raised by Living Manor in support of its cross motion. Moreover, contrary to the motion court's finding that its prior denial of a motion to dismiss pursuant to CPLR 3211 precluded it from considering this issue, the prior ruling did not constitute law of the case, given the difference in procedural posture (*see Moses v Savedoff*, 96 AD3d 466, 468 [1st Dept 2012]).

The court also should have dismissed the Labor Law § 200 and common-law negligence claims. The duty of an employer or owner to provide workers with a safe place to work "does not extend to

hazards which are part of or inherent in the very work being performed or to those hazards that may be readily observed by reasonable use of the senses in light of the worker's age, intelligence and experience" (*Bombero v NAB Constr. Corp.*, 10 AD3d 170, 171 [1st Dept 2004] [internal quotation marks omitted]). Here, plaintiff testified that he saw that the metal roof contained corrugated and smooth portions, yet he walked up the smooth part, which he described as dry and free of any foreign substances. His testimony suggests that the accident was caused by the inherently slippery nature of the smooth surface at an incline of approximately 30 degrees. It is also notable that the 59-year-old plaintiff had worked on other roofs in the past, although not this one. Accordingly, since the inherent risk of walking up a smooth portion of the sloped roof rather than walking on one of the visibly corrugated portions was just as apparent to plaintiff as it would have been to defendants, plaintiff could not hold defendants liable based on a theory that

defendants had constructive notice of such condition (*see Stephens v Tucker*, 184 AD2d 828, 829-830 [3d Dept 1992]; *see also Eichelbaum v Douglas Elliman, LLC*, 52 AD3d 210 [1st Dept 2008]).

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9704 The People of the State of New York, Ind. 2747/00
Respondent,

-against-

Juan Cardena,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

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Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered April 4, 2012, resentencing defendant, as a second felony drug offender, to a term of five years, with three years' postrelease supervision, unanimously affirmed.

The court provided a sufficient reduction of sentence pursuant to CPL 440.46. In light of defendant's criminal history, we perceive no basis for a further reduction.

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9705 Timothy McCue, et al., Index 110693/10
Plaintiffs,

-against-

Tower III, LLC, et al.,
Defendants.
- - - - -
Tower III, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

SJ Electric, Inc.,
Third-Party Defendant-Appellant.

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O'Connor Redd LLP, White Plains (Amy L. Fenno of counsel), for appellant.

Hannum Feretic Prendergast & Merlino, LLC, New York (David P. Feehan of counsel), for respondents.

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Order, Supreme Court, New York County (Louis B. York, J.), entered September 26, 2012, which denied third-party defendant-appellant SJ Electric, Inc.'s motion for summary judgment dismissing the third party complaint against it, unanimously affirmed, without costs.

The motion court correctly determined that issues of fact exist concerning whether SJ Electric was working on the fourth floor in the days prior to the accident and whether it was

responsible for cleaning up debris created as a result of its work. These issues of fact preclude dismissal of the third-party complaint for indemnification (*see Pennisi v Standard Fruit & S.S. Co.*, 206 AD2d 290 [1st Dept 1994]).

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9706 Mati Salomon, Index 117680/09
Plaintiff-Respondent,

-against-

Jaspal Singh, et al.,
Defendants,

Hlatun Minswe, et al.,
Defendants-Appellants.

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Brand Glick & Brand, P.C., Garden City (Peter M. Khrinenko of counsel), for appellants.

Asta & Associates, P.C., New York (Eliot S. Bickoff of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered April 9, 2012, which, insofar as appealed from as limited by the briefs, denied the cross motion of defendants Hlatun Minswe and Maung Y. Mon for summary judgment dismissing plaintiff's claims of serious injury under the "permanent consequential limitation of use" and "significant limitation of use" categories of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established that plaintiff did not suffer a serious injury to his cervical spine by submitting the affirmed reports of their orthopedist and neurologist. Each physician examined plaintiff and found full range of motion in all planes

(*see Bailey v Islam*, 99 AD3d 633 [1st Dept 2012]; *Rosa v Mejia*, 95 AD3d 402, 403 [1st Dept 2012]). In opposition, plaintiff raised a triable issue of fact by submitting an affirmed report of a radiologist who opined that an MRI of plaintiff's cervical spine taken shortly after the accident revealed a herniated disc, and affirmed medical reports finding that tests conducted, both shortly after the accident and recently, revealed limitations in cervical spine range of motion (*see Pindo v Lenis*, 99 AD3d 586 [1st Dept 2012]).

On the issue of causation, defendants' medical experts' passing reference to medical conditions that plaintiff experienced several years prior to the subject accident did not meet defendants' prima facie burden. The experts did not review any medical records related to plaintiff's prior treatment and expressed no opinion as to whether such conditions would "interrupt the chain of causation between the accident and claimed injury" (*Pommells v Perez*, 4 NY3d 566, 572 [2005]; *see Bray v Rosas*, 29 AD3d 422, 423-424 [1st Dept 2006]). Further,

plaintiff's treating physcian opined that the cervical injury was caused by the accident, based on plaintiff's lack of previous symptoms and the onset of pain after the accident (*see Perl v Meher*, 18 NY3d 208, 219 [2011]).

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

ENTERED: APRIL 2, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Richter, Román, JJ.

9707N Hildene Capital Management, LLC, et al.,
Plaintiffs,

-against-

The Bank of New York Mellon, etc., et al.,
Defendants,

The Bank of New York Mellon, etc., et al.,
Nominal Defendant.

- - - - -

Preferred Term Securities XX, Ltd.,
Plaintiff-Intervenor-Respondent,

-against-

The Bank of New York Mellon, etc., et al.,
Defendants-Appellants.

Index 650980/10

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Emmet, Marvin & Martin, LLP, New York (Paul T. Weinstein of counsel), for The Bank of New York Mellon, appellant.

Willkie Farr & Gallagher LLP, New York (Kelly M. Hnatt of counsel), for Bimini Capital Management, Inc., appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Jonathan E. Pickhardt of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about August 24, 2012, which granted Preferred Term Securities XX, Ltd.'s motion to intervene as a party plaintiff, unanimously affirmed, with costs.

Preferred Term Securities XX, Ltd. (PreTSL XX) issues

collateralized debt obligations. It sold notes to investors and used the proceeds to purchase various securities (the Collateral Securities), cash flows from which are distributed to the investors (the noteholders). PreTSL XX is governed by an Indenture among itself, as issuer, Preferred Term Securities XX, Inc., as co-issuer, and defendant Bank of New York Mellon (BNYM), as trustee. Because it is structured as a static investment vehicle, that is, the pool of assets it holds was intended to stay constant, Collateral Securities can only be sold or otherwise removed from the PreTSL XX Trust Estate in limited circumstances prescribed by the Indenture.

Plaintiffs, senior noteholders, allege that BNYM improperly sold Collateral Securities to defendant Bimini Capital Management, Inc., thereby diverting valuable portfolio collaterals from the Trust Estate and diminishing its value, and wrongly depriving them and other noteholders of the full bargained-for value of their investments.

PreTSL XX moved to intervene in this action on the grounds that the action involves claims for damages that relate to the disposition of property it owns, that its interests may not be adequately represented by the parties, and that it may be affected by the judgment (*see* CPLR 1012 [intervention as of right]), and that its claims and this action have common

questions of law and fact (*see* CPLR 1013 [intervention by permission]). Defendants argue that PreTSL XX does not have standing to assert a claim for damage to the Trust Estate, because any alleged injury was sustained by nonparty noteholders, not PreTSL XX. We find, contrary to defendants' argument, that PreTSL XX has "an actual legal stake in the matter being adjudicated" (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]) and therefore has standing to intervene in this action.

Initially, we reject the proposition implicit in defendants' argument that there may be no party in a position to hold BNYM responsible for the full scope of the damage caused by its alleged breach of the Indenture (*see Matter of Petroleum Research Fund*, 3 AD2d 1, 4 [1st Dept 1956]; *CFIP Master Fund, Ltd. v Citibank, N.A.*, 738 F Supp 2d 450, 477 [SD NY 2010]).

More specifically, we find that PreTSL XX, as a signatory to and BNYM'S primary counterparty under the Indenture, has standing to bring a breach of contract claim in the face of BNYM's sale to Bimini of assets that the Indenture allegedly did not permit it to sell (*see Petrohawk Energy Corp. v Law Deb. Trust Co. of New York*, 2007 WL 211096, *3, 2007 US Dist LEXIS 5803, *8-9 [SD NY 2007]). That any recovery PreTSL XX obtains may have to be distributed to the noteholders does not alter this conclusion

(*see Petroleum Research Fund*, 3 AD2d at 4; *Petrohawk*, 2007 WL 211096, at *3, 2007 US Dist LEXIS 5803, at 8).

PreTSL XX also has standing as the owner of the Collateral Securities that were sold by BNYM to defendant Bimini (*see US Bank N.A. v Gestetner*, 74 AD3d 1538, 1541 [3d Dept 2010]).

Most significantly, PreTSL XX has standing based upon the contractual duties it assumed under the Indenture (*see Petrohawk*, 2007 WL 211096 at *3, 2007 US Dist LEXIS 5803, at 8). In the "Granting Clause," PreTSL XX granted its "right, title and interest" in the Collateral Securities to BNYM, "for the benefit of itself and the Holders of the Notes," and "in trust ... to secure compliance with the provisions of this Indenture, all as provided in this Indenture." Section 3.5 of the Indenture, "Protection of the Trust Estate," authorizes PreTSL XX to take action "necessary or advisable to: ... (iv) preserve and defend title to the Collateral." Defendants' interpretation of the Granting Clause would lead to the perverse result that a grant made expressly to secure compliance with the Indenture and to

benefit PreTSL XX and the noteholders would preclude PreTSL XX from bringing claims, for the benefit of itself and the noteholders, to recover damages for BNYM's alleged breach of the Indenture.

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

ENTERED: APRIL 2, 2013

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8850 Access Point Medical, LLC, et al., Index 102082/10
Plaintiffs-Appellants,

-against-

Edward R. Mandell, et al.,
Defendants-Respondents.

_____

Joseph M. Heppt, New York, for appellants.

Friedman Kaplan Seiler & Adelman LLP, New York (Philippe Adler of counsel), for respondents.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered August 2, 2011, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Karla Moskowitz
Helen E. Freedman
Sheila Abdus-Salaam, JJ.

8850
Index 102082/10

_____x

Access Point Medical, LLC, et al.,
Plaintiffs-Appellants,

-against-

Edward R. Mandell, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Judith J. Gische, J.), entered August 2, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss as time-barred the claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty.

Joseph M. Heppt, New York, for appellants.

Friedman Kaplan Seiler & Adelman LLP, New York (Philippe Adler of counsel), for respondents.

SAXE, J.

Plaintiffs Access Point Medical LLC and its wholly owned subsidiary, Access Point Medical, Inc., were formed by nonparty Bill Kidd, with the assistance of defendant attorney Edward R. Mandell to engage in the business of manufacturing and selling durable home medical equipment such as wheelchairs, canes, walkers, and oxygen tanks. Kidd was plaintiffs' largest shareholder and served as chairman of the board. In this action, plaintiffs essentially allege that defendants, acting as their attorneys, actively misled them and failed to disclose critical information because, while representing them, defendants simultaneously represented Kidd when Kidd's interests were adverse to theirs.

Plaintiffs commenced this action on February 17, 2010, alleging causes of action for legal malpractice, breach of contract, and breach of fiduciary duty, and seeking damages including compensatory damages and the "disgorgement" of the $658,117.28 they paid to defendants in legal fees. In support of these causes of action, the complaint alleges a number of events. First, that Mandell and his law firm, defendant Troutman Sanders, LLP, prepared the private placement memoranda when Kidd decided to sell plaintiffs' securities to outside investors in order to recoup his investment, and errors in those memoranda exposed

plaintiffs to legal liability. Second, that defendants improperly represented both Kidd and plaintiffs in the drafting and negotiating of a management services agreement between them, despite, and without disclosing, the existence of a conflict between their interests.

Plaintiffs further allege that defendants negotiated a line of credit for them from Wells Fargo, while failing to address Kidd's causing or contributing to their deteriorating financial condition and the certainty of their default on the line of credit, rendering them liable for extra penalties and fees and, ultimately, causing the cancellation of the line of credit. In addition, plaintiffs claim that defendants failed to properly inform them of warning letters sent by the Food and Drug Administration regarding allegedly defective products being sold by them, resulting in loss of business and damage to their business reputation.

Defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) was granted. The motion court observed that the claims for malpractice and breach of fiduciary duty were barred by the three-year statute of limitations (CPLR 214), because all the complained-of conduct occurred in 2005 or 2006. As to the language added in plaintiffs' amended complaint, that "[u]pon information and belief, Troutman's and Mandell's

representation of APM continued through March 2007," the motion court found that it was conclusively disproved by the last entry on defendants' final invoice to plaintiffs, which reflects a telephone call on February 14, 2007, more than three years before this action was commenced.

Plaintiffs do not challenge the motion court's determination that their legal malpractice action was barred by the three-year statute of limitations, since the cause of action accrued in 2005 or 2006, this action was commenced on February 17, 2010, and the continuous representation doctrine was not shown to be applicable. However, they challenge the ruling that their breach of fiduciary duty claims are also barred by the three-year limitations period.

Plaintiffs' argument against treating the fiduciary duty claims as time-barred has changed over time. They acknowledged before the motion court that the three-year limitations period applied to the breach of fiduciary duty claims, but insisted that under the continuous representation doctrine the fiduciary duty claims did not start to run until some time after March 2007. Now plaintiffs now take the position that it is the six-year statute of limitations that applies to their claims for breach of fiduciary duty.

For breach of fiduciary duty claims, "the choice of the

applicable limitations period depends on the substantive remedy that the plaintiff seeks" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Plaintiffs characterize their claim, seeking the return of $658,117.68 that they paid in attorneys' fees, as an equitable claim for "disgorgement," to which they contend the six year limitations period should apply. However, we reject plaintiffs' contention that the remedy they seek is properly characterized as an equitable claim for disgorgement.

Plaintiffs rely on this Court's statement that "[d]isgorgement is an equitable remedy" (*see J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 91 AD3d 226, 230 [1st Dept 2011], *lv granted* 19 NY3d 806 (2012). However, the disgorgement remedy referred to in *J.P. Morgan Sec.* and the cases it discusses is a fundamentally different than the "disgorgement" plaintiff seeks here. Claims for disgorgement most commonly arise in actions brought by the Securities and Exchange Commission in which the agency seeks an order directing a party to disgorge its ill-gotten gains for the recompense of injured investors or some entity other than the prosecuting agency (*see J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 91 AD3d 226, 230 [1st Dept 2011], *lv granted* 19 NY3d 806 [2012] and cases discussed therein). Other types of government agencies or quasi-governmental entities also

have sought the disgorgement of wrongfully obtained funds to third parties (*see e.g. Morgan Stanley Capital Group Inc. v Pub. Util. Dist. No. 1 of Snohomish County*, 554 US 527, 538 [2008]; *Montana v Crow Tribe of Indians*, 523 US 696 [1998]). Similarly, the equitable disgorgement relief sought by the plaintiff in *IDT Corp. v Morgan Stanley* (12 NY3d at 139) consisted of profits Morgan Stanley allegedly earned as investment banker for a third party through the third party's allegedly improper financial dealings with IDT; consequently, the disgorgement of those profits could not necessarily be accomplished simply by awarding IDT a judgment against Morgan Stanley in the amount of funds that it had paid out.

In contrast, plaintiffs' demand for the return of attorneys' fees they paid to defendants is, essentially, a claim for monetary damages. The calculated use of the term "disgorgement" instead of other equally applicable terms such as repayment, recoupment, refund, or reimbursement, should not be permitted to distort the nature of the claim so as to expand the applicable limitations period from three years to six. We cannot allow a purely semantic distinction to control the application of the statute of limitations.

Nor do we accept plaintiffs' alternative argument that the breach of fiduciary duty claim is essentially a fraud claim, to

which the six-year statute would be applicable. The amended complaint is based on an alleged conflict of interest and allegedly impaired professional judgment, and it does not allege the elements of fraud (*see Buller v Giorno*, 57 AD3d 216 [1st Dept 2008]). The failure to disclose a conflict of interest does not transform a breach of fiduciary duty into a fraud.

Another new contention plaintiffs raise on appeal is that the statute of limitations must be treated as tolled, not only pursuant to the continuous representation doctrine, but also under the fiduciary tolling rule, also known as the open repudiation rule.

As the motion court found, no facts are alleged that would justify the application of the continuous representation doctrine to toll the statute of limitations.

Nor, we find, is the fiduciary tolling rule, or open repudiation rule, applicable to plaintiffs' breach of fiduciary duty claims. Under that rule, the statute of limitations on claims against a fiduciary for breach of its duty is tolled until such time as the fiduciary openly repudiates the role (*see Matter of Barabash*, 31 NY2d 76, 80 [1972]). The cases in which this rule arose, and the cases applying it, reflect that the rule arose to protect beneficiaries in the event of breaches of duty by fiduciaries such as estate administrators (*see Barabash*, 31

NY2d at 80), trustees (*see Matter of Ashheim*, 111 App Div 176 [1906], *affd* 185 NY 609 [1st Dept 1906]), corporate officers (*see Westchester Religious Inst. v Kamerman*, 262 AD2d 131 [1st Dept 1999]), and receivers (*see Golden Pac. Bancorp v Federal Deposit Ins. Corp.*, 273 F3d 509 [2d Cir 2001]), that is, in circumstances in which the beneficiaries would otherwise have no reason to know that the fiduciary was no longer acting in that capacity. In those circumstances, it is appropriate to toll the limitations period until the beneficiary has reason to know that the fiduciary relationship has unequivocally ended.

However, where one party's fiduciary obligations to another arose out of their attorney-client relationship, and would not have existed without that relationship, there is no need for an open repudiation of the fiduciary's role, because the attorney's fiduciary duty to the client necessarily ends when the representation ends. Plaintiffs' causes of action alleging breach of fiduciary duty specifically assert that defendants' fiduciary duty to them arose out of their attorney-client relationship with them, thus, their fiduciary relationship ended when their attorney-client relationship ended, without any need for a declaration to that effect.

We recognize that in *212 Inv. Corp. v Kaplan* (44 AD3d 332 [1st Dept 2007]), this Court accepted the premise, framed by the

parties, that the open repudiation doctrine applies to *equitable* claims brought by clients against their attorneys, although not to claims for money damages. That decision states, without elaboration, that "the 'open repudiation' doctrine tolls the statute of limitations on the [client's] unjust enrichment claim [against the lawyer], which seeks equitable relief" (*id.* at 334, citing *Matter of Kaszirer v Kaszirer*, 286 AD2d 598, 599 [1st Dept 2001], and *Westchester Religious Inst. v Kamerman*, 262 AD2d 131 [1st Dept 1999]). However, we observe that neither of the cited cases concerned claims against attorneys for breach of their fiduciary duty to their clients arising out of the attorney-client relationship. *Matter of Kaszirer* concerned a claim by a trust beneficiary against a trustee, and *Westchester Religious Inst.* involved a claim by a nonprofit corporation against its officers for breach of their fiduciary duty; both of those claims form proper bases for application of the open repudiation rule. And unlike this case, in *212 Inv. Corp.*, neither party questioned the applicability of the fiduciary tolling rule to an attorney whose fiduciary duty arose out of the attorney-client relationship, so this Court was not required to decide that issue. Presented with the issue now, we reject the application of the fiduciary tolling rule to claims by a client against an attorney for breach of the fiduciary duty arising out of the

attorney-client relationship, at least in the absence of a true entitlement to equitable relief.

Accordingly, the order of the Supreme Court, New York County (Judith J. Gische, J.), entered August 2, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss as time-barred the claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty, should be affirmed, without costs.

All concur.

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

ENTERED: APRIL 2, 2013

CLERK