SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 14, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3625 A.F.C. Enterprises, Inc., Index 117236/07
Petitioner-Respondent,

-against-

New York City Transit Authority,
Respondent-Appellant.

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Martin B. Schnabel, Brooklyn (Bettina Quintas of counsel), for appellant.

Peckar & Abramson, P.C., New York (Cesar F. F. Pereira of counsel), for respondent.

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Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered August 7, 2009, vacating respondent's determination, dated August 31, 2007, which denied petitioner's application for additional payment under the parties' contract, and remanding the matter for further proceedings, unanimously affirmed, without costs.

The determination of respondent's Chief Engineer (CE) denying petitioner's claim for additional compensation for disposing of an amount of petroleum-contaminated soil in excess of the contract amount was made without sound basis in reason and

in disregard of the facts (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Firstmark Dev. Co. v New York State Div. of Hous. & Community Renewal*, 283 AD2d 274, 277 [2001]). In support of its claim, petitioner submitted detailed evidence that the vast majority of the material excavated from the transit yards was contaminated. In opposition, respondent submitted weigh receipts regarding uncontaminated waste from one of the respondent's facilities, evidence that did not contradict petitioner's submissions. Nevertheless, and without setting forth all of the facts presented, the CE found that the waste "removed from the site" conformed to the parties contractual definition of noncontaminated solid waste. Accordingly, the absence of a full factual analysis by the CE precluded adequate review by the court in the subsequent article 78 proceeding. In vacating the CE's determination and remanding for further proceedings, the court did not substitute its judgment for that of the administrative finder of fact but, rather, addressed a failure to consider, or a misconstruction of, key evidence (*see Firstmark*, 283 AD2d at 277).

Finally, the court did not err in considering petitioner's proof of its disposal of petroleum-contaminated soil at recycling

centers. Although petitioner offered this proof outside the contractual time frame for the submission of evidence, the parties' contract allowed the CE to expand the time for such submission, and the record on appeal indicates that the evidence was before the CE when she made her determination (*see Matter of Kelly v Safir*, 96 NY2d 32, 39 [2001]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2964 Dominic Bonomonte, Index 106954/06
Plaintiff-Apellant,

-against-

The City of New York,
Defendant-Respondent.

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Apicella & Schlesinger, New York (Alan C. Kestenbaum of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

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Order, Supreme Court, New York County (Karen S. Smith, J.), entered April 3, 2009, which granted defendant's motion for summary judgment dismissing the complaint, affirmed, without costs.

Plaintiff, a New York City Sanitation employee who was already on sick leave due to surgeries to his right arm, brought this action for the exacerbation of his injuries as a result of slipping and falling outside his home on his way to a mandated doctor's appointment at the Sanitation Department's clinic. Dismissal of the complaint was warranted, since there was no duty flowing from defendant to plaintiff *(see generally Matter of New York City Asbestos Litig.*, 5 NY3d 486, 493-494 [2005]). Contrary to plaintiff's contention, a duty was not created by the fact that defendant's clinical supervisor had ordered plaintiff to

travel to the clinic or face possible termination or suspension of employment and medical benefits *(see D'Amico v Christie*, 71 NY2d 76, 88 [1987]; *Lundberg v State of New York*, 25 NY2d 467, 471 [1969]).

Although plaintiff contends that his fall was a foreseeable consequence of defendant's negligence in ordering him to the clinic at a time when defendant should have been aware that plaintiff had been directed by his physician not to travel, foreseeability "merely determines the scope of the duty once it is determined to exist" *(Matter of New York City Asbestos Litig.*, 5 NY3d at 493 [internal quotation marks and citations omitted]). Since there was no duty owing to plaintiff, he does not have a viable negligence claim against defendant. Furthermore, the evidence fails to establish proximate cause, since the directive that plaintiff report to defendant's clinic merely furnished the occasion for the accident (*see Escalet v New York City Hous. Auth.*, 56 AD3d 257 [2008]).

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS (dissenting)

I would reverse the order appealed from and reinstate the complaint. It cannot be said, as a matter of law, that defendant employer owed plaintiff employee no duty. An employer owes a duty to provide a safe workplace (*see Matter of New York City Asbestos Litig.*, 5 NY3d 486, 494 [2005]). This duty exists when an employee is acting within the course and scope of employment. At the time he was injured, plaintiff was traveling to a mandated doctor's appointment at the direct behest of his employer, under compulsion to do so lest he risk suspension from the job and suspension of all medical benefits. Instead of a field visit, as per a medical form in his chart, plaintiff was ordered to report to defendant's clinic by one of the supervisors for the sick leave unit. Despite plaintiff's protests that he was under physician's orders not to travel – indeed, plaintiff supplied a physician's letter and persuaded the union to intervene in the dispute, obtaining a three-day postponement of the appointment – he was nonetheless ordered to go to the clinic on December 27th. It is not disputed that plaintiff would not have traveled to the clinic had he not been directly ordered to do so. Plaintiff was told in no uncertain terms that if he failed to go to the appointment, his medical benefits would be cut off and he would face suspension. As has been aptly summarized: "if the employee

would not have undertaken the journey had the business purpose been canceled, the employee was acting within the scope of employment" (*Pitt v Matola*, 890 F Supp 89, 93 [ND NY 1995] [internal quotations and citation omitted]). Plaintiff was on his way to a mandated clinic appointment, in furtherance of his work obligations, at the time he slipped and fell, exacerbating his injuries. His employer owed him a duty which under the circumstances was arguably breached. I would therefore reverse and allow the case to proceed.

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

ENTERED: DECEMBER 14, 2010

CLERK

Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3146 Sandra Arabian, Index 301835/09
Plaintiff-Respondent,

-against-

Massoud Arabian,
Defendant-Appellant.

_____

Kenneth J. Weinstein, Garden City, for appellant.

Cohen Lans LLP, New York (Robert Stephan Cohen of counsel), for respondent.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered on or about January 27, 2010, which, inter alia, denied defendant's application to compel arbitration and ordered him to pay $17,000 per month in pendente lite maintenance and child support, unanimously affirmed, without costs.

Immediately before the parties' wedding ceremony on March 18, 2000, they signed a "Binding Arbitration Agreement" wherein they agreed to submit to the Beth Din of America, Inc., for a binding decision, any dispute over issues relating to a *get* (religious divorce), premarital agreements or monetary matters. When plaintiff commenced this divorce action, defendant moved for a stay and to compel arbitration. Plaintiff cross-moved for pendente lite support.

The parties' agreement, while not unconscionable (*see*

Avitzur v Avitzur, 58 NY2d 108, 113-114 [1983]), is not "acknowledged or proven in the manner required to entitle a deed to be recorded," as required by Domestic Relations Law § 236(B)(3). Nor is it "an oral agreement entered on the record in open court during a matrimonial action intended to settle that action" (*Rubenfeld v Rubenfeld*, 279 AD2d 153, 156 [2001]). In light of the sweeping language in *Matisoff v Dobi* (90 NY2d 127, 133-134, 136 [1997]) and the statute's plain terms, we find that the parties' agreement, which addresses matters of substance, falls within the scope of the statute and therefore is not enforceable to the extent it purports to require arbitration of disputes beyond the issue of a *get*. We find no merit to defendant's argument that this action will cease to be a matrimonial action once he asserts a breach of contract counterclaim. In light of our holding, we do not reach the question of whether there are any provisions of the agreement that would be unenforceable as violative of public policy even if the agreement had been acknowledged.

Defendant has substantial liquid assets, unlike the husband in *Hill v Hill* (121 AD2d 270, 271 [1986]). Thus, he "shows no exigency which would warrant departure from the general rule that

an aggrieved party's remedy for perceived inequities in a pendente lite award is a speedy trial" (*Shurka v Shurka*, 68 AD3d 488, 489 [2009]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3463 Isamar Rodriguez, Index 7268/05
Plaintiff-Appellant,

-against-

705-7 East 179th Street Housing
Development Fund Corporation,
Defendant-Respondent.

_____

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

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about September 16, 2009, which, in an action for personal injuries sustained in a fall on defendant cooperative's premises, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The exterior of the building entrance where the accident occurred had two stairs, a landing, then two more stairs. In her affidavit in opposition to the summary judgment motion, plaintiff asserts that on January 27, 2005 at 8:30 A.M., she slipped and was injured "due to the wet and icy conditions of the exterior stairs and rug of said premises, as well as the movement, shifting and crumpling of the unsecured rug on said exterior stairs."

At her deposition, plaintiff testified that on the morning of the accident it was cold, below freezing, with the sun shining, but not bright. It was warmer the day before. The rug covered most of the steps on the bottom stairs and it was "loose" and "frozen," with a clear and wet looking "icy patch," which could be described as "black ice," all over the rug. Plaintiff could not tell how thick the icy patch, which she did not see until after she fell, was. Nor did plaintiff see ice on the top stairs or landing. While plaintiff did see ice and snow in the courtyard, through which defendant had shoveled a small path from a snow storm that occurred four or five days earlier, she did not see ice on the path to the stairs itself.

When asked how the accident occurred, plaintiff first testified that she slipped on the icy patch. When asked if she "slipped on the icy patch, tripped over the rug, or something else," plaintiff replied: "[i]ce on it." When asked if the rug moved, plaintiff replied that she did not remember because everything happened so fast. Although plaintiff did testify that after her fall she looked back and saw the rug was "kind of crumbled up" and that it was crumbled before her fall, when asked if the crumbling or the ice or a combination of the two caused her fall, she answered:

"A. Yes.

"Q. It was the ice?

"A. Yes."

In her bill of particulars, plaintiff claimed that defendant had constructive notice of the icy condition because it snowed approximately one week before the accident.

The Board's former president, Raymond Agosto, testified at his deposition that the building had a part-time porter who worked from 5:00 P.M. to 9:00 P.M. every day, except Saturday and Monday. The porter's duties included snow removal and he was instructed to make a two-foot path while a snow storm was in progress and to widen it after the storm stopped. The porter would throw a layer of salt after removing snow, or the day before, if he expected snow. If the porter was unavailable, Board members or volunteers would help with snow removal. It was the Board's decision to place a mat on the landing between the two exterior stairways. However, the stairs themselves were never covered by the mat. About 45 minutes after plaintiff's accident, Agosto saw the mat pushed to one side of the landing, folded over.

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition,

nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith v Costo Wholesale Corp.*, 50 AD3d 499, 500 [2008] [internal citations omitted]).

On the record before us, defendant sustained its prima facie burden through: (i) plaintiff's deposition testimony that, at around 5:45 or 6:00 P.M. on the night before the accident, she had used the stairs and did not see any ice; that on the morning of the accident, she did not see the icy patch, which looked like black ice, until *after* she fell; that she could not tell how thick the ice was; and that while she did see the rug on the steps two or three other times in the seven years she had lived in the building, and complained about inadequate snow removal to her mother and other tenants, she never complained to defendant about either of those conditions; and (ii) Agosto's deposition testimony that at around 6:30 P.M. on the night before the accident, he observed that the mat was in its proper place on the landing between the two exterior stairways, which were free of ice, and that he was not aware of any prior incidents or suits involving people who slipped in the area of plaintiff's accident

(see *Thomas v Boston Props.*, 76 AD3d 460 [2010]; *Killeen v Our Lady of Mercy Med. Ctr.*, 35 AD3d 205 [2006]; *Manning v Americold Logistics, LLC*, 33 AD3d 427 [2006]; *Murphy v 136 N. Blvd. Assoc.*, 304 AD2d 540 [2003]).

In opposition to defendant's prima facie showing, plaintiff failed to raise a triable issue of fact. Plaintiff's theory that the hazards existed in time for defendant to have discovered and remedied them is speculative in light of the testimony of both plaintiff and Agosto that there were no hazardous conditions when they used the steps the evening before the accident; the absence of any evidence that there was a change in the weather that would have caused a thaw and freeze between that time and the accident the next morning; plaintiff's testimony that she did not notice the black ice before she fell and could not say how thick it was; and plaintiff and Agosto's testimony showing that there were no known complaints of a hazardous condition in the area where plaintiff fell. Nor is there any nonspeculative basis to conclude that defendants' snow removal activities may have caused or exacerbated the alleged hazards given that it last snowed a minimum of four or five days earlier and there was no hazardous condition on the evening before the accident (*see Disla v City of New York*, 65 AD3d 949, 949 [2009]; *Killeen*, 35 AD3d at 205; *Manning*, 33 AD3d at 427). Similarly, even if plaintiff's

testimony is viewed as asserting that she tripped over the crumpled rug, the rug could have crumpled only minutes before her accident and a general awareness that carpets can bunch is not enough (*see Kasner v Pathmark Stores, Inc.*, 18 AD3d 440, 441 [2005]).

Lebron v Napa Realty Corp. (65 AD3d 436 [2009]), does not mandate a different conclusion. In *Lebron*, where the plaintiff slipped on a patch of ice on the sidewalk abutting defendant's 24-hour service station, we held that

> "[e]ven if the climatological records were accurate, given the facts that defendant *always had employees on site and that those employees' duties included ensuring that the sidewalks were safe*, it can be presumed that seven hours were sufficient for those employees to notice and address the dangerous condition before the accident. Since it did not submit evidence establishing why its employees were not able to notice and address the condition in that time period, defendant failed to establish its prima facie entitlement to summary judgment" (*Lebron* at 437 [emphasis added]).

Here, no such presumption can be made. The evidence shows that no hazardous condition existed on the evening before plaintiff's accident, that the building's porter, whose duties included snow removal, only worked from 5:00 P.M. to 9:00 P.M., Sundays and Tuesday through Friday, that no prior complaints had been made to defendant concerning icy conditions or a loose rug

at the accident location and that plaintiff did not observe any dangerous condition before her fall (*see Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 [2005] [plaintiff did not raise a triable issue as to constructive notice where he asserted that the beer bottle on which he tripped at 5:00 A.M. was not on the steps at 8:30 P.M. the night before and no evidence was offered indicating that the landlord was notified of the debris that night or that the bottle was present for a sufficient period of time that defendant's employees had an opportunity to discover and remedy the problem]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

3592 Leslie Kahn, Index 112312/08
Petitioner-Respondent,

-against-

New York City Department of Education, et al.,
Respondents-Appellants.
- - - - - - - -
New York State United Teachers and Council of School Supervisors & Administrators,
Amici Curiae.

_____

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for appellants.

New York Civil Liberties Union Foundation, New York (Adriana C. Piñon of counsel), for respondent.

James R. Sandner, New York (Wendy M. Star of counsel), for New York State United Teachers, amicus curiae.

Charity M. Guerra, Brooklyn, for Council of School Supervisors & Administrators, amicus curiae.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about September 8, 2009, which denied respondents' motion to dismiss the petition, unanimously reversed, on the law, without costs, and the motion granted.

Petitioner challenges the termination of her probationary employment as a social worker, and asserts due process claims pursuant to 42 USC § 1983. She began working for the Department of Education in February 2005 as a social worker, spending 2½

years at Williamsburg High School. In July 2007 she switched to Khalil Gibran International Academy, where respondent Salzberg, as Interim Acting Principal, gave her a rating of Unsatisfactory in an evaluation on December 19, 2007. Two days later, the Superintendent wrote to petitioner, denying her a Certification of Completion of Probation, and advising that her service would be terminated effective January 25, 2008, and that she was entitled to administrative review under the collective bargaining agreement.

Petitioner proceeded with an administrative appeal on January 3, 2008. Following an administrative hearing, the Department of Education, by letter dated May 9, reaffirmed the denial of petitioner's Certification of Completion of Probation. On or about September 9, 2008, petitioner commenced this proceeding.

Petitioner's claims, which are equitable in nature, are not barred by her failure to file a notice of claim pursuant to Education Law § 3813(1), which is only required when money damages are sought (*Ruocco v Doyle*, 38 AD2d 132 [1972]).

However, her claims are time-barred. A petition to challenge the termination of probationary employment on substantive grounds must be brought within four months of the effective date of termination (*see* CPLR 217[1]; *Matter of*

Andersen v Klein, 50 AD3d 296 [2008]; *Lipton v New York City Bd. of Educ.*, 284 AD2d 140 [2001]). The time to commence such a proceeding is not extended by the petitioner's pursuit of administrative remedies (*Matter of Strong v New York City Dept. of Educ.*, 62 AD3d 592 [2009], *lv denied* 14 NY3d 704 [2010]). Petitioner failed to commence this proceeding within four months of the effective date of her termination. Although the notice of termination was procedurally defective in that she was not given the requisite 60 days' prior notice of discontinuance, as required by Education Law § 2573(1)(a), that defect does not invalidate the discontinuance or render the statute of limitations inapplicable; at best, it would have entitled petitioner to additional back pay, had she served a notice of claim and sought money damages (*see Matter of Pascal v Board of Educ. of City School Dist. of City of N.Y.*, 100 AD2d 622, 624 [1984]).

Nor does petitioner have a valid claim for deprivation of civil rights under 42 USC § 1983. Such a claim requires an allegation that the proponent was deprived of a property or liberty interest without due process of law (*see Ciambriello v County of Nassau*, 292 F3d 307, 313 [2d Cir 2002]). A probationary teacher does not have a property right in his or her position (*see Pinder v City of New York*, 49 AD3d 280 [2008];

Donato v Plainview-Old Bethpage Cent. School Dist., 96 F3d 623, 629-630 [2d Cir 1996], *cert denied* 519 US 1150 [1997]). The process provided for in the collective bargaining agreement did not create such an interest (*see Sealed v Sealed*, 332 F3d 51, 56 [2d Cir 2003]). Moreover, petitioner was not deprived of a liberty interest by the "stigma" arising from allegations of poor work performance. To establish such a "stigma plus" claim, a petitioner must prove "some action by the [agency] imposing a tangible and material burden, . . . and [the] utterance of a false statement that damaged his reputation in connection with the burdensome action" (*O'Connor v Pierson*, 426 F3d 187, 195 [2d Cir 2005]). While Salzberg's accusations against petitioner may "go to the heart of [petitioner's] professional competence and damage her professional reputation to such an extent as to severely impede her ability to continue in the education field in a supervisory capacity" (*Donato*, 96 F3d at 633), petitioner's

"stigma plus" claim is defeated by the availability of a post-termination administrative hearing (*see Segal v City of New York*, 459 F3d 207 [2d Cir 2006]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3864 The People of the State of New York, Ind. 3002/08
Respondent,

-against-

Richard Neal,
Defendant-Appellant.

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The Legal Aid Society, New York (Steven Banks of counsel), and Cahill Gordon & Reindel LLP, New York (Matthew A. Ford of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Charles J. Tejada, J. at suppression hearing; Charles H. Solomon, J. at jury trial and sentence), rendered February 17, 2009, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, unanimously affirmed.

The court properly denied defendant's suppression motion. We perceive no basis to overturn the hearing court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The officer testified that upon seeing a clip and the top part of the handle of the knife protruding out of defendant's pocket, he believed, based on his training and experience, that more likely than not it was a gravity knife.

The officer, based upon his familiarly with gravity knives, had, at least, a reasonable suspicion to believe that defendant possessed an illegal weapon, justifying a stop (*see People v Herrera*, 76 AD3d 891, 893 [2010]; *People v Fernandez*, 60 AD3d 549 [2009], *lv granted* 15 NY3d 749 [2010]; *People v Snovitch*, 56 AD3d 328 [2008], *lv denied* 11 NY3d 930 [2009]), and reasonable safety concerns warranted the officer's removal of the knife from defendant's pocket. *People v Mendez* (68 AD3d 662 [2009], *lv dismissed* 14 NY3d 842 [2010]) is distinguishable because the officer in that case admitted he did not see any characteristics of an illegal type of knife.

The verdict was supported by sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). According to the evidence, the operability of the knife conformed to the statutory definition of a gravity knife. The officer demonstrated in court that he could open the knife by using centrifugal force, created by flicking his wrist, and the blade automatically locked in place after being released (*see* Penal Law § 265.00[5]; *People v Birth*, 49 AD3d 290 [2008], *lv denied* 10 NY3d 859 [2008]).

The court properly instructed the jury that defendant need only know that he possessed a knife in general, and did not need

to know that the knife met the statutory definition of a gravity knife (*see People v Wood*, 58 AD3d 242, 253 n 5 [2008], *lv denied* 12 NY2d 823 [2008]; *People v Berrier*, 223 AD2d 456 [1996], *lv denied* 88 NY2d 876 [1996]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3866 Manhattan Properties, Inc., Index 603535/06
Plaintiff, 590687/07
591127/07

-against-

9 East 30th Realty LLC, et al.,
Defendants.

[And a Third-Party Action]
- - - - - -
9 East 30th Realty LLC,
Second Third-Party
Plaintiff-Respondent,

-against-

Waldorf Carting Corp.,
Second Third-Party
Defendant-Appellant,

Protech Interiors, Inc.,
Second Third-Party
Defendant-Respondent.

_____

Litchfield Cavo LLP, New York (Joseph E. Boury of counsel), for appellant.

Landman Corsi Ballaine & Ford P.C., New York (Christopher G. Fretel of counsel), for 9 East 30th Realty LLC, respondent.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for Protech Interiors, Inc., respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 27, 2009, which, to the extent appealed from, denied second third-party defendant Waldorf Carting Corp.'s motion for summary judgment dismissing the second third-party

complaint and all cross claims against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of Waldorf dismissing the second third-party complaint and all cross claims as against it.

The extensive, and in material part, uncontradicted deposition testimony, along with photographs and certain other evidence, eliminates any factual dispute as to the cause of the collapse of the party wall between 7 East 30th Street and 9 East 30th Street. The record demonstrates conclusively that the earlier partial collapse of the interior of the building at 9 East 30th Street, during which several floors and floor joists collapsed, resulting in the removal of structural elements of the walls, and the subsequent demolition and attempted reconstruction work therein, compromised the structural integrity of the party wall between the buildings. Indeed, defendant 9 East 30th Street Realty LLC was cited for numerous violations for non-permitted construction and demolition work, stop-work orders were issued and typically ignored, emergency work was required to stabilize the building and shore up its walls, and eventually the building had to be demolished.

9 East 30th Street Realty LLC failed to raise an inference that the minor non-structural renovations Waldorf was performing in the first floor of the building at 7 East 30th Street, such as

removing decorative paneling from the party wall, were a causative factor in the wall's collapse. If anything, the fact that the collapse occurred shortly after the renovations commenced reinforces the conclusion that the wall was already unsustainably fragile.

To the extent that 9 East 30th Realty LLC relies on the affidavit by an engineer who visited the site four years after the event – and after the building at 9 East 30th Street had been demolished – such reliance is unavailing, since the expert's conclusions are not factually substantiated (*see e.g. Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337, 338 [2008]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3867 In re Ed Watt, as Secretary-Treasurer of Transport Workers Union of America, Local 100, et al., Petitioners-Respondents,

-against-

Howard H. Roberts, Jr., as President of the New York City Transit Authority, etc., et al., Respondents-Appellants.

Index 112001/09

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Proskauer Rose LLP, New York (Neil H. Abramson of counsel), for appellants.

Cary Kane LLP, New York (Larry Cary of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered December 18, 2009, which, to the extent appealed from, granted petitioners' application to confirm the portions of an arbitration award, dated August 11, 2009, that (1) granted a 3% wage increase for employees of respondents the New York City Transit Authority and the Manhattan and Bronx Surface Transit Operating Authority in the third year of a contract with petitioner Transport Workers Union of America, Local 100, and (2) capped the formula for employees' contributions toward health insurance costs, and denied respondents' cross petition to vacate those portions of the award, unanimously affirmed, without costs.

An arbitration panel selected by the parties was required to make "a just and reasonable determination of the matters in dispute," taking into account factors enumerated in the Taylor Law and specifying the basis for its findings (Civil Service Law § 209[4][c][v]; 209[5][d]; *see Matter of Buffalo Professional Firefighters Assn., Inc., Local 282, IAFF, AFL-CIO-CLC [Masiello]*, 13 NY3d 803 [2009]). In reviewing the award, a court is limited to considering whether the award is arbitrary and capricious and ascertaining that the "criteria specified in the statute were 'considered' in good faith and that the resulting award has a 'plausible basis'" (*Caso v Coffey*, 41 NY2d 153, 158 [1976]; *see Masiello*, 13 NY3d at 804). Applying that standard, the application court correctly concluded that the award as a whole, including the particular provisions challenged, was made upon good faith consideration of the statutory criteria and has a plausible basis in the evidentiary record.

The panel's references to certain matters outside the hearing record, including the MTA 2010 Preliminary Budget and July Financial Plan and matters reported in newspaper articles, did not constitute "corruption, fraud, or misconduct in procuring the award" prejudicing the rights of either party and warranting vacatur (CPLR 7511[b][1][i]; *see Matter of Goldfinger v Lisker*, 68 NY2d 225, 230-232 [1986]). Arbitrators "often are chosen

because of their expertise in a particular area and are generally permitted independent recourse to third-party sources when necessary to confirm technical information" (*id.* at 231 [citations omitted]). Here, the arbitrators did not purport to rely on matters outside the record in setting the award, but acknowledged and referred to developments known to the parties and widely reported (*see Matter of Travelers Ins. Co. v Job*, 239 AD2d 289, 291-292 [1997]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3868 The People of the State of New York, Ind. 4587/08
Respondent,

-against-

Luis Vargus,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Quinn E. Clancy of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Britta Gilmore of counsel), and Miller & Wrubel P.C., New York (Jeremy M. Sher of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura Ward, J.), rendered March 17, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

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 jury's credibility determinations. The prosecution presented credible evidence establishing the element of unlawful intent, and we reject defendant's arguments to the contrary.

The court properly concluded that the jury verdict

acquitting defendant of second-degree assault while convicting him of third-degree assault and third-degree weapon possession was not repugnant (*see People v Tucker*, 55 NY2d 1 [1981]). "It is settled law that repugnancy is analyzed solely on the basis of the court's instructions, and not on whether a reasonable view of the evidence supported the mixed verdict" (*People v Kronberg*, 277 AD2d 182, 183 [2000], *lv denied* 96 NY2d 785 [2001]). Since, under the court's charge, the jury could have found that defendant possessed a dangerous instrument that he intended to use unlawfully, but that he injured the victim without using it, the verdict was not repugnant, irrespective of whether such a theory had any evidentiary support (*see People v Robinson*, 60 AD3d 463 [2009]). In any event, under the evidence adduced at trial, the jury could have reasonably concluded that defendant sought to injure the victim by striking him with the object, but actually injured him by kicking him in the face.

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3869 Richard Honig, etc., et al., Index 602924/09
Plaintiffs-Appellants,

-against-

Technicraft Industries, Inc., et al.,
Defendants-Respondents.

_____

Hinman, Howard & Kattell, LLP, New York (Joseph Paykin of counsel), for appellants.

McLaughlin & Stern, LLP, New York (Paul H. Levinson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered March 17, 2010, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs' action seeking payment on promissory notes which defendants had defaulted on by 1993 was time-barred (*see* CPLR 213[2]). The motion court properly rejected plaintiffs' claim that the running of the statute of limitations should have been tolled during a period in which plaintiffs allegedly agreed to forbear on the loans to induce Krintzman to sign a post-nuptial agreement with his then spouse, Wendy Honig, until the time the agreement was declared null and void by a Massachusetts court. Plaintiffs' right to seek payment on the notes was unconditional, at the latest, when Krintzman challenged the validity of the post-nuptial agreement more than six years before this action was

instituted (*see generally John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979]). Furthermore, there is no support for plaintiffs' argument that defendants should be equitably estopped from asserting a statute of limitations defense, since defendants' alleged actions did not keep plaintiffs from timely bringing suit (*see Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]).

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

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3870 The People of the State of New York, Ind. 5722/08
Respondent,

-against-

Devon R.,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson 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 (Bruce Allen, J.), rendered on or about January 30, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 14, 2010

CLERK

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

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3871 Thomas Davies, et al., Index 112787/06
Plaintiffs-Appellants,

-against-

Peter Ferentini, et al.,
Defendants,

Home Depot U.S.A., Inc., et al.,
Defendants-Respondents.

_____

Marshall S. Bluth, New York, for appellants.

Law Office of Charles J. Siegel, New York (Christopher A. South of counsel), for Home Depot U.S.A., Inc., RIV Construction Group, Inc. and Eastview Holdings LLC, respondents.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Thomas M. Fleming II of counsel), for John Meyer Consulting, Planning, Engineering, Landscape Architecture and Land Surveying, P.C., respondents.

Connors & Connors, P.C., Staten Island (Robert J. Pfuhler of counsel), for Shawn's Lawns, Inc., respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered February 5, 2010, which, to the extent appealed from, as limited by the briefs, granted the motions of defendants Home Depot USA, Inc., RIV Construction Group, Inc., John Meyer Consulting, Planning, Engineering, Landscape, Architecture and Land Surveying, P.C., Shawn's Lawns, Inc. and Eastview Holdings LLC for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

In this personal injury action which arose out of a motor vehicle accident at an intersection on Route 9A, a New York State arterial highway, and a temporary access road to the construction site for a Home Depot store, plaintiffs have failed to submit competent evidence to raise triable issues of fact as to whether defendants-respondents created an unsafe condition which was a proximate cause of plaintiffs' injuries. Plaintiffs allege that defendants-respondents were negligent in failing to install a Type I End Assembly Box Beam Guide Rail to the blunt ends of the guide rail after the guide rail was cut in order to allow temporary access to the construction site. Instead, Type II End Assemblies were installed. According to plaintiffs, Type I End Assemblies would have prevented plaintiff's vehicle from flipping over and landing on its roof. It is undisputed that the guide rail at issue is located on a right-of-way owned by New York State and that the New York State Department of Transportation is the agency vested with the authority to control the right-of-way.

Plaintiffs' sole remaining claim against Home Depot, which was constructing a store on land abutting the State's right-of-way, is that Home Depot proposed the use of the Type II End Assemblies. Plaintiffs rely on the deposition testimony of non-party witness Kenneth Franco, a permit inspector at the DOT, that Home Depot proposed the installation of Type II End Assemblies.

Although at one point, Franco's testimony is ambiguous, when read as a whole, he continuously stated that the engineer on the Home Depot project, defendant-respondent JMC, suggested the Type II End Assemblies. As plaintiffs submitted no other evidence in support of their claim that Home Depot participated in the decision-making process concerning the Type II End Assemblies, the motion court properly granted Home Depot's motion for summary judgment dismissing the complaint as against it (*see Estate of Hamzavi v Dewberry-Goodkind, Inc.*, 24 AD3d 184 [2005], *lv denied* 7 NY3d 704 [2006]).

Defendant-respondent Shawn's Lawns was hired by defendant-respondent RIV, the general contractor on the Home Depot construction site, to perform site excavation work. As part of its work, it was directed to cut the guide rail. Cutting the guide rail was done pursuant to sketches provided by the DOT, and plaintiffs submitted no evidence to refute this claim. Moreover, Shawn's Lawns had no role in the selection of the Type II End Assemblies. The fact that the DOT selected the Type II End Assemblies and approved of their installation was confirmed by the deposition testimony of Shawn's Lawns' president, JMC's project manager, RIV's supervisor of construction, and two non-party employees of the DOT.

Since Shawn's Lawns' work was performed pursuant to the

DOT's sketches and it was ultimately confirmed that the Type II End Assemblies were properly installed pursuant to the DOT's specifications, Shawn's Lawns fulfilled its contract and did not

launch a force or instrument of harm (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]; *Luby v Rotterdam Sq., L.P.*, 47 AD3d 1053 [2008]). Accordingly, the motion court properly granted Shawn's Lawns motion for summary judgment dismissing the complaint and all cross claims as against it.

Defendant-respondent JMC entered into a limited written contract with Home Depot to provide engineering consulting services and to serve as a facilitator to obtain the necessary permits for the Home Depot construction project. Plaintiffs claim that JMC proposed the Type II End Assemblies in sketches it provided to the DOT and that the deposition testimony of Franco of the DOT creates an issue of fact as to whether it was JMC who proposed the Type II End Assemblies and not the DOT as claimed by several other witnesses, including two other employees of the DOT. With regard to the threshold issue as to whether JMC owed a duty to plaintiffs, and applying the *Espinal* factors, the actions of JMC, in providing construction drawings calling for the installation of the Type II End Assemblies pursuant to the DOT's directives, review, inspection and approval, do not rise to the requisite standard of creating a dangerous condition so as to be deemed to have launched a force or instrument of harm (*see Church v Callanan Indus.*, 99 NY2d 104 [2002]).

Assuming arguendo that Franco's unsubstantiated statement,

that it was his understanding that JMC recommended the use of Type II End Assemblies, was sufficient to raise a triable issue of fact that JMC initially proposed the use of Type II End Assemblies in drawings submitted to the DOT, the DOT still had the ultimate responsibility for approving the use of and installation of the Type II End Assemblies and could have overidden JMC's suggestion. Thus, since JMC had no control over the type of end assemblies that would ultimately be installed, JMC is not liable to the plaintiffs (*see Estate of Hamzavi*, 24 AD3d 184). Accordingly, the motion court properly granted JMC's motion for summary judgment dismissing the complaint and all cross claims as against it.

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

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3872 Richard Pu, Index 602986/06
Plaintiff-Appellant,

-against-

George Mitsopoulos, et al.,
Defendants-Respondents.

_____

Richard Pu, appellant pro se.

Alatsas & Taub PC, Brooklyn (Asher E. Taub of counsel), for respondents.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered October 5, 2009, which, in this action to recover attorneys' fees, denied plaintiff's motion to strike defendant's answer or compel discovery, granted defendants' cross motion for sanctions to the extent of directing plaintiff to pay $5,000 directly to defendants' counsel, and directed plaintiff to turn over the file in the underlying litigation, unanimously affirmed, with costs.

Plaintiff sought to conduct discovery as to an alleged fraudulent conveyance in spite of this Court's finding that he had "no basis for challenging the underlying conveyances" and that "there is no indication that such conveyances were at all fraudulent" (67 AD3d 561, 562 [2009]), and sought to enforce document demands for all documents in unacceptably broad

categories. Plaintiff argues that he is entitled to seek more discovery in an attempt to cure the deficiencies in his complaint, but he never made this request before, and in any event he has made no attempt to support the request with a "demonstration how further discovery might reveal the existence of such evidence" (*see Sovereign Metal Corp. v Ciraco*, 210 AD2d 75, 76 [1994] [internal quotation marks and citation omitted]).

The amount of reasonable counsel fees awarded, which was less than defendants sought, was properly based on counsel's affirmation.

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

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3873 The People of the State of New York, Ind. 6946/96
Respondent,

-against-

John Suggs,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (John Cataldo, J.), entered on or about November 25, 2008, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although defendant challenges two particular point assessments, we find those challenges unavailing. In any event, even without those assessments defendant would remain a level three offender, and we find no basis for a discretionary downward

departure (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]), particularly in light of the seriousness of defendant's criminal history.

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3874 William D. Rotblut, et al., Index 602854/07
Plaintiffs-Appellants,

-against-

150 East 77th Street Corp.,
Defendant-Respondent.

_____

William D. Rotblut, New York, appellant pro se, and for Louis Rotblut, appellant.

Cantor, Epstein & Mazzola, LLP, New York (Bryan J. Mazzola of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered June 17, 2009, which denied plaintiffs' motion for summary judgment declaring them holders of unsold shares in defendant corporation and granted defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny defendant's motion and to declare that plaintiffs are not holders of unsold shares, and otherwise affirmed, without costs.

Plaintiffs failed to demonstrate that they are holders of unsold shares in the corporation under the controlling documents, i.e., the offering plan, amendments to the plan, and proprietary lease (*see Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54 [2005]). The fact that the offering plan at issue, unlike the offering plan in *Sassi-Lehner v Charlton Tenants Corp.* (55 AD3d

74 [2008]), did not contain the term "designated by" the Sponsor is of no moment, since plaintiffs failed to establish that the shares and proprietary lease at issue were transferred from an original purchaser of unsold shares (*see e.g. LJ Kings, LLC v Woodstock Owners Corp.*, 46 AD3d 321 [2007]). Plaintiffs purchased the subject apartment, 11 years after the conversion, from a trust company acting as receiver for a depository institution that acquired the apartment after a default, and they offered no evidence that the original, defaulting, purchaser was "produced" by the Sponsor (*see Sassi-Lehner*, 55 AD3d at 74; *compare Katsam Holdings LLC v 419 W. 55th St. Corp.*, 58 AD3d 444 [2009], *and Likokas v 200 E. 36th St. Corp.*, 48 AD3d 245 [2008]). Indeed, pursuant to the contract of sale, plaintiffs acknowledged that the trust company was not the Sponsor or acting on behalf of the Sponsor.

In light of the "no waiver" provision of the proprietary lease, plaintiffs failed to demonstrate that defendant waived its right to declare that plaintiffs were not holders of unsold shares by agreeing that consent to certain acts was not required or that certain fees need not be paid (*see Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 69-70 [2003], *lv dismissed* 2 NY3d 794 [2004]). Nor did plaintiffs establish the elements of equitable estoppel or detrimental reliance (*see BWA Corp. v*

Alltrans Express U.S.A., 112 AD2d 850, 853 [1985]), since the cooperative made no representations at the time of sale and expressly required plaintiffs to make all necessary investigations. Moreover, plaintiffs' own correspondence suggests that they knew their status as holders of unsold shares was questionable.

Upon finding that plaintiffs were not entitled to the declaration they sought, the court erred in granting defendant's motion for summary judgment dismissing the complaint; it should have declared that plaintiffs were not holders of unsold shares (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *appeal dismissed* 371 US 74 [1962], *cert denied* 371 US 901 [1962]; *Rockland Light & Power Co. v City of New York*, 289 NY 45, 51 [1942]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3876-
3876A In re Elijah Jose S., and Another,

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

Jose Angel S.,
Respondent-Appellant,

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

_____

Neal D. Futerfas, White Plains, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose LLP, New York (Sandra J. Badin of counsel), Law Guardian.

Orders of disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about January 7, 2010, which, upon a fact-finding of permanent neglect, terminated respondent father's parental rights to the children and transferred custody of the children to petitioner agency and the Commissioner of the Administration for Children's Services for purposes of adoption, unanimously affirmed with respect to the disposition and the appeal therefrom otherwise dismissed, without costs.

Respondent did not appear at the fact-finding hearing and never moved to adjourn the hearing or to vacate his default. Thus, the fact-finding part of the order is not appealable (CPLR

5511; *Matter of Miguel R. v Wilda C.*, 74 AD3d 631 [2010]).

In any event, the finding of permanent neglect was supported by clear and convincing evidence of respondent's failure to maintain contact with the children and plan for their future, notwithstanding the agency's diligent efforts (Social Services Law § 384-b(7)(a) and (f); *see Matter of Sheila G.*, 61 NY2d 368, 380-381, 385 [1984]). Although the agency arranged for weekly visitation, respondent's appearances were sporadic, and he has not visited the children since December 2007 (*see Matter of Aisha C.*, 58 AD3d 471, 472 [2009], *lv denied* 12 NY3d 706 [2009]; *Matter of Lamikia Shawn S.*, 276 AD2d 279 [2000]). He also failed to comply with all random drug test requests, failed to complete a court-directed psychological evaluation, and commenced but failed to complete a substance abuse and parenting skills course. Finally, he developed no plan for the children's future, despite the agency's diligent efforts to assist him (*see Matter of Star Leslie W.*, 63 NY2d 136, 144 [1984]; *Sheila G.*, 61 NY2d at 385; *Matter of Aisha*, 58 AD3d at 472).

A preponderance of the evidence established that termination of respondent's parental rights was in the children's best interests (*Star Leslie W.*, 63 NY2d at 147-148). The children have been placed in the same foster home since January 2008, and their foster mother intends to adopt them. The record

demonstrates that the foster mother has provided loving care to the children, as well as attended to their medical, educational, and special needs. Given the father's failure to bond with the children and his continued failure to plan for their future, a suspended judgment was not warranted (*compare Matter of Shaquill Dywon M.*, 50 AD3d 1142, 1144 [2008]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3878-
3879-
3879A- Alexandre Van Damme, Index 601995/07
3979B Plaintiff-Respondent, 590203/08

-against-

Nahum Gelber,
Defendant-Appellant,

Arij Gasiunasen Fine Art of Palm Beach, Inc.,
doing business as, Gasiunasen Gallery,
Defendant-Respondent.

[And a Third-Party Action]

_____

Boies, Schiller & Flexner LLP, Armonk (Edward J. Normand of counsel), for appellant.

McLaughlin & Stern, LLP, New York (Jon Paul Robbins of counsel), for Alexandre Van Damme, respondent.

Melvyn R. Leventhal, New York, for Gasiunasen Gallery, respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 8, 2009, which denied defendant Gelber's motion for summary judgment dismissing the complaint and granted plaintiff's motion for partial summary judgment on claims for specific performance and an award of attorney's fees, unanimously affirmed, with costs. Order, same court and Justice, entered August 3, 2009, which directed Gelber to deliver a painting to plaintiff upon payment of the contractual purchase price,

unanimously affirmed, with costs. Orders, same court and Justice, entered March 15, 2010, which confirmed the Special Referee's recommended award of $364,172.09 in attorney's fees and disbursements, and denied Gelber's motion to renew, unanimously affirmed, with costs.

The record evidence demonstrates that Gelber expressly and impliedly appointed defendant Gasiunasen Gallery to act as his agent with regard to the sale of a painting by Gerhard Richter, and thus became obligated under the contract of sale to deliver the painting upon his agent's receipt of the full purchase price within the time limit imposed by the contract and its ancillary escrow agreement (see 2A NY Jur 2d, Agency and Independent Contractors §§ 98, 113 [2009]; Restatement [Second] of Agency § 144; *Greene v Hellman*, 51 NY2d 197, 204 [1980]; *News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 148 [2005]). To the extent Gelber averred otherwise in support of his cross motion for summary judgment, his statement was self-serving and tailored to avoid the consequences of his earlier deposition testimony, and hence was insufficient to raise a triable issue of fact (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]).

Under this same authority, Gelber's agent was also authorized to bind him under usual and customary contractual terms, which (1) provided that in the event of litigation, the

prevailing party may recover reasonable attorney's fees, and (2) designated New York courts as the forum for litigation and subjected the parties to jurisdiction in this State (*see* 2A NY Jur 2d, Agency and Independent Contractors § 113 [2009]). On the basis of this record, we reject Gelber's contention that there were insufficient contacts with New York to enforce the forum designation clause. We note that in a related Canadian action, Gelber made an informal judicial concession that New York is the proper forum in which to resolve the parties' dispute (*see People v Rivera*, 45 NY2d 989 [1978]; *Catanese v Lipschitz*, 44 AD2d 579, 580 [1974]).

When Gelber failed to deliver the painting upon tender of the full purchase price, plaintiff did not abandon his contractual rights by demanding return of his money and timely seeking specific performance and related relief (*see* UCC 2-711, 2-716; *Toto We're Home LLC v Beaverhome.Com, Inc*, 301 AD2d 643, 644 [2003]).

The record supports the court's confirmation of the Special Referee's recommended award of attorney fees and disbursements. Gelber, having plainly acquiesced in court to plaintiff's representation by litigation counsel who helped facilitate the underlying transaction, will not be heard to argue that an award of counsel fees was precluded by a purported conflict.

Gelber's argument that plaintiff lacks standing is unpreserved for appeal, as he failed to timely raise it before Supreme Court (*see Honique Accessories, Ltd. v S.J. Stile Assoc., Ltd.*, 67 AD3d 481 [2009]). Were we to consider this argument, we would reject it.

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3880 Mohammed Sidibe, an Infant by his Mother and Natural Guardian, Camara Sarata, etc., Plaintiffs-Appellants, Index 23992/06

-against-

Juan A. Cordero, et al., Defendants-Respondents.

_____

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

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Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered September 9, 2009, which granted defendants' motion for summary judgment dismissing the complaint on the grounds that infant plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established their prima facie entitlement to judgment as a matter of law by demonstrating, through an affirmed report of a plastic surgeon and photographs, that the infant plaintiff did not sustain a "significant disfigurement" within the meaning of Insurance Law § 5102(d). Rather, the photographs reflect minor skin discoloration on the infant plaintiff's left cheek, left temple and near the right antihelical rim. In

opposition, plaintiff failed to raise a triable issue of fact. The "recent" photographs of the infant plaintiff fail to support a finding that "a reasonable person would view [the facial discoloration] as unattractive, objectionable, or as the subject of pity or scorn" (*Hutchinson v Beth Cab Corp.*, 207 AD2d 283, 283 [1994] [internal quotation marks and citation omitted]; *see Santos v Taveras*, 55 AD3d 405, 406 [2008]).

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

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

ENTERED: DECEMBER 14, 2010

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3881 Recharde Hospedales, Index 20773/06
Plaintiff-Appellant,

-against-

"John Doe" also known as
Danilo G. Perdomo, et al.,
Defendants-Respondents.

_____

Rosenbaum & Rosenbaum, P.C., New York (Andrew B. Roth of counsel), for appellant.

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Dennis J. Monaco of counsel), for respondents.

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Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered August 10, 2009, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff failed to raise an issue of fact in response to defendants' prima facie showing that plaintiff's alleged injuries are neither permanent nor significant and, moreover, not the result of the July 2005 automobile accident in question. More particularly, in support of the motion, defendants' orthopedic surgeon stated that he examined plaintiff in October 2007 and diagnosed him with a resolved sprain/strain of the cervical and lumbar spine, a resolved sprain of the bilateral shoulders, and a

resolved sprain of the bilateral elbows. In response, plaintiff's treating physician stated that he last saw plaintiff in March 2006, at which time he diagnosed plaintiff with cervical pain secondary to cervical disc herniations, cervical radiculopathy, and lower back pain, all permanent. The only explanation offered for this cessation of treatment eight months after the accident is plaintiff's physician's statement that unspecified "insurance coverage issues" prevented plaintiff from complying with a recommendation to see an orthopedic surgeon. Such statement does not reasonably explain a complete cessation of treatment for allegedly permanent injuries (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]). Thus, other than plaintiff's physician's conclusory statement that plaintiff's injuries are permanent, there is no response to defendant's medical evidence that, a year and a half after plaintiff was last seen by his physician, plaintiff's injuries had resolved.

In addition, plaintiff simply did not address the affidavit of defendant's radiologist stating that the disc herniations revealed on an MRI taken in November 2005 were the result of a degenerative condition unrelated to the accident (*see Pommells*, 4 NY3d at 579-580). In any event, even if plaintiff's alleged limitations were attributable to disc herniations that are not degenerative in nature, "bulging or herniated discs are not, in

and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury" (*DeJesus v Paulino*, 61 AD3d 605, 608 [2009], citing *Pommells*, 4 NY3d at 574). Plaintiff offered no such objective evidence. At most, plaintiff showed that he was, about eight months after the accident, still experiencing some cervical pain, cervical radiculopathy, and low back pain.

Plaintiff's alleged 90/180-day injury was sufficiently refuted, prima facie, by his bill of particulars alleging that he was confined to bed for one week and to home for one month (*see DeJesus*, 61 AD3d at 607). The report of plaintiff's treating physician, which does not indicate that plaintiff was advised not to work or engage in any particular activities after the accident, failed to raise an issue of fact in this regard (*see Nieves v Castillo*, 74 AD3d 535 [2010]; *Weinberg v Okapi Taxi, Inc.*, 73 AD3d 439 [2010]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3883 The People of the State of New York, Ind. 4083/06
Respondent,

-against-

Javaar Williams,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Lester B. Adler, J.), rendered April 30, 2008, convicting defendant, after a jury trial, of assault in the second degree, attempted assault in the second degree and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 4 years, unanimously affirmed.

The evidence was legally sufficient to establish the element of intent to cause physical injury. Defendant did not preserve his challenge to the sufficiency of the evidence that the victim sustained physical injury, and we decline to review it in the interest of justice. As an alternative holding, we likewise find that the evidence was legally sufficient. We also find, with regard to both issues, 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 jury's credibility determinations. The evidence supported the inference that when defendant fired at the victim and inflicted a head wound, he did so with, at a bare minimum, the intent to cause physical injury, especially since the credible evidence showed that defendant continued to fire his weapon as the victim turned and fled (*see e.g. People v Santana*, 70 AD3d 448 [2010], *lv denied* 14 NY3d 844 [2010]). The evidence also amply established that the victim's head wound caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]), thus satisfying the physical injury element (Penal Law § 10.00[9]).

Defendant's contentions regarding his registration under the Gun Offender Registration Act (Administrative Code of City of NY § 10-601 *et seq.*) are not reviewable on this appeal because the registration is not part of the judgment of conviction (*see People v Smith*, 69 AD3d 450 [2010], *lv granted* 14 NY3d 844 [2010]); in any event, they are both unpreserved and without merit (*see id.* at 451).

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

ENTERED: DECEMBER 14, 2010

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CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3884 Pamela Wirth, et al., Index 103735/08
Plaintiffs-Appellants, 590085/09

-against-

Steven R. Krawitz, P.C., et al.,
Defendants-Respondents.

[And a Third-Party Action]

_____

Greenberg & Massarelli, LLP, Purchase (William G. Greenberg of counsel), for appellants.

Malito & Adolfsen, P.C., New York (John H. Somoza of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 12, 2010, which, to the extent appealed from as limited by the briefs, granted defendants' motion to disqualify third-party defendants as counsel for plaintiffs, unanimously affirmed, without costs.

Defendants met their burden of demonstrating that William Greenberg's testimony will be necessary to their third-party action (*see S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]) and that Greenberg's dual role of

advocate and witness will create the appearance of representing conflicting interests (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7[b]; *see generally Flores v Willard J. Price Assoc., LLC*, 20 AD3d 343, 344 [2005]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3885-
3886 In re Jonathan S., and Another,

Children Under the Age
of Eighteen Years, etc.,

Ismelda S.,
Respondent-Appellant,

Marcos S.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for respondent.

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

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Order, Family Court, New York County (Jody Adams, J.), entered on or about July 23, 2009, which, insofar as appealed from, upon a fact-finding determination that respondent mother neglected the subject children, placed the children in the custody of the Administration for Children's Services until the completion of the next permanency hearing, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal otherwise dismissed, without costs, as moot.

The appeal from the dispositional order has been rendered moot as the date scheduled for the next permanency hearing has passed (*see Matter of Taisha R.*, 14 AD3d 410 [2005]).

The finding of neglect is supported by a preponderance of the evidence. The mother's hospital records demonstrate that she was diagnosed with a major depressive disorder, which was recurrent and moderate to severe, and she had expressed to hospital personnel that she was experiencing increasingly persistent thoughts of killing herself and drowning the children in the bathtub. There were also numerous incidents of domestic violence in the presence of the children. Under these circumstances, the court properly found that the children's "physical, mental or emotional condition . . . [was] in imminent danger of becoming impaired" (Family Court Act § 1012[f][i]; *see Matter of Kayla W.*, 47 AD3d 571 [2008]). Contrary to the mother's contention, expert testimony regarding how her mental

illness affected her ability to care for the children was not required (*see Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 436 [2010]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3887 J.D.M. Imports Co., Inc., doing business as Instock Programs, Plaintiff-Respondent, Index 103463/06

-against-

Marvin Hartstein, et al., Defendants-Appellants.

_____

Borstein & Sheinbaum, New York (Leon Borstein of counsel), for appellants.

Law Offices of Mitchell J. Devack, PLLC, East Meadow (Mitchell J. Devack of counsel), for respondent.

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Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 2, 2009, after an inquest in an action for conversion, in favor of plaintiff and against defendants in the principal amount of $1,600,948.93, plus interest, costs and disbursements, unanimously modified, on the law, to reduce the principal amount of the award to $1,299,088.93, the matter remanded for recalculation of interest, and otherwise affirmed, without costs.

We reject defendants' contention that plaintiff was required to prove, at the inquest, the number of specifically identifiable pieces of its jewelry that were in the individual defendant's possession and the value of each specific piece. We note that defendants do not seek review of the prior order that granted

plaintiff's motion for summary judgment on the issue of liability.

The court correctly found that plaintiff's computer database was a business record (*see Ed Guth Realty v Gingold*, 34 NY2d 440, 451 [1974]), and then properly admitted a print-out from the database (*see People v Weinberg*, 183 AD2d 932, 933 [1992], *lv denied* 80 NY2d 977 [1992]*; see also Guth*, 34 NY2d at 452).

The court erred, however, in including plaintiff's profits in the damages for conversion (*see Fantis Foods v Standard Importing Co.*, 49 NY2d 317, 326 [1980]; *Long Playing Sessions v Deluxe Labs.*, 129 AD2d 539 [1987]). Plaintiff does not claim the converted items were irreplaceable (*cf. Fantis*, 49 NY2d at 326; *Barrington v Offenbach*, 163 NYS 423, 426 [1917]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3888 Steven Smolev, et al., Index 600081/08
Plaintiffs-Respondents-Appellants,

-against-

Carole Hochman Design Group, Inc.,
Defendant-Appellant-Respondent.

_____

Phillips Nizer LLP, New York (Donald L. Kreindler of counsel), for appellant-respondent.

Kleinberg, Kaplan, Wolff & Cohen, P.C., New York (David Parker of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered March 29, 2010, which, to the extent appealed from, granted so much of plaintiffs' motion for summary judgment as sought a declaration that defendant is liable to plaintiffs for amounts under the parties' asset purchase agreement, and so declared, and denied so much of the motion as sought summary judgment on the breach of contract cause of action, unanimously modified, on the law, to deny the part of the motion that sought summary judgment declaring that defendant is liable to plaintiffs for amounts due under the asset purchase agreement and to vacate the declaration, and otherwise affirmed, without costs.

The record presents questions of fact whether plaintiffs breached certain non-disparagement and consulting agreements in connection with the sale of their business to defendant and, if

so, whether the breaches were material under these agreements, i.e., were "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract" (*Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284 [1910]). With respect to the consulting agreements, there is evidence that plaintiffs Arlene Smolev and Hayley Denman failed to provide consulting services, meet deadlines and provide useful ideas to be incorporated into a viable product line. With respect to the non-disparagement agreements, there is evidence that Denman made disparaging remarks in front of individuals who were not employees of defendant during meetings with potential buyers of plaintiffs' business and that Arlene Smolev engaged in conduct and made statements disparaging of defendant and its products and employees in front of defendant's employees.

The parties agree that the consulting and non-disparagement agreements were part of the asset purchase pursuant to the asset purchase agreement and thus should be read together with the asset purchase agreement as a single contract. Accordingly, questions of fact exist whether the breaches of the non-disparagement and consulting agreements, if any, were material under the asset purchase agreement so as to relieve defendant of its payment obligations thereunder.

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

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

ENTERED: DECEMBER 14, 2010

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3891-
3891A Jason Provenzano, Index 16888/04
Plaintiff-Appellant,

-against-

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

_____

Anita Nissan Yehuda, P.C., Roslyn Heights (Anita Nissan Yehuda of counsel), for appellant.

Cornell Grace, P.C., New York (Keith D. Grace of counsel), for City of New York, respondent.

Fixler & Lagattuta, LLP, New York (Jason L. Fixler of counsel), for Kinney Parking Systems, respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered June 24, 2009, which, insofar as appealed from as limited by the briefs, granted defendants' motion and cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and defendants' motion and cross motion denied. Appeal from order, same court and Justice, entered on or about March 5, 2010, which denied plaintiff's motion for leave to reargue defendants' motions, unanimously dismissed, without costs, as taken from a nonappealable order.

In this personal injury action arising from a trip and fall, the motion court erred in determining, as a matter of law, that the defective condition upon which plaintiff fell was outside of

the parking lot owned by the City and leased to Kinney. The record demonstrates that, at a minimum, an issue of fact exists as to whether the defective condition was part of the parking lot or part of the public sidewalk. Even assuming that the area where plaintiff fell constituted a "sidewalk" under Administrative Code § 7-201(c), sufficient evidence was presented to raise a triable issue of fact as to whether the City, as a landlord, made special use of that portion of the sidewalk to allow access to the parking lot, and whether or not prior written notice of the alleged condition was required (*cf. Spangel v City of New York*, 285 AD2d 425 [2001]).

Summary judgment also should not have been granted to Kinney, since issues of fact remain as to whether, under the maintenance agreement between the City and Kinney, Kinney had agreed to displace the City's duty to maintain its property (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 589 [1994]).

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

ENTERED: DECEMBER 14, 2010

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3892 The People of the State of New York, Ind. 6720/98
Respondent,

-against-

Jessie Velez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered June 18, 2009, resentencing defendant to a term of 9 years, with 5 years' postrelease supervision, unanimously reversed, on the law, the resentence vacated, and the original sentence without postrelease supervision reinstated.

Defendant is entitled to relief under *People v Williams* (14 NY3d 198 [2010]), which invalidates the imposition of postrelease supervision upon resentencing of defendants who have been released after completing their terms of imprisonment. When a person serving a determinate sentence is conditionally released, the determinate sentence is still in effect, but the person has clearly been released from imprisonment within the meaning of *Williams*. Accordingly, the controlling date for double jeopardy purposes under *Williams* is the date of release from prison, not

the expiration date of the sentence (*People v Grant*, 75 AD3d 558 [2010]), and we reject the People's argument to the contrary.

In light of this determination, we find it unnecessary to reach any other issues.

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

ENTERED: DECEMBER 14, 2010

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3900 The People of the State of New York, Ind. 2162/08
Respondent, 3418/05

-against-

Roshan Higgins, also known as
Shawn Huggins,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Kristina Schwarz 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 (Bonnie Wittner, J.), rendered on or about July 22, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 14, 2010

CLERK

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

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3901 In re Estate of Jean A. Holke, Deceased. Index 3213/07

- - - - - -

Murray H. Shulman,
Petitioner-Appellant,

-against-

Martha Beverly,
Respondent-Respondent.

_____

Murray H. Shulman, appellant pro se.

_____

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about August 13, 2009, which dismissed the petition to revoke letters testamentary issued to respondent, unanimously affirmed, without costs.

Petitioner failed to show that respondent caused harm to the estate (*see* SCPA 711[2]; *Matter of Jordan*, 52 AD3d 328, 329-330 [2008]).

The statements in the Surrogate's order that petitioner challenges are supported in the record, and the Surrogate stated that she had reviewed all the papers and exhibits that were submitted.

Petitioner's temporary residence in the decedent's apartment

to care for her while paying rent on his own apartment and his trip to Sweden to dispose of her ashes were voluntary and not authorized by respondent; thus, the expenses he incurred are not reimbursable by the estate.

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

ENTERED: DECEMBER 14, 2010

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3902N Anna Pezhman, Index 402354/09
Plaintiff-Appellant,

-against-

Department of Education of the
City of New York, et al.,
Defendants-Respondents.

_____

Anna Pezhman, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered August 23, 2010, which denied plaintiff's motion to strike defendants' answer, unanimously affirmed, without costs.

Plaintiff failed to carry her burden of clearly demonstrating that defendants' failure to comply with disclosure obligations was willful, contumacious or in bad faith (*compare Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1999], *with Rodriguez*

v United Bronx Parents, Inc., 70 AD3d 492 [2010]). Plaintiff

also failed to file the affirmation of good faith required by 22 NYCRR 202.7 (*see 148 Magnolia LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [2009]).

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

ENTERED: DECEMBER 14, 2010

CLERK

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

2863 The People of the State of New York, Ind. 788/08
Respondent,

-against-

Debra Pagan,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered August 7, 2008, affirmed.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Saxe
James M. McGuire
Karla Moskowitz
Helen E. Freedman, JJ.

2863
Ind. 788/08

_____x

The People of the State of New York,
Respondent,

-against-

Debra Pagan,
Defendant-Appellant.
_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Marcy L. Kahn, J.), rendered August 7, 2008, convicting her, after a jury trial, of attempted robbery in the second degree, criminal possession of a weapon in the third degree, assault in the third degree and menacing in the second degree, and imposing sentence.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer and Gina Mignola of counsel), for respondent.

MOSKOWITZ, J.

On the night of February 17, 2008 at 9:30 p.m., defendant hailed a livery cab at 116th Street and Madison Avenue and asked the cabdriver to take her to 109th Street and Lexington Avenue. Defendant claimed to have only four dollars, said she knew the minimum fare was six dollars, but asked the cabdriver to "do her a favor and take her" anyway. The cabdriver agreed, because it was cold and raining, and defendant looked a little sick.

Although she had claimed to have only four dollars, upon arrival at defendant's destination, defendant gave the cabdriver a $1 bill and a $20 bill. The cabdriver returned the dollar to defendant, saying that he did not need it to make change, then gave her $16. However, defendant insisted that she was entitled to $17. When the cabdriver reminded her that he had already returned one dollar, defendant became angry. Screaming, defendant accused the cabdriver of confusing her and demanded that he return the $20 bill. The cabdriver handed her the $20, with the expectation that she would return his $16 and start again. Instead, defendant kept the $20 and gave the cabdriver $4 from the $16 he had given her as change. The cabdriver left the money where defendant had placed it, on the console between the two front seats, and said that she was paying him from the change he had given her. Defendant said the cabdriver was "confusing

her" and grabbed back the $4. Defendant grabbed the door handle, but the cabdriver activated the security locks.

The cabdriver told defendant to return the money he had given her and leave, and said he would not charge her for the ride, saying he "didn't want any problems" and the $4 would not make him "richer or poorer." Defendant became angrier, and refused to return the money or to leave. The cabdriver said he would take defendant to the police precinct. Defendant put the $16 on the console and the cabdriver unlocked the doors, but defendant would not get out. The cabdriver held the money with his right hand, and eventually drove toward the police precinct.

Defendant leaned forward and tried to grab the cabdriver's right hand, the hand that was holding the $16. Accusing the cabdriver of trying to steal her money, she tried to get the cash from him. She pulled on, scratched and bit his hand, leaving marks and some blood.

The cabdriver stopped at 107th Street and Lexington Avenue, and noticed that his hand was injured. Defendant began looking for something in her bag, stating, "now you're going to see." The cabdriver turned and saw that defendant was holding up a blade. Seconds later, the cabdriver saw two police officers, Edward Arias and Pete Rios, crossing the street. The cabdriver got out of the car and called them over. He told them there was

a knife in the car and showed them his hand. It had cuts and abrasions, with the skin peeled back, and visible blood.

Defendant, still sitting in the back seat, held money in one hand and an open folding knife, with the blade visible, in the other. She was extremely agitated and "borderline incoherent." When she made eye contact with Officer Arias, she quickly put the knife back into her purse. The officers asked her several times to get out of the car, but defendant refused. Eventually, the officers had to pull her out physically. Defendant did not appear to understand why she was being arrested. Arias took the money from her hand and retrieved from her bag the knife with a sharp, three-inch-long blade. Defendant then refused to get into the police car and resisted the officers' efforts to place her inside. Defendant was at the precinct for over four hours, during which time she no longer seemed incoherent. The cabdriver was treated at the hospital for the injuries to his hand.

Defendant was charged with attempted robbery in the first degree (uses or threatens the immediate use of a dangerous instrument), attempted robbery in the second degree (causes physical injury to another), criminal possession of a weapon in the third degree, assault in the third degree (intentionally causes physical injury) and menacing in the second degree.

Defendant proceeded to trial on July 16, 2008. The main

theory upon which the defense relied to combat the robbery charge was that defendant was mistaken about whether the cabdriver owed her money and that this mistake negated the larcenous intent element of robbery. To refute this theory the prosecutor requested that the court instruct the jury that a claim of right is not a defense to robbery. Defense counsel objected, arguing that such a charge would confuse the jury, would shift the burden on larcenous intent and direct a verdict for the People. Defense counsel also requested that the court charge the jury that a reasonable mistake of fact would be a defense against robbery, because it could negate the larcenous intent element. Counsel maintained that this charge differed from a claim-of-right defense.

The court ruled that it would give the negative claim-of-right charge, but not the mistake-in-fact instruction the defense requested. The court also determined that it would instruct the jurors that an element of robbery was the intent to deprive another person of property, in particular the owner, and give an expanded charge on intent. The defense would be permitted to argue that defendant did not intend to steal, and that she believed that the money belonged to her.

Accordingly, the court gave an extended instruction on intent:

> "Intent means conscious objective or purpose. . . A person acts with intent to commit robbery in the first degree when his or her specific intent, that is conscious objective or purpose, is to commit robbery in the first degree. That is, when the person's conscious objective or purpose is to deprive another of property or to appropriate property to herself by the use of force, specifically by the use or threat of the immediate use of a dangerous instrument, for the purpose of compelling the owner of such property to deliver up the property.
>
> "Intent does not require premeditation, though. Intent does not require advanced planning, nor is it necessary that the intent be in a person's mind for any particular period of time. The intent may be formed and need only exist at the very moment the person engages in prohibited conduct or acts to cause the prohibited result, and not at any earlier time.
>
> "The question naturally arises as to how to determine whether or not a defendant had the intent required for the commission of a crime. To make that determination in this case you must decide if the required intent can be inferred beyond a reasonable doubt from the proven facts. In doing so you may consider the person's conduct, all of the circumstances surrounding the conduct . . ."

After defining attempted robbery in the first and second degrees, including the above expanded instruction on intent, the court instructed the jury that:

> "Now, with respect to the [robbery counts] I charge you also, jury members that the law does not permit one person to use force to take money from another person, even where the person doing the taking honestly believes he or she is entitled to take the money."

During deliberations, the jury sent a note (it was their second) requesting repetition of the "instruction regarding

whether the person thinks they are entitled to property as it relates to the attempted robbery charges." The jury also asked for a "legal definition of 'entitled to'" After discussion with counsel (and over defense counsel's objection) the court answered the jury's question:

> "And to answer the remaining question: "May we have a legal definition of entitled to," I would say to you, in this context entitled to means that the person has a legal right to possession which is superior to any right of possession of the other person in the transaction.
>
> "Entitled to means having a legal right to possession superior to that of the other person, or of any other person."

The court also repeated that, with respect to the attempted robbery counts, "the law does not permit one person to use force to take money from another person, even where the person doing the taking honestly believes that he or she is entitled to the money."

The next morning, the jury sent a third note requesting the judge to read the instructions on the two attempted robbery counts and the weapons possession count. In response, the court reread the definitions of attempted robbery, first and second degrees, and criminal possession of a weapon in the third degree.

The jury was deadlocked on count one, attempted robbery in the first degree, but convicted defendant of attempted robbery in

the second degree, criminal possession of a weapon in the third degree, assault in the third degree and menacing in the second degree.

On this appeal, defendant focuses primarily on the court's charge to the jury with respect to the attempted robbery count, contending that the charge, as given, in effect directed a verdict on this offense. She also claims that she was denied a right to a fair trial because the court gave the jury written excerpts from the charge.

Intent is an element of robbery that the People must prove beyond a reasonable doubt (*see People v Green*, 5 NY3d 538, 544 [2005] ["because the prosecution must prove beyond a reasonable doubt that the defendant intended to take property from someone with a superior right to possession, a good faith but mistaken claim of right might defeat a robbery prosecution"]). Thus, in *People v Harrison*, 35 AD3d 52, 53 (2006), *lv denied*, 8 NY3d 923 (2007), a case involving a fight over a backpack during which the defendant threatened the owner with a knife, but had claimed the backpack was his, we held it was error for the court to respond "yes" to a jury inquiry asking "[i]f a person attempts to forcibly regain property that he or she truly believed is his or hers, does that make that person subject to the law of attempted robbery?" We reasoned this response left the jury with the

mistaken impression that defendant's belief as to the true ownership rights of the backpack was irrelevant.

Even though it is the prosecution's burden to prove the intent element of robbery, the law also discourages "resorting to extra-judicial means in order to protect a property interest" (*People v Reid*, 69 NY2d 469, 476 [1987]). Thus, a defendant who forcibly retakes a specific chattel he or she believes they own is not entitled to a *charge* concerning claim of right, but can still argue claim of right to the jury (*People v Green,* 5 NY3d at 544). However, when a defendant uses force to recover cash allegedly owed as a debt, a claim of right *defense* is not available (*see People v Reid*, 69 NY2d at 475*; see also People v Lueshing*, 306 AD2d 218 [2003], *lv denied* 100 NY2d 643 [2003]). The greater legal restriction regarding forcible taking of money, as opposed to a specific chattel, relies on the fungibility of cash (*see Reid* at 476). There can therefore be no genuine belief as to ownership of cash (*cf. People v Green*, 5 NY3d at 544 [distinguishing *Reid* on the ground that "[t]here, the defendant simply could not have had a true claim of right to the fungible cash - the bills themselves - he took to satisfy an alleged debt. When the robbery is of a particular chattel, however, there can be a genuine belief in ownership of specific property taken"]).

Defendant claims that she mistakenly believed that the

actual bills in the cabdriver's hand belonged to her because "she erroneously believed that she had given the cabdriver more money than was due him and that the money he refused to return belonged to her." Thus, defendant argues that her mistaken belief that the cabdriver wrongfully withheld her change negates the culpable mental state of larcenous intent.

Defendant's argument misses the mark. First, under the facts here, we agree with the People that a claim of right and mistake of fact are essentially equivalent. This is because a claim of right for the purposes of the Penal Law is essentially a good faith but mistaken belief as to ownership and defendant claims that she was mistaken as to the ownership of the bills in the hand of the cabdriver. Because a claim of right defense is unavailable to a defendant who uses force to recover cash, (*see Reid* at 476), defendant's claim of error is unavailing.

Moreover, it was only defendant's original $20 dollars that she could have thought belonged to her. The bills in the cab driver's hand were actually the change the cab driver had originally given defendant in exchange for her $20 bill that the cab driver had already returned to defendant. The particular bills in the cabdriver's hand never were defendant's property. Indeed, this situation shows the wisdom inherent in the rule in *Reid* that, due to its fungible nature, a defendant cannot have a

genuine belief as to ownership of cash. To hold otherwise because defendant believed the money was change to which she was entitled, would run counter to a policy that discourages violent self-help. Of course, some forms of cash, a collectible coin, for example, might not be fungible. We need not determine, however, whether defendant would have a legitimate argument had she tried to take back her original $20 bill.

Therefore, we conclude that, even under her view of the facts, defendant was properly convicted of attempted robbery, because the property at issue was cash rather than a particular piece of property. For the same reasons, we find no error in the court's main and supplementary charges. The court properly declined to charge mistake in fact, and, given the circumstances of this case, it properly exercised its discretion when it gave the jury an anticipatory instruction that the claim of right defense did not apply (*see e.g. People v Rodriguez*, 52 AD3d 399 [2008], *lv denied* 11 NY3d 834 [2008]); *see also People v Simmons*, 15 NY3d 728 [2010] [viewed in context of jury charge as a whole, court conveyed the proper legal standard regarding intent]).

With respect to defendant's remaining contentions, we find them unavailing. The record, viewed as a whole, establishes that even though defendant did not initially consent to the court's submission of written instructions of the elements of the crimes

in response to the jury's request (*see* CPL 310.30), counsel changed her position after further colloquy with the court and, ultimately, consented.

Moreover, the evidence was legally sufficient to establish attempted second degree robbery and the verdict was not against the weight of the evidence. As discussed, even if the trier of fact were to find that defendant mistakenly believed that the money in the cabdriver's hand belonged to her, that belief could not negate larcenous intent. We have considered defendant's remaining contentions and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Marcy L. Kahn, J.), rendered August 7, 2008, convicting defendant, after a jury trial, of attempted robbery in the second degree, criminal possession of a weapon in the third degree, assault in the third degree and menacing in the second degree, and sentencing her, as a second felony offender, to concurrent

terms of, respectively, 3 years on the robbery count, 2 to 4 years, 1 year and 1 year should be affirmed.

All conur.

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

ENTERED: DECEMBER 14, 2010

CLERK