SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 21, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3126 Gabor Baumann, et al., Index 153825/14
Plaintiffs-Respondents,

-against-

Dawn Liquors, Inc. doing business as
Diplomat Wines and Spirits,
Defendant,

The Sterling Plaza Condominium,
Defendant-Appellant.

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Fixler & LaGattuta, LLP, New York (Paul F. LaGattuta, III of counsel), for appellant.

O'Donnell & Fox, P.C., New York (Thomas O'Donnell of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 10, 2016, which, insofar as appealed from as limited by the briefs, denied the motion of defendant the Sterling Plaza Condominium (Sterling) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

On this appeal, we are asked to determine whether Supreme Court properly denied Sterling's summary judgment motion on the

ground that plaintiffs raised a triable issue of fact as to whether Sterling created or exacerbated the sidewalk condition that caused plaintiff Gabor Baumann to slip and fall. We conclude that summary judgment was properly denied on that ground.

Plaintiff Gabor Baumann alleges that on January 21, 2014, at approximately 6:45 p.m., while a snowstorm was occurring, he slipped and fell on a patch of ice, fracturing his hip, while walking on a sidewalk in front of a store leased by defendant Dawn Liquors, Inc. in a building owned by Sterling. He testified that after he fell, he saw that the portion of the sidewalk where he had fallen was covered by a transparent sheet of ice measuring a few feet in diameter. His wife, plaintiff Tina Baumann, testified that she arrived at the accident scene shortly after her husband's fall and observed that the sidewalk area in front of the Dawn Liquors store was quite icy and very slippery, that the sheet of ice was about two inches thick and that the area in question was not cleared completely. She further testified that she did not recall seeing snow on top of the patch of ice.

Sterling's general manager testified that on occasions prior to the day of the accident he had observed Sterling employees using a snowblower to clear a path along the sidewalk in front of

the building and a rotary salt spreader to de-ice the path. He did not remember if any Sterling employees had cleared snow in front of the Dawn Liquors store on the day in question, however.

Dawn Liquors' general manager testified that sometime after he arrived at work at approximately 2:00 p.m. on the day of the accident, he saw Sterling employees removing snow with a snowblower but could not say whether they used de-icing material.

Each of the defendants submitted the expert affidavit of a meteorologist. The meteorologist's affidavit submitted by Dawn Liquors stated that on the day of the accident, air temperatures in New York City were well below freezing and had continued to fall from the time the snowstorm started until the time of the accident. Similarly, Sterling's meteorological expert agreed that the air temperatures were below freezing throughout the day of the accident, and well below freezing at the time of the accident.

Under the storm in progress doctrine, a landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is ongoing until a reasonable time after the storm has ended (*Weinberger v 52 Duane Assoc. LLC*, 102 AD3d 618, 619 [1st Dept 2013]; *Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]). Upon a defendant's

showing that the doctrine applies, the plaintiff may defeat summary judgment by raising a triable issue of fact as to whether the landowner had undertaken snow removal activities that created or exacerbated a hazardous condition (*see Pipero v New York City Tr. Auth.*, 69 AD3d 493 [1st Dept 2010]).

Here, as plaintiffs concede, there was a storm in progress at the time of the accident. Thus, the burden shifted to plaintiffs to demonstrate the existence of a triable issue of fact as to whether Sterling created or exacerbated the hazardous condition through its snow removal activities. Plaintiffs have met that burden, as they have both testified that they saw an ice patch at the scene of the accident. Dawn Liquors' general manager testified that he observed Sterling employees using a snowblower on that day prior to plaintiff Gabor Baumann's accident, but he could not say whether they used de-icing material when removing the snow. The evidence from defendants' meteorologists was that air temperatures in the vicinity of the accident remained well below freezing and continued to drop from the commencement of the snowstorm to the time of the accident. This evidence supports plaintiffs' argument that ice could not have formed after the snowclearing efforts by Sterling's employees. Accordingly, an issue of fact was raised as to

whether Sterling's actions created or exacerbated a hazardous condition by employing a snowblower to remove snow without taking further steps to de-ice the sidewalk (*see Pipero*, 69 AD3d 493).

Neither the shared expert opinion of the defendants' meteorologists that there was no ice naturally present on the sidewalk on the day of the accident nor the testimony of Dawn Liquors' general manager that he did not recall observing any ice and had no difficulty traversing the sidewalk after Sterling's snow removal work and before plaintiff Gabor Baumann's fall is dispositive of the motion.

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

ENTERED: MARCH 21, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3144 Dakota Jade T., an Infant, by her Mother and Natural Guardian, Tiesha J., et al., Plaintiffs-Respondents,

-against-

New York City Housing Authority, Defendant-Appellant.

Index 350150/11

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for appellant.

Rheingold, Valet, Rheingold, Ruffo & Giuffra, LLP, New York (Jeremy A. Hellman of counsel), for respondents.

Order, Supreme Court, Bronx County (Barry Salman, J.), entered January 28, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly denied defendant New York City Housing Authority's (NYCHA) motion for summary judgment. The subject child, Dakota Jade T., born in 2005, was diagnosed as having elevated blood lead levels in 2010, and some of the surfaces that the Department of Health (DOH) tested in each of the subject apartments had positive results for lead. NYCHA, the owner and operator of the subject premises, was responsible for maintaining both apartments. The conflicting test results submitted by NYCHA

and testimony by its expert that DOH's positive readings were affected by rebar in the concrete ceilings, did not satisfy NYCHA's burden on summary judgment to disprove the existence of lead. Additionally, NYCHA did not demonstrate that it did not know about lead paint in the building. At the very least there are genuine issues of fact regarding whether NYCHA had knowledge of lead paint danger in the apartments.

Dakota has resided with her mother, plaintiff Tiesha J. (plaintiff), in apartment 20S since birth. During a routine blood test on January 20, 2010, Dakota was diagnosed with lead poisoning; her blood lead level was 45ug/dl. Prior to her diagnosis, Dakota's aunt used to babysit for Dakota four days a week in her apartment from which she runs a City-approved day care business. The aunt's apartment (14P), is in the same building that Dakota lives in. Plaintiff claims that she made numerous complaints to NYCHA about peeling paint in her apartment. When deposed, she testified that she made these complaints over a period of years to NYCHA's employees. The complaints were made orally, in person, and by telephone, and once she filled out a repair request form at NYCHA's management office. She also filed a complaint with 311. No one, however, came to inspect her apartment until after Dakota's diagnosis.

Plaintiff says she saw Dakota (then a toddler) playing with peeling paint chips on the floor, sometimes putting them into her mouth. The aunt, who was also deposed, testified that she also complained about peeling paint in her apartment, but no one came to inspect.

Danny Lugo, a former NYCHA employee and superintendent at the subject building from 2009 until April 2013, was deposed. He testified that several tenants came in with reports showing that a child they lived with had elevated blood-level lead or lead poisoning. Upon such a report being made, NYCHA would inspect the apartment, but did not notify DOH. Lugo testified several parents came in with positive results while he was employed and that several apartments were inspected. Lugo could not remember exactly how many, but this happened approximately five times. He could not recall instances when an apartment underwent lead abatement, but he also testified that he did not know the results of any of the inspections that were made. Lugo testified that apartments within the subject building were painted every 3½ years. According to Lugo, the painting was not done "in-house" by NYCHA, but performed by a contractor. The work was later inspected by a paint inspector, but he did not elaborate what this entailed. He also testified he received no special training

regarding lead paint.

NYCHA denies it had actual or constructive notice of peeling lead-based paint in either apartment. It argues that it could not have had any knowledge of lead paint because there was no lead paint in the apartments and that it otherwise did not know about any lead paint.

Although NYCHA relies on its own testing that was negative for lead paint, DOH's lead testing came back positive. NYCHA's arguments that these were false positives due to the manner in which, and location from where, the samples were taken is insufficient to disregard them as a matter of law. It is undisputed that lead-paint violations were issued against NYCHA. Although NYCHA filed a notice of intent to challenge the violations (contestation), the contestation was denied by DOH. DOH denied the contestation on the basis that the supporting documentation NYCHA provided was "not sufficient" to indicate that proper procedure had not been followed by the tester or that the test results were inaccurate. NYCHA separately argues it would be unreasonable to conclude that lead-based paint was used to paint either apartment because the use of lead-based paint in residential buildings was banned in New York City in 1960 and construction of the building was completed in 1974. The ban on

lead paint alone is not sufficient to conclusively prove that no lead paint was used.[1]

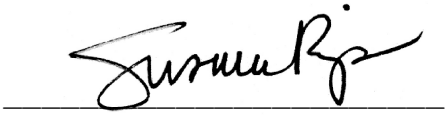
Nor did NYCHA prove as a matter of law, that it had no actual or constructive notice of the existence of lead paint in the building. Pursuant to the City's Childhood Lead Poisoning Prevention Act (Local Law 1 of 2004), lead-based paint is presumed to exist in a multiple dwelling unit if the building was built before 1960. Where, as here, the building is built between 1960 and 1978, the presumption will apply only if the owner knows that there is lead-based paint, and a child under the age of six lives in the apartment. Although in a pre-1960 building, paint is presumed to contain lead, the opposite is not true; there is no presumption that paint in a building constructed after 1960 is not lead-based. Given plaintiff's claim, that NYCHA maintains the premises and assumed the duty to have the apartments painted,

[1]Lead paint was still available for purchase and it was not until 1978 when the Federal government banned the use, sale and distribution of lead paint as a hazardous product (16 CFR 1303 *et seq*.)

the absence of any evidence concerning the history of painting in the subject apartments is insufficient for the court to rule out, as a matter of law, notice.

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

ENTERED: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3159 The People of the State of New York, Ind. 6896/84
Respondent,

-against-

Andrew Williams,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

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Order, Supreme Court, New York County (Larry R.C. Stephen, J.), entered September 10, 2015, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art. 6-C), unanimously modified, on the facts and in the exercise of discretion, to the extent of reducing the adjudication from level three to level two, and otherwise affirmed, without costs.

This appeal presents one of the rare cases in which we should exercise our discretion to depart downward from defendant's presumptive sex offender risk assessment level. During his 30 years of incarceration, defendant committed himself to changing his life. At age 52, he is markedly different from the 20 year-old who committed the violent offense that requires

his registration. Defendant has completed academic and therapeutic programming that greatly diminish his likelihood of re-offending. His likelihood of reoffense is further decreased by the pain and mobility problems that he has developed. Under these circumstances, we find that the risk assessment instrument (RAI) did not "fully capture" that defendant has demonstrated his ability to be a constructive member of society who does not pose the high level of reoffense characteristic of a level three sex offender (*see* Guidelines at 4).

In 1984, defendant raped and robbed a 22-year old woman on the rooftop of her building. At the time, he had been using phencyclidine (PCP) and marijuana, and suffered from alcoholism. Following his conviction after trial of one count of rape in the first degree and five counts of robbery in the first degree, defendant was sentenced to a term of imprisonment of 15 to 30 years, which was run consecutively to a term of 12½ to 25 years that he received on an unrelated robbery conviction.

In the 30 years since these heinous offenses, defendant has taken major steps to turn his life around. He obtained his GED in 1986, an Associate's Degree in 1992, and two Bachelor's Degrees, in 2007 in human behavior and in 2008 in organizational management. Defendant also hopes to pursue a law degree. The

attorney who assisted him with his parole application has offered to mentor him in this endeavor. She submitted a letter of recommendation in support of his application for a downward departure, the first time she had ever done so, in which she stated that "[h]is narrative illustrates the rehabilitative force of education" and described him as "reliable, respectful and hardworking."

Defendant also took advantage of therapeutic programming related to substance abuse and nonviolent conflict resolution. He completed a 16-week Islamic Therapeutic Substance Abuse Program, the Department of Correction and Community Supervision's Alcohol and Substance Abuse Treatment program, and the Compadre Helper Bilingual Peer Counseling Training Program, in which he acquired counseling skills while receiving therapy for drug and alcohol abuse. Additionally, he participated in the Alternatives to Violence Project (AVP) where he completed basic and advanced nonviolent conflict resolution course work before training to become a program facilitator. Defendant's performance with AVP was praised in a letter of recommendation from a former program facilitator who recognized defendant as a "positive contributor"

to the program and a "good influence" on his fellow inmates.[1]

Defendant has also strengthened his community ties while incarcerated. Defendant communicated by mail with one of his childhood friends who is now a District Manager for the Social Security Administration. In her letter supporting his application, defendant's friend remarked that, through his letters, she has seen defendant "mature[] over the years" and she hopes that they remain friends. Defendant also found support in the Islamic community while incarcerated.

Defendant's efforts at rehabilitation have been recognized by two of his correction officers. One officer stated that defendant "deserves a chance" and is "intelligent, possesses insight and is a respectable person." This officer expressed his belief that "[defendant] will not return to prison once released." The other officer, who stated that he normally does not write inmate recommendation letters but had made an exception for defendant, believed that defendant would "re-enter society successfully and be a contributing member of his community." He

[1] In addition to developing counseling skills related to substance use and conflict resolution, defendant also trained to become an HIV/AIDS peer educator.

added that defendant is the "perfect candidate for any departure . . . ."

Defendant's incarceration has also been marked by a decline in his mobility. In 1996, defendant fell down a flight of stairs and suffered multiple disc herniations for which he underwent surgery (*see Williams v Smith*, 2009 WL 2431948, at *1, 2009 US Dist LEXIS 69871, *2 [SD NY Aug. 10, 2009]). He continues to suffer from degenerative disc disease in his spine, a bulging disc, and herniation in his back. The results of a 2014 MRI indicated the presence of a "large disc protrusion" causing "spinal stenosis." While incarcerated, defendant has received physical therapy and steroid injections to treat his continued pain. Additionally, his physical therapist has ordered him not to lift more than 10 pounds.

The Parole Board scheduled defendant, then 51 years old, for an open release date of July 21, 2015. Notice of this release date was submitted to the Board of Examiners of Sex Offenders. On July 2, 2015, an examiner scored defendant on the RAI at 135, which placed him at a presumptive level three sex offender adjudication. No departure was recommended.

Defendant appeared for a SORA hearing on September 10, 2015. At the hearing, he did not dispute the calculation of his

presumptive risk level. However, defendant moved for a downward departure, arguing that, among other things, his efforts at rehabilitation and his medical condition warranted a departure from his presumptive level three risk assessment. He submitted a number of exhibits, including copies of his degrees and certificates, the letters of recommendation that he had received, and his medical records attesting to his pain and mobility issues. His counsel argued that a level two adjudication would be adequate to monitor defendant because it involved many of the same registration requirements as a level three adjudication. The SORA court recognized defendant's accomplishments but declined to grant a downward departure, citing the seriousness of his underlying offense. We now exercise our discretion to modify defendant's sex offender adjudication from level three to level two.

The Court of Appeals has enunciated a three-step process for determining whether to depart downward from a defendant's presumptive risk level (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). First, a court must decide whether the proffered mitigating circumstance or circumstances are "of a kind, or to a degree, not adequately taken into account by the guidelines" (*Gillotti*, 23 NY3d at 861, citing Guidelines at 4). Second, a

court must determine whether the defendant seeking a downward departure has proven the existence of these alleged mitigating circumstances by a preponderance of the evidence (*id*. at 864). If the defendant surmounts these first two steps, a court must then exercise its discretion and determine at the final third step, "whether the totality of the circumstances warrants a departure" (*id*. at 861]).

Here, we find that, under this three-step analysis, a departure to level two is warranted. Initially, we note that defendant has met his burden of proving the existence of mitigating circumstances unaccounted for in the Guidelines by a preponderance of the evidence. Defendant's remarkable rehabilitation and his pain and mobility problems constitute, in this case, the sort of "special circumstances" for which a downward departure is appropriate (Guidelines at 4). Moreover, defendant supported his application with a number of exhibits, including his degrees, his medical records, and his letters of recommendation.

While we agree with the calculation of defendant's score on the RAI, it does not accurately depict his current ability to become a productive member of his community. First, while the RAI gives him a zero score under Factor 13, "Conduct While

Confined or Under Supervision," this does not adequately capture the exceptional degree to which defendant has worked to rehabilitate himself.

Additionally, defendant was assessed points on other sections of the RAI based on his characteristics at the time of the underlying offense that he has since changed. Defendant received 15 points as to Factor 11 of the RAI, "Drug or Alcohol Abuse," based on his use of marijuana, PCP, and alcohol at the time of the offense. He has since completed multiple substance abuse programs. Defendant received 30 points under Factor 1 of the RAI, "Use of Violence," because he was armed with a gun when he committed the underlying offense. His excellent work with the AVP and his many supporters' belief that he has rehabilitated himself reduce our concerns that he will behave violently again.

Defendant received 15 points under Factor 9, "Number and Nature of Prior Offenses," and 10 points under Factor 10, "Recency of Prior Felony," based on burglary convictions that he had received not long before committing the underlying offense. However, defendant's many supporters and his own efforts to rehabilitate himself suggest that he changed since committing the underlying offense.

As to defendant's mobility problems, a "physical condition

that minimizes [defendant's] risk of reoffense" has been recognized by the Board as a basis upon which to depart downward (Guidelines at 5). Here, defendant's 20 years of ongoing pain and mobility issues make it unlikely that he could commit an act like the one he was convicted of over 30 years ago (*cf. People v Portolatin*, 145 AD3d 463, 464 [1st Dept 2016] [downward departure from level two assessment inappropriate where health problems did not minimize likelihood of recidivism]).

Having concluded that defendant has surmounted the first two steps under *Gillotti*, we turn now to the issue of whether or not a downward departure would be an appropriate exercise of our discretion. In undertaking this analysis, we recognize the important public safety rationale underlying New York State's sex offender registration laws (Correction Law § 168-l[5] [directing the Board to develop guidelines and procedures to assess the likelihood of a sex offender's risk of repeat offending]; *People v Mingo*, 12 NY3d 563, 574 [2009] [Court of Appeals stating that the purpose of SORA is to "protect the public from sex offenders")]. The crime which has required defendant's registration was, as the People described at the SORA hearing and on appeal, undoubtedly serious. However, defendant committed this offense when he was a violent, drug-using 20 year old. He

is now a mature 52-year-old man whose time in prison has not only significantly transformed his behavior, but has been marked by a decline in his mobility, bearing on his ability to re-offend. As the Board has recognized, "The ability to depart is premised on a recognition that an objective instrument, no matter how well designed, will not fully capture the nuances of every case" (Guidelines at 4). In this case, the RAI, by scoring defendant for his actions and characteristics from 30 years ago, as it was designed to do, fails to provide a complete picture of the extraordinary changes that defendant has made while incarcerated. Moreover, defendant's changes have directly addressed the factors leading to his level three score on the RAI: his substance use, use of violence, and prior criminal activity.

We also consider that here, defendant has asked us only to depart downward from level three to level two, a designation that imposes many of the same registration requirements. Both level three and level two offenders are listed on a publicly available electronic database (Correction Law § 168-q[1]) and required to disclose both their home and employment addresses (Correction Law § 168-b[1][e]); the registry information for both level two and level three offenders is shared with municipal housing authorities (Correction Law § 168-b[12]). Additionally, because

defendant's underlying conviction classifies him as a sexually violent offender, he will be subjected to lifetime registration even as a level two offender (Correction Law §§ 168-h[2]; 168-a[3]).

However, as a level two offender, defendant will not be precluded from being located with 1,000 feet of school grounds, which would likely impede his efforts to find stable housing, employment, or even attend law school as he hopes (Executive Law § 259-c[14]; Penal Law § 220.00[14]). He will also not be required to verify his address in person every 90 days and he will have to provide a current photograph to the registry every three years as opposed to every year (Correction Law §§ 168-f[3]; 168-f[2][b2-b3]).

Accordingly, we find that a level two sex offender adjudication better reflects the person that defendant has become

over these past 30 years. A level three adjudication might jeopardize the important changes that defendant has achieved, while a level two adjudication is adequate to ensure that he does not re-offend and to protect the community.

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

ENTERED: MARCH 21, 2017

CLERK

Friedman, J.P., Andrias, Feinman, Kapnick, Gesmer, JJ.

3300-
3301-
3302 Ind. 3980/13

The People of the State of New York,
Respondent,

-against-

Haywood Hinton,
Defendant-Appellant.

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

Haywood Hinton, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jill Konviser, J. at dismissal motion; Patricia M. Nuñez, J. at suppression hearing; Juan M. Merchan, J. at jury trial, sentencing and resentencing), rendered November 6, 2014, as amended February 9, 2016, convicting defendant of 17 counts of criminal possession of a forged instrument in the first degree, and sentencing him, as a second felony offender, to 17 concurrent terms of 1½ to 4½ years, unanimously modified, on the law, to the extent of granting defendant's motion to suppress the 15 counterfeit bills recovered from his shoulder bag and dismissing counts 3 through 17 of the indictment, and otherwise affirmed, and order, same court (Juan

M. Merchan, J.), entered on or about March 30, 2015, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The hearing court should have granted defendant's motion to suppress the 15 counterfeit bills recovered from his shoulder bag. The bag was searched incident to defendant's arrest at a time when he was in handcuffs and five police officers were standing close to him. The officer who testified at defendant's suppression hearing stated that both defendant and the shoulder bag were "secured." The officer did not state that defendant was uncooperative or that he posed any sort of threat; indeed, officers had pursued defendant based only on their suspicion that he had committed the nonviolent offense of criminal possession of a forged instrument in the first degree. The record contains no testimony or other evidence suggesting that defendant was attempting to access, let alone destroy, the contents of his shoulder bag. Under these circumstances, we find that there was no issue of police or public safety nor any risk of destruction of evidence and therefore, no exigency, to justify the warrantless search of defendant's shoulder bag incident to his arrest (*see People v Jimenez*, 22 NY3d 717, 722-723 [2014]; *People v Gokey*, 60 NY2d 309, 313-314 [1983]). Accordingly, we grant

defendant's motion to suppress the bills recovered from his shoulder bag.

The hearing court properly denied defendant's motion to suppress a statement that he volunteered to the police immediately after they recovered two counterfeit bills from his pocket. *Miranda* warnings were not required, because there was no interrogation or its functional equivalent of interrogation (*see People v Arriaga*, 309 AD2d 544 [1st Dept 2003], *lv denied* 1 NY3d 624 [2004]; *People v Smith*, 298 AD2d 182 [1st Dept 2002], *lv denied* 99 NY2d 585 [2003]). This was not a situation where the police placed incriminating evidence in front of a defendant (*see People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]). Here, the police simply found the evidence in the course of a routine search of defendant's person incident to arrest during which he blurted out an incriminating statement. The fact that defendant had already made a statement that the hearing court suppressed as the product of custodial interrogation undertaken without *Miranda* warnings does not warrant a different conclusion, because that interrogation had ceased completely and the statement at issue was entirely spontaneous.

The verdict was supported by legally sufficient evidence and

was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility findings. There was overwhelming evidence to support the elements of knowledge and intent to defraud, including, among other things, the fact that the counterfeit bills were crude and obvious forgeries, the testimony of two store clerks that a person believed to be defendant had tried to give them counterfeit bills prior to his arrest, and defendant's admission that the two bills recovered from his pocket were fake (*see People v Johnson*, 65 NY2d 556, 562 [1985]; *People v Bogan*, 80 AD3d 450 [1st Dept 2011], *lv denied* 16 NY3d 856 [2011]). Based on the overwhelming evidence against defendant, we reject his argument that, in the event we were to suppress the contents of his shoulder bag, we should remand for a new trial on the remaining counts of the indictment pertaining to the two bills recovered from his pocket. The admission of the bills recovered from defendant's shoulder bag was harmless beyond a reasonable doubt, because had they been suppressed, there was no reasonable possibility that the jury would have acquitted on the counts pertaining to the bills recovered from his pocket (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *see also People v Whelan*, 165 AD2d 313, 325 [2d Dept 1991], *lv denied* 78 NY2d 927 [1991]

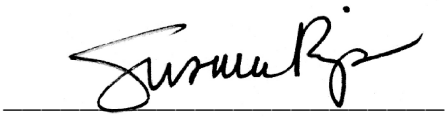
[suppression of blood test results required dismissal of driving while intoxicated per se count but did not require a new trial on the defendant's remaining convictions for counts of common law driving while intoxicated, reckless assault, and a violation of Vehicle and Traffic Law § 1128[a], which were overwhelmingly supported by other evidence]).

We have considered and rejected defendant's arguments concerning the denials of his CPL 190.50(5)(c) motion to dismiss the indictment and his CPL 440.10 motion to vacate the judgment, as well as his pro se claims.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3441 The People of the State of New York, Ind. 5102/11
Respondent,

-against-

Princesam Bailey,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Fried, Frank, Harris Shriver & Jacobson LLP, New York (Joseph V. Micali of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered July 30, 2013, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The court providently exercised its discretion in admitting evidence of defendant's membership in the Bloods gang and testimony from an expert witness concerning the customs, hierarchies and violent practices of the Bloods. On appeal, defendant's principal argument is that the extent of this evidence was excessive. However, the level of detail permitted by the court was highly probative of defendant's motive and "was

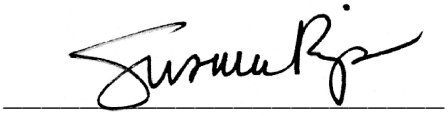
central to the jury's understanding" of the relationship among defendant and his two codefendants and his participation in "an otherwise unexplained assault" (*see People v Hierro*, 122 AD3d 420, 421 [1st Dept 2014], *lv denied* 25 NY3d 1165 [2015]; *People v Cain*, 16 AD3d 288 [1st Dept 2005], *lv denied* 4 NY3d 884 [2005]). Simply informing the jury, as defendant suggests, that the participants in the crime were fellow gang members would not have sufficed to permit the jury to fully understand defendant's conduct. The court's thorough instructions minimized any prejudicial effect.

Defendant's claim regarding an incident involving a juror is similar to an argument unsuccessfully raised on a codefendant's appeal (*People v Wiggins*, 132 AD3d 514 [1st Dept 2015], *lv denied* 27 NY3d 1076 [2016]). We find no reason to revisit the determinations made on that appeal, with regard to both

preservation and the merits. The fact that the juror's outburst was directed at counsel for this particular defendant does not warrant a different result.

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

ENTERED: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3442 Washington Mutual Mortgage Securities Corp., Plaintiff-Appellant, Index 110621/07

-against-

Vincent Jackson, also known as Vincent R. Jackson, etc., Defendant-Respondent,

Criminal Court of the City of New York, et al., Defendants.

_____

Hogan Lovells US LLP, New York (Christian Fletcher of counsel), for appellant.

Greenberg & Wilner, LLP, New York (Julian K. White of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 21, 2016, which, to the extent appealed from, denied plaintiff's motion for leave to renew defendant Vincent Jackson's prior motion to vacate the default judgment against him, or, alternatively, for vacatur of three of the court's prior orders, which, among other things, vacated the default judgment, granted a traverse hearing, and dismissed the case, unanimously affirmed, with costs.

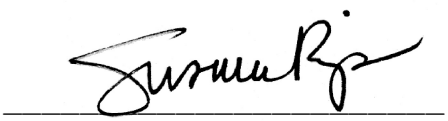
The motion court properly denied the motion for leave to renew, because plaintiff failed to offer new facts that would

change the court's prior determination (CPLR 2221[e][2]). Nor was vacatur of the court's prior orders warranted under CPLR 5015(a).

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

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

ENTERED: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3444 Jesus Corporan, Index 158253/13
Plaintiff-Appellant,

-against-

Anita Erichsen, et al.,
Defendants-Respondents.

_____

Mallilo & Grossman, Flushing (Serge M. Pierre of counsel), for appellant.

Sweetbaum & Sweetbaum, Lake Success (Joel A. Sweetbaum of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about April 13, 2016, which granted defendants' motion for summary judgment dismissing the action on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not suffer any permanent consequential limitation or significant limitations of use in his shoulder or spine, by submitting the affirmed reports of their experts, who found no limitations in those body parts, and who concluded that plaintiff's cervical and lumbar spine injuries were degenerative, and not causally related to the accident (*Johnson v Salaj*, 130 AD3d 502, 502 [1st Dept 2015]).

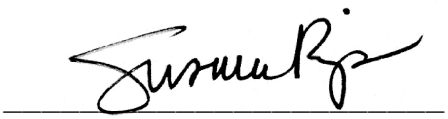
Plaintiff failed to raise any triable issues of fact. A tear in the shoulder, without any evidence of limitations, is insufficient to raise a triable issue of fact (*Acosta v Zulu Servs., Inc.*, 129 AD3d 640, 640 [1st Dept 2015]). Although plaintiff's expert measured significant limitations in his cervical spine shortly after the accident, plaintiff submitted no evidence that he continued to have range of motion deficits or qualitative limitations (*Luetto v Abreu*, 105 AD3d 558, 558 [1st Dept 2013]). Plaintiff's expert did not make any qualitative assessments or observations of limitations of plaintiff's lumbar spine until almost two years after the accident, which is insufficient to raise an issue of fact as to causation (*see Camilo v Villa Livery Corp.*, 118 AD3d 586, 586-587 [1st Dept 2014]).

Defendants made a prima facie showing that plaintiff did not suffer a serious injury under the 90/180-day category by submitting evidence that plaintiff did not miss any work as a result of the accident (*DaCosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016]) and that plaintiff's cervical and lumbar spine injuries were not causally related to the accident (*Camilo*, 118

AD3d at 587). Given that plaintiff did not miss any work, plaintiff's affidavit and his expert's affidavit were insufficient to raise a triable issue of fact (*see Stevens v Bolton*, 135 AD3d 647, 648-649 [1st Dept 2016]; *see also Gorden v Tibulcio*, 50 AD3d 460, 463 [1st Dept 2008]).

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

ENTERED: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3445-
3446 PNY III, LLC formerly known as PNY III, LP, et al.,
Plaintiffs,

-against-

Axis Design Group International, LLC, et al.,
Defendants-Respondents,

ULM II Holding Corp,
Defendant-Appellant.

- - - - -

United Church Insurance Association as subrogee of Church of the Covenant Presbyterian,
Plaintiff,

-against-

Axis Design Group International, LLC, et al.,
Defendants-Respondents,

ULM II Holding Corp,
Defendant-Appellant.

Index 159743/14
151873/15

_____

Haworth Coleman & Gerstman, LLC, New York (Barry Gerstman of counsel), for appellant.

Byrne & O'Neill, LLP, New York (Albert Westey McKee of counsel), for respondents.

_____

Appeals from orders, Supreme Court, New York County (Paul Wooten, J.), entered November 16, 2015, which granted the motions of defendants Axis Design Group International LLC (Axis) and

Joseph V. Lieber, P.E., pursuant to CPLR 3211(a)(1) and (7), dismissing plaintiff PNY III, LLC f/k/a PNY III, LP and American Guarantee and Liability Insurance Company a/s/o PNY III, LLC f/k/a PNY III, LP,'s (PNY) complaint as against them, and dismissing plaintiff United Church Insurance Association a/s/o Church of the Covenant Presbyterian's (United Church) complaint as against them, unanimously dismissed, without costs, as moot.

In each of these appeals, ULM, which appeals the respective dismissals of plaintiffs PNY's and United Church's direct claims as against Axis and Lieber, is not an aggrieved party (*see Rodriguez v Heritage Hills Socy., Ltd.*, 141 AD3d 482, 483 [1st Dept 2016), citing *Hecht v City of N.Y.*, 60 NY2d 57 [1983]; *see also Rojas v Paine*, 125 AD3d 742 [2d Dept 2015]). Moreover, PNY settled its action with Axis and Lieber, releasing those defendants and executing a stipulation of discontinuance with prejudice, and the Church has discontinued, with prejudice, its action against Axis and Leiber. Thus, even if ULM were an aggrieved party, these appeals must nevertheless be dismissed as

moot (*see Matter of Anonymous v New York City Health & Hosps. Corp.*, 70 NY2d 972, 974 [1988]).

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

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

ENTERED: MARCH 21, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3447 The People of the State of New York, Ind. 1265/14
Respondent,

-against-

Kevin Kareem,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered August 24, 2015, convicting defendant, after a jury trial, of attempted assault in the first degree, and sentencing him to a term of 5 years, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

As in *People v Velez* (131 AD3d 129 [1st Dept 2015]), the court's jury charge failed to convey that an acquittal on the top count of first-degree assault based on a finding of justification would preclude consideration of the remaining charges. We find that this error was not harmless and warrants reversal in the interest of justice (*see e.g. People v Blackwood*, __ AD3d __, 2017 NY Slip Op 00941 [1st Dept 2017]; *People v Flores*, 145 AD3d

568 [1st Dept 2016]). We have considered and rejected the People's various arguments for affirmance.

Since we are ordering a new trial, we find it unnecessary to reach defendant's remaining contentions.

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

ENTERED: MARCH 21, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3448 Alexander Weicht, Index 300381/11
Plaintiff-Respondent, 83846/11

-against-

City of New York, et al.,
Defendants-Appellants.
- - - - -
[And a Third-Party Action]

_____

Gambeski & Frum, Elmsford (Donald L. Frum of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 21, 2015, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, and denied defendants' cross motion for summary judgment dismissing that claim, unanimously affirmed, without costs.

"A plaintiff's inability to testify exactly as to how an accident occurred does not require dismissal where negligence and causation can be established with circumstantial evidence" (*Patrikis v Arnotis*, 129 AD3d 928, 930 [2d Dept 2015]; *Angamarca v New York City Partnership Hous. Dev. Fund Co., Inc.*, 56 AD3d 264, 264 [1st Dept 2008]). Plaintiff established his entitlement

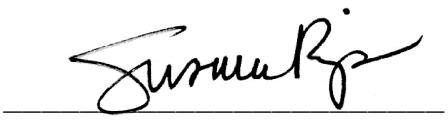
to partial summary judgment on the Labor Law § 240(1) claim, despite his admitted inability to remember the specifics of the accident, through the submission of a workers' compensation report and the statement of defendant Rockmore Contracting Corp.'s owner, both of which established that the accident occurred when the bottom of the ladder from which plaintiff was descending suddenly slipped out from under him, causing him to fall to the ground (*see Ortiz v Burke Ave. Realty, Inc.*, 126 AD3d 577, 577 [1st Dept 2015]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 191 [1st Dept 2011]).

Defendants did not raise a triable issue of fact in opposition to plaintiff's prima facie case, and merely challenged the evidence submitted by plaintiff in support of his motion. However, defendants may not for the first time on appeal challenge the admissibility of the reports submitted by plaintiff. Nevertheless, the workers' compensation report was properly considered by the motion court because it was properly authenticated as a business record by the person who prepared the report — who established that it was prepared in the regular course of business contemporaneously with the accident — and was based on the personal knowledge of someone who witnessed the accident (*see* CPLR 4518[a]; *People v Kennedy*, 68 NY2d 569, 579-

580 [1986]; *cf. Acevedo v Williams Scotsman, Inc.*, 116 AD3d 416, 417 [1st Dept 2014]). Moreover, testimony about a statement made by Rockmore's owner in a report to OSHA, detailing how the accident occurred, was admissible as a vicarious admission of an employee (*see Brusca v El Al Israel Airlines*, 75 AD2d 798, 800 [2d Dept 1980]; *Matter of Anthus v Rail Joint Co.*, 193 App Div 571 [3d Dept 1920], *affd* 231 NY 557 [1921]; *see generally* Prince, Richardson on Evidence § 8-208 at 515 [Farrell 11th ed 1995]).

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

ENTERED: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3451-
3452 Index 650969/11

LNYC Loft, LLC, etc., et al.,
Plaintiffs-Appellants,

-against-

David J. Loo, et al.,
Defendants,

Stanley Perelman, et al.,
Defendants-Respondents.

_____

Rosenfeld & Kaplan, LLP, New York (Steven M. Kaplan of counsel), for appellants.

Ganfer & Shore, LLP, New York (Steven J. Shore of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 9, 2016, which, to the extent appealed from, granted defendants-respondents' motion for summary judgment dismissing the second cause of action for tortious interference with contract, unanimously reversed, on the law, with costs, and the motion for summary judgment denied. Appeal from order, same court and Justice, entered August 29, 2016, which granted plaintiff's motion for reargument and, upon reargument, adhered to its February 9, 2016 decision, unanimously dismissed, without costs, as academic.

The record demonstrates that respondents lacked an economic

interest in the breaching party, Hudson Opportunity Fund I, LLC, and, rather, acted in their own economic interest in allegedly procuring the breach. Accordingly, they do not have an economic interest defense to the tortious interference claim asserted against them (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *Wells Fargo Bank, N.A. v ADF Operating Corp.*, 50 AD3d 280, 281 [1st Dept 2008]).

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

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

ENTERED: MARCH 21, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3453 The People of the State of New York, Ind. 5228/12
Respondent,

-against-

Robert Chibatto,
Defendant-Appellant.

_____

Seymour W. James, Jr., Legal Aid Society, New York (David Crow and Ursula Bentele of counsel), and Dechert, LLP, New York (Diana Wang of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 8, 2014, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a persistent felony offender, to a term of 15 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the persistent felony offender adjudication and sentence, and sentencing defendant, as a second felony offender, to a term of 2 to 4 years, and otherwise affirmed.

While the court did not comply with the protocols for handling a jury note laid out in *People v O'Rama* (78 NY2d 270, 276 [1991]), the on-the-record statements of the court and

parties make clear that there had been an off-the-record conference regarding the note, and those on-the-record statements indicate that the court had apprised the parties of the entire contents of the note during the off-the-record conference (*see People v Walston*, 23 NY3d 986, 989 [2014]). Accordingly, defendant's claim that the court violated the *O'Rama* procedures required preservation under the circumstances, and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find that defendant was not prejudiced by the lack of full compliance with the *O'Rama* procedures.

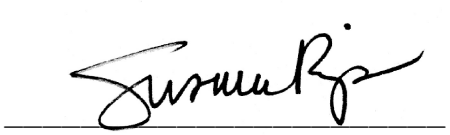
The court providently exercised its discretion when it gave the jury an unrequested supplemental instruction after deliberations had begun, and defendant has not shown any prejudice (*see People v Echevarria*, 136 AD3d 589 [1st Dept 2016], *lv denied* 27 NY3d 1131 [2016]). The instruction, which the court had inadvertently omitted, was legally correct, and the court

avoided any prejudice by advising the jury to draw no inference from the fact that the instruction was being delivered belatedly.

We find that sentencing defendant as a persistent felony offender was an improvident exercise of discretion.

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

ENTERED: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3455 Robert Duffy, et al., Index 105148/10
Plaintiffs-Respondents,

-against-

274 West 19, LLC, et al.,
Defendants-Appellants.
- - - - -
[And Third-Party Actions]

_____

Lester Schwab Katz & Dwyer, LLP, New York (Daniel Kotler of counsel), for appellants.

Jacoby & Meyers, LLP, Newburgh (Lawrence D. Lissauer of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 26, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiffs' complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff Robert Duffy allegedly struck his head while attempting to walk through a low door that led to a machine room in a building owned by defendant 274 West 19, LLC and managed by defendant Beach Lane Management, Inc.

Defendants made a prima facie showing that the alleged New York City Building Code violations did not apply to the building,

which was erected in 1899, before the enactment of the Code (*see e.g. Vasquez v Soriano*, 106 AD3d 545, 545 [1st Dept 2013]). Plaintiffs' expert's opinion that "[t]he door and exterior stair w[ere] clearly not of the original construction and would violate whatever code edition was in effect at the time [the door and stairs] had been installed," was too conclusory and speculative to raise an issue of fact (*see Cummo v Children's Hosp. of N.Y.*, 113 AD3d 405, 406 [1st Dept 2014]).

Defendants are entitled to dismissal of plaintiff's common-law claim, as plaintiff's testimony established that the condition complained of was open and obvious and not inherently dangerous (*see Boyd v New York City Hous. Auth.*, 105 AD3d 542, 543 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]).

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

ENTERED: MARCH 21, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3456 Maria Del Carmen Hernandez, Index 156644/12
Plaintiff-Respondent,

-against-

34 Downing Owners Corp.,
Defendant-Appellant.

_____

Mauro Lilling Naparty LLP, Woodbury (Kathryn M. Beer of counsel), for appellant.

Law Offices of William Pager, Brooklyn (William Pager of counsel), for respondent.

_____

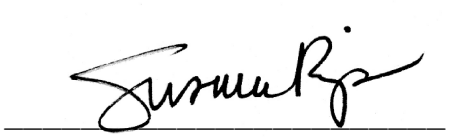
Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered October 17, 2016, which denied the motion of defendant building owner for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured when a door to the cellar of the restaurant at which she worked, which was located in the sidewalk abutting the building, swung shut and struck her on the head. Pursuant to its lease with nonparty Manhattan Mansions, which leased the commercial area of the building, defendant remained obligated to maintain and repair the cellar stairs and sidewalk. Although an out-of-possession landlord contractually obligated to make repairs may not be held liable unless it created or had notice of

the dangerous condition (*see Gomez v 192 E. 151st St. Assoc., L.P.*, 26 AD3d 276, 277 [1st Dept 2006]; *Torres v West St. Realty Co.*, 21 AD3d 718, 721 [1st Dept 2005], *lv denied* 7 NY3d 703 [2006]), here, defendant has failed to establish that it lacked constructive notice of the allegedly defective cellar door or that it did not create the condition.

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

ENTERED: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3457 The People of the State of New York, Ind. 1686/13
Respondent,

-against-

Edwin Mendez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered January 29, 2014, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of one year, unanimously affirmed.

Defendant's challenges to the voluntariness of his plea do not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 381-82 [2015]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we also reject them on the merits.

The court sufficiently advised defendant of his rights under *Boykin v Alabama* (395 US 238 [1969]), notwithstanding that it

omitted the word "jury" from its reference to the right to a trial (*see People v Williams*, 137 AD3d 706 [1st Dept 2016], *lv denied* 27 NY3d 1141 [2016])

In addition, under the circumstances of this case, the court was not required to inquire into the existence of a possible agency defense. In the course of making an application for a more lenient sentence, defense counsel stated, "What we have here is a user, offering or doing a favor to another user, potentially, if the People's case is true in this case." Counsel's statement was merely speculation about what the People's proof might show at trial rather than a statement for which "defendant . . . was the source of the information" (*see People v Moye*, 11 AD3d 212 [1st Dept 2004] *lv denied* 4 NY3d 766 [2005]). Accordingly, we find that this was not a situation "where the defendant's recitation of the facts . . . clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*People v*

Lopez, 71 NY2d 662, 666 [1988]; *see also People v Mox*, 20 NY3d 936, 938 [2012], quoting *People v Serrano*, 15 NY2d 304, 308 [1965] ["the requisite elements should appear from the defendant's own (factual) recital"]).

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

ENTERED: MARCH 21, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3459- Index 653707/15
3460-
3461 Harvey Rubin,
Plaintiff-Respondent,

-against-

James S. Baumann, et al.,
Defendants-Appellants.

_____

Zingman & Associates PLLC, New York (Mitchell S. Zingman of counsel), for appellants.

Joseph H. Neiman, Jamaica Estates, for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about July 22, 2016, which granted plaintiff's motion for partial summary judgment, unanimously reversed, on the law, with costs and the motion denied. Order, same court and Justice, entered July 25, 2016, which denied defendants' motion to strike plaintiff's motion, unanimously reversed, on the law, with costs and the motion granted. Appeal from order, same court and Justice, entered August 29, 2016, which granted defendants' motion for reargument but, upon reargument, adhered to its prior determination, unanimously dismissed, without costs, as academic.

We reject defendants' contentions that plaintiff's 2015 sale notice was too vague, that it was defective because it was sent

by his attorney rather than plaintiff personally, that plaintiff's motion sought relief not sought in the complaint, and that the court improperly reformed the parties' contract. However, we agree with defendants' argument that plaintiff was not entitled to partial summary judgment because he failed to send defendant James S. Baumann a sale notice pursuant to paragraph 8.5.2 of the Operating Agreement.

Paragraph 8.5.2 provides, "If the Managers elect not to purchase the Interest of the Offering Members as above described and if the Offering Members still desire to sell the Interest, the Offering Members shall give the other Members a Sale Notice." Plaintiff contends that "the other Members" means "Members who are not Managers." However, defendants' interpretation – that "the other Members" means "Members other than the Offering Members" – makes at least as much sense as plaintiff's interpretation. Hence, the contract is ambiguous (*see e.g. Telerep, LLC v U.S. Intl. Media, LLC,* 74 AD3d 401, 402-403 [1st Dept 2010]). If a contract is ambiguous, "it cannot be construed as a matter of law" (*id.* at 402). Therefore, plaintiff was not entitled to summary judgment.

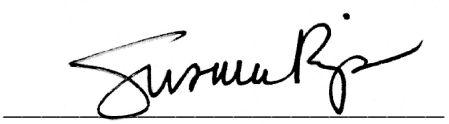
Plaintiff correctly states that "a contract should not be interpreted to produce an absurd result" (*Macy's Inc. v Martha*

Stewart Living Omnimedia, Inc., 127 AD3d 48, 54 [1st Dept 2015] [internal quotation marks omitted]). However, requiring plaintiff to serve a second Sale Notice on other Members would not produce an absurd result – it would merely give Baumann an additional 30 days (beyond his 120 days as Manager) to purchase plaintiff's interest in defendant 330 West 85, LLC.

Moreover, plaintiff's 2016 Sale Notice, which set an offer price of $9.7 million, is inconsistent with his 2015 Sale Notice, which set an offer price of $8.65 million (*see Norca Corp. v Tokheim Corp.*, 227 AD2d 458, 458-459 [2d Dept 1996]). Although the 2016 Sale Notice says it is without prejudice to the 2015 notice, it would be improper for both notices to be effective at the same time. For example, it would allow plaintiff to skirt the two-year ban on subsequent Sale Notices in paragraph 8.5.3 if he failed to sell the building for a price that would net him and Baumann $9.7 million each.

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

ENTERED: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3462 The People of the State of New York, Ind. 4868/11
Respondent,

-against-

Lamont Gray,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

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

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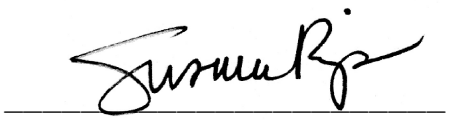
Judgment, Supreme Court, New York County (Larry R.C. Stephen, J. at suppression hearing; Robert M. Stolz, J. at plea and sentencing), rendered June 12, 2013, convicting defendant of two counts of operating a motor vehicle while under the influence of alcohol, and sentencing him to a term of six months, with five years' probation and a $2500 fine, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant made the statements at issue while he was detained during a traffic stop. While defendant may have been seized for Fourth Amendment purposes, he was not in custody for *Miranda* purposes (*see Berkemer v McCarty*, 468 US 420, 436-437 [1984]; *People v Bennett*, 70 NY2d 891 [1987]), and none of the police conduct at the time of the investigatory questioning can "fairly

be characterized as the functional equivalent of formal arrest" (*Berkemer*, 468 US at 442); accordingly, *Miranda* warnings were not required.

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

ENTERED: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3463 Maria A. Santana, Index 303534/10
Plaintiff-Appellant,

-against-

3410 Kingsbridge LLC, et al.,
Defendants-Respondents.

_____

Melcer Newman PLLC, New York (Jeffrey B. Melcer of counsel), for appellant.

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered June 22, 2015, after a jury trial, in favor of defendants, unanimously affirmed, without costs.

The jury's finding that there was no slippery condition on the stairs at the time of the plaintiff's accident was not against the weight of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744 [1995]). While plaintiff's parade of witnesses testified consistently as to the existence of recurring conditions, the building's superintendent expressly denied the existence of such conditions and plaintiff has not identified any basis to disturb the jury's determination on this issue.

A trial court has "broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony,

expedite the proceedings and to admonish counsel and witnesses when necessary" (*Campbell v Rogers & Wells*, 218 AD2d 576, 579 [1st Dept 1995]). The court did not err in excluding certain photographs, alleged to depict an ephemeral wet and waxy condition, in the absence of testimony that they was "taken reasonably close to the time of the accident and that the condition at the time of the accident was substantially as shown in the photographs" (*Melendez v New York City Tr. Auth.*, 196 AD2d 460, 461 [1st Dept 1993]). As the photographs were close-ups of stairs, which could be located anywhere in the building, absent such testimony, it could not be determined whether they were the same stairs involved in the accident.

Plaintiff's objection to the admission of a surveillance videotape, on the eve of trial, is academic given that the jury never reached the issue of damages. Moreover, as the videotape is not part of the appendix, this Court cannot assess whether its admission constituted error. In any event, the timing of service was not improper, but rather a function of the need to conduct a further deposition and independent medical examination, which were made necessary by plaintiff's having undergone a second surgery after a trial date had already been set, and her treating physician had ample opportunity to review the videotape prior to

testifying.

The narrative of the accident contained in a ambulance report, which was never introduced at trial, was properly precluded, and the court appropriately sustained objections to defense counsel's isolated questions as to whether plaintiff told the ambulance personnel that she had tripped (*cf. Grant v New York City Tr. Auth.*, 105 AD3d 445, 446 [1st Dept 2013]; *Delgado v City of New York*, 128 AD2d 484 [1st Dept 1987]).

It cannot be determined, based upon the appendix, whether plaintiff's objections to the failure to grant missing witness charges as to the building's porter and a liability expert are preserved for appeal and whether plaintiff met her burden in seeking the charges (*see Hamer v City of New York*, 106 AD3d 504, 510 [1st Dept 2013]; *Germe v City of New York*, 211 AD2d 480 [1st Dept 1995]). Any error in denying missing witness charges as to defendants' medical experts, whose availability is not evidenced in the record, would be immaterial since the jury did not reach the issue of damages.

Plaintiff's request for a missing document charge was properly denied in the absence of evidence that she had requested the documents during discovery.

Finally, plaintiff's objection to defense counsel's conduct

during the trial is largely, if not entirely, unpreserved, and unavailing. Defense counsel's statements as to plaintiff's treating physician's financial arrangement with plaintiff's counsel's firm constituted fair commentary on the evidence, and were within the wide latitude afforded on summation (*see Gregware v City of New York*, 132 AD3d 51, 61 [1st Dept 2015]; *cf. Berkowitz v Marriott Corp.*, 163 AD2d 52, 53-54 [1st Dept 1990]).

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

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

ENTERED: MARCH 21, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3464 Timothy M. Clarkin, Index 161347/13
Plaintiff-Respondent,

-against-

In Line Restaurant Corp., doing business as Shucker's Lobster and Clam Bar, et al.,
Defendants-Appellants.

_____

Rivkin Radler LLP, Uniondale (Henry Mascia of counsel), for appellants.

Kahn, Gordon, Timko & Rodriques, P.C., New York (Nicholas I. Timko of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered May 18, 2016, which, to the extent appealed from, denied defendant-appellant In Line Restaurant Corp., d/b/a Shucker's Lobster And Clam Bar's (In Line) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges he was injured while patronizing Shucker's Lobster and Clam Bar, a restaurant owned by defendant In Line and located in Hampton Bays, New York, when he stepped in a hole in the grass on the restaurant's front lawn while playing a frisbee game called Jam Can. Defendant Scott W. Spanburgh was a shareholder and chief principal officer of In Line and was the

restaurant's manager when the accident occurred. It is undisputed that the restaurant provided the frisbee game to its patrons.

The court properly denied In Line's motion for summary judgment. Defendants failed to establish that In Line did not create the hole in its front lawn by submitting Spanburgh's deposition testimony and affidavit, because Spanburgh did not state that the lawn was inspected after it was last maintained by the outside company In Line had hired to mow the grass. They also failed to satisfy their initial burden to show that In Line lacked actual notice of the hole in its lawn, because they submitted no evidence that its employees and the outside company had received no complaints about the defect prior to the incident and that there were no similar accidents at the subject location (*see Valverde v Great Expectations, LLC*, 126 AD3d 633, 633 [1st Dept 2015]). The fact that Spanburgh testified and averred that he did not receive any complaints about the condition of the lawn does not establish that In Line lacked actual notice, because he did not state that he was working when the accident happened.

Defendants also failed to satisfy their initial burden to show that In Line lacked constructive notice of the hole in its lawn, because Spanburgh's testimony and averment that he would

inspect the entire premises every time the restaurant was open is insufficient to establish when the lawn was last checked before the accident (*see Joachim v AMC Multi-Cinema, Inc.*, 129 AD3d 433, 434 [1st Dept 2015]; *Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [1st Dept 2007]). Since defendants failed to meet their initial burden to establish that In Line did not create the defect and lacked notice that it was there as a matter of law, the burden never shifted to plaintiff to establish how long the condition existed (*see Sabalza v Salgado*, 85 AD3d 436, 438 [1st Dept 2011]).

Lastly, we find that plaintiff did not assume the risk of injury by playing the frisbee game, because it is undisputed that the hole was not perfectly obvious (*see Ellis v City of New York*, 281 AD2d 177 [1st Dept 2001]; *Radwaner v USTA Natl. Tennis Ctr.*, 189 AD2d 605, 605 [1st Dept 1993]).

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

ENTERED: MARCH 21, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3465-
3466 The People of the State of New York,
Respondent,

-against-

Leroy Williamson,
Defendant-Appellant.

Ind. 415/12

Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered November 10, 2014, unanimously affirmed.

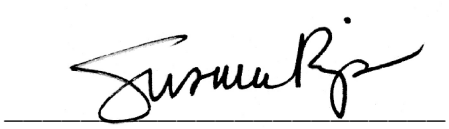
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3467N 570 Smith Street Corp., et al., Index 653296/14
Plaintiffs-Respondents,

-against-

Seneca Ins. Company, Inc.,
Defendant-Appellant,

Coverage Concepts, Inc.,
Defendant.

_____

Ken Maguire & Associates, PLLC, Garden City (Kenneth R. Maguire of counsel), for appellant.

Weg & Myers, P.C., New York (Joshua L. Mallin of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 23, 2016, which directed defendant insurer to produce documents that it had claimed were subject to the attorney-client privilege, unanimously reversed, on the law and facts, with costs, and the directive vacated.

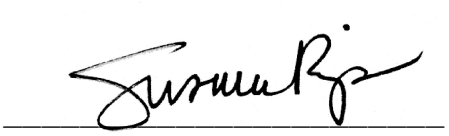
In this action for breach of contract based on defendant insurer's failure to pay benefits due under an insurance policy, plaintiffs objected, in a letter to Supreme Court, to defendant's withholding of certain correspondence between it and its counsel on the ground that it was protected by the attorney-client privilege. Following an in camera inspection, the court directed

defendant to produce the documents to plaintiff.

Following our own in camera review of the correspondence between defendant and its counsel, we conclude that it is protected by the attorney-client privilege, as the correspondence is predominantly of a legal character (*see Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 593 [1989]).

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

ENTERED: MARCH 21, 2017



CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3468 In re 15 West 55th st. Property Index 450151/15
[M-132] LLC, et al., Dkt. 92/178
Petitioners,

-against-

Hon. James d'Auguste, etc., et al.,
Respondents.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, Brooklyn (Anthony J. Genovesi, Jr. of counsel), for petitioners.

Eric T. Schneiderman, Attorney General, New York (Alissa S. Wright of counsel), for Hon. James d'Auguste, respondent.

Zachary W. Carter, Corporation Counsel, New York (Brian Krist of counsel), for City of New York, respondent.

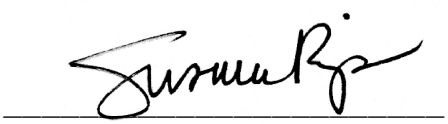
The above-named petitioners having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: MARCH 21, 2017



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