SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 11, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2320 The People of the State of New York, Ind. 5271/07
Respondent,

-against-

Randall Graves,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered December 3, 2008, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion, made on the basis of an isolated portion of the prosecutor's summation that allegedly made an improper statement of fact, since that comment was a permissible response to a corresponding portion of the defense summation (*see generally People v Overlee*, 236 AD2d 133 [1997]). Defendant's

remaining challenges to the summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: MARCH 11, 2010

CLERK

Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2321 Priscilla Charest, et al., Index 14014/05
Plaintiffs-Appellants,

-against-

K Mart of NY Holdings, Inc.,
Defendant-Respondent.

Goldman & Grossman, New York (Jay S. Grossman of counsel), for appellants.

Simmons Jannace, LLP, Syosset (Marvin N. Romero of counsel), for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered October 11, 2007, which, inter alia, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

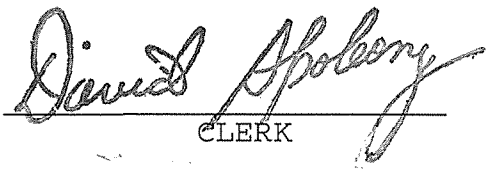
Plaintiff claims that she was injured while shopping at a K Mart store, and sued defendant, K Mart of NY Holdings, Inc. Defendant moved for summary judgment, asserting that it never owned, operated, maintained or operated the store, and did not otherwise owe plaintiff a duty of care. In support, defendant submitted the lease for the store, which has been in effect at all relevant times and names nonparty K Mart Corporation as the tenant and makes no reference to defendant. Plaintiff's argument that this lease is not in evidentiary form in that it is not a certified copy and has not been authenticated by sworn testimony is improperly raised for the first time on appeal, and we decline

to review it. Defendant also submitted the affidavit of a K Mart Corporation officer stating that he was familiar with K Mart Corporation and its affiliated entities, including defendant, and that the latter is separate and distinct from the former and has never had any right to own, lease, operate, possess, manage, operate, or maintain any K Mart store. Plaintiff's argument that this affidavit does not disclose the personal knowledge necessary to support a motion for summary judgment is also unpreserved, and in any event without merit (*see IRB-Brasil Resseguros S.A. v Eldorado Trading Corp. Ltd.*, 68 AD3d 576, 577 [2009]), and her characterization of the affidavit as "self-serving" does not relieve her of the burden of coming forward with rebutting evidence. The documents subsequently submitted by plaintiff do not tend to show, as her attorney contends, that defendant was formed to take over K Mart Corporation's business in New York after its emergence from bankruptcy. Plaintiff's argument that the documents show a complex relationship warranting further disclosure was properly rejected by the motion court as a

"fishing expedition" (*compare Banham v Morgan Stanley & Co.*, 178 AD2d 236, 238 [1991]; *see Devore v Pfizer Inc.*, 58 AD3d 138, 143-144 [2008], *lv denied* 12 NY3d 703 [2009])

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

ENTERED: MARCH 11, 2010



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Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2322 In re Ezri,

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

Kimberly F.,
Respondent-Appellant,

-against-

Alba R.,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

Goetz L. Vilsaint, Bronx, for respondent.

Steven N. Feinman, White Plains, Law Guardian.

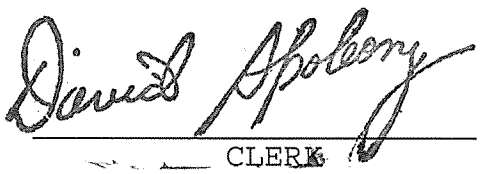
Order, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about November 12, 2008, which, upon a finding of abandonment, terminated respondent mother's parental rights to the subject child and determined that her consent was not required for the child's adoption by petitioner stepmother, unanimously affirmed, without costs.

The finding of abandonment is supported by clear and convincing evidence of "a purposeful ridding of parental obligations and the foregoing of parental rights -- a withholding of interest, presence, affection, care and support" (*see Matter of Corey L. v Martin L.*, 45 NY2d 383, 391 [1978]). Respondent admitted that she failed to contact, visit, call or provide support for the child during the six months preceding the filing

of the petition. She also admitted that the child's father, with whom the child has resided since May 2002, did not discourage contact during this time period. Moreover, although respondent has experience with court proceedings, she took no steps to enforce her parental rights or to obtain visitation until after the adoption petition was filed.

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

ENTERED: MARCH 11, 2010



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Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2323 The People of the State of New York, Ind. 3418/04
Respondent,

-against-

Carlos Gonzalez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered December 9, 2008, as amended February 10, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees, and sentencing him to concurrent terms of 14 years and 7 years, respectively, unanimously affirmed.

Defendant, who asserts that his only intended use of the weapon was to lawfully defend himself, argues that the verdict convicting him of second-degree weapon possession, requiring intent to use unlawfully against another, was contrary to the weight of the evidence. However, we find that the evidence, viewed in light of the court's charge, established that element (*see People v Danielson*, 9 NY3d 342 [2007]). Defendant's claim that the jury, by acquitting him of second-degree murder, accepted his justification defense speculates as to the jury's

thought processes and does not warrant a different result (*see People v Hemmings*, 2 NY3d 1, 7 n [2004], *People v Rayam*, 94 NY2d 557 [2000]). "Where a jury verdict is not repugnant, it is imprudent to speculate concerning the factual determinations that underlay the verdict because what might appear to be an irrational verdict may actually constitute a jury's permissible exercise of mercy or leniency" (*People v Horne*, 97 NY2d 404, 413 [2002]). Among other things, the jury could have found a lack of proof of some element of second-degree murder, or it could have found mitigating circumstances falling short of legal justification but meriting leniency. In any event, even assuming that defendant acted with justification at the moment he fired his first shots at the deceased, the evidence supports the conclusion that he possessed the weapon with the requisite unlawful intent immediately before or after that point in time, or both (*see People v Guzman*, 266 AD2d 37 [1999], *lv denied* 94 NY2d 920 [2000]).

Although defendant casts his principal argument in terms of weight of the evidence, to the extent he is also claiming the evidence was legally insufficient to establish guilt beyond a reasonable doubt, we find that claim to be unpreserved and we

decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 11, 2010

CLERK

Gonzalez P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2327 Keith White, Index 307008/05
Plaintiff-Appellant, 350391/05

-against-

Gabriela White,
Defendant-Respondent.

Keith White, appellant pro se.

Gabriella White, respondent pro se.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered May 27, 2008, which, after a nonjury trial, awarded to defendant mother primary residential custody of the subject child, as well as final decision-making on health-related issues, extracurricular activities and education through eighth grade, granted plaintiff father final decision-making on religion and on education after eighth grade, and issued a comprehensive parental access schedule, unanimously affirmed, without costs.

In the totality of the circumstances, the joint custody arrangement crafted by the court was in the child's best interest and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). In reaching this determination, the court considered the appropriate factors, including defendant's traditional role as the child's primary caregiver, the strengths and weaknesses of both parents, and the child's need for nurturing, guidance and the meaningful involvement of

both parents. The court also gave proper consideration to the fact that both parents had, at times, placed their own needs above the child's best interests. For example, in 2005, defendant took the then two-year-old child to Germany for four months without plaintiff's permission. Plaintiff does not challenge the court's finding that shortly after the child was returned to this country, plaintiff refused to call him for a three-week period as a "message of protest" regarding his access to the child. On this score, the court cited a forensic evaluator's unchallenged observation that plaintiff did not appear to appreciate how the child might perceive this absence of contact by his father.

The court's award provided the child with stability in that he would continue to reside primarily with defendant, while ensuring plaintiff's significant role in longer-term matters of religion and education. Plaintiff's participation in all other matters was ensured by the court's direction that the parties consult with each other on all issues in good faith.

We note, contrary to plaintiff's assertions, that the German court to which he applied for return of the child did not declare defendant a kidnapper or "child abductor." Rather, the record shows that the Hague Convention proceedings initiated by plaintiff were dismissed, upon agreement of the parties, without any such finding having been made. The German court stated, in

describing the mother's actions in transporting the child to Germany, "[i]f this was initially against the law, [it was] negligible," since both parents were entitled to joint custody. The court did not overlook the German proceedings and appropriately considered the import of the proceedings in rendering its detailed and well-balanced decision.

In order to allay plaintiff's fears that defendant might again take the child abroad, the court directed that neither party could remove the child from this country without the express written consent of the other parent or an order of the court. Since the award was a form of joint custody, disobeying the court's ban on foreign travel would permit the other party to petition for return of the child under the terms of the Hague Convention on the Civil Aspects of International Child Abduction (TIAS No. 11670, 1343 UNTS 89; *see* 42 USC § 11601; *cf. Matter of Welsh v Lewis*, 292 AD2d 536 [2002]; *Croll v Croll*, 229 F3d 133 [2d Cir 2000], *cert denied* 534 US 949 [2001]).

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

M-723 ***White v White***

Motion seeking an adjournment of the appeal and related relief denied as moot.

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

ENTERED: MARCH 11, 2010

David Spolony

CLERK

Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2329 The People of the State of New York, Ind. 3364/06
Respondent,

-against-

Jimmie Pugh,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Heather L. Holloway of counsel), for appellant.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about October 3, 2006, unanimously affirmed.

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

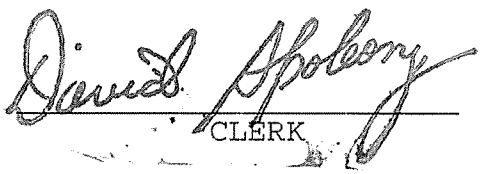
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 11, 2010



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Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2332 The People of the State of New York, Ind. 1707/07
Respondent,

-against-

Pedro Mena,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered June 9, 2008, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree, criminal possession of a controlled substance in the third and fourth degrees and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 22½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. The victim's reliable identification of defendant was extensively corroborated by physical evidence and police testimony.

The court properly exercised its discretion in permitting

the People to elicit defendant's racially offensive statements to the police shortly after the shooting. We conclude that, in the context of the case, this evidence was more probative than prejudicial. Although defendant was not charged with hate crimes under Penal Law § 485.05, and motive was not an element to be proven, motive was nevertheless an important issue. While the prosecution contended that defendant shot the victim seven times in revenge for an insult, the defense argued that such an overreaction to trivial teasing was implausible. Accordingly, defendant's racially charged comments tended to explain the overreaction by showing that defendant's intense racism was a contributing factor. In addition, there was a relationship between the statements at issue and epithets used by the assailant during the crime that was sufficient to make the statements relevant to the issue of identity. Defendant's remaining contentions concerning this evidence are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

M-577 - ***People v Pedro Mena***

Motion seeking leave to file pro se supplemental brief denied.

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

ENTERED: MARCH 11, 2010

CLERK

Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2334 Laverne J. Williams, Index 20777/06
Plaintiff-Appellant,

-against-

Wilner Nelson, et al.,
Defendants-Respondents.

Harold Chetrick, P.C., New York (Harold Chetrik of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 26, 2009, which granted defendants' motion to dismiss the complaint for failure to show serious injury and denied plaintiff's cross motion for summary judgment on the issue of liability, unanimously modified, on the law, defendants' motion denied, the complaint reinstated, and otherwise affirmed, without costs.

CPLR 3213[b] requires that a motion for summary judgment be supported by copies of the pleadings. Accordingly, the complaint is a requisite part of the record on a summary judgment motion (*see Krasner v Transcontinental Equities*, 64 AD2d 551 [1978]). Summary judgment was properly denied inasmuch as the complaint is not part of the record on the instant motion and cross motion. Also, we are unable to pass upon the timeliness of plaintiff's

cross motion as the record does not indicate whether or not Supreme Court set any date for the making of summary judgment motions (see CPLR 3212[a]).

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

ENTERED: MARCH 11, 2010

CLERK

Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2335 In re Bondam Realty Associates, L.P., Petitioner, Index 105871/08

506-524 W. 173 LLC, Petitioner-Respondent,

-against-

New York State Division of Housing and Community Renewal, Respondent-Appellant,

Rafael Vicente, Respondent.

Gary R. Connor, New York (Robert Ambaras of counsel), for appellant.

Law Offices of Santo Golino, New York (Santo Golino of counsel), for 506-524 W. 173 LLC, respondent.

Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered on or about December 10, 2008, granting the petitions to annul a determination of respondent DHCR, dated February 28, 2008, which found petitioners jointly and severally liable for rent overcharges and treble damages, to the extent of remanding the proceeding brought pursuant to CPLR article 78 to DHCR for recalculation of the base rent based on the rent registration on record and for reconsideration of whether petitioner 506-524 W. 173 LLC's overcharge was willful, unanimously modified, on the law, to deny the petitions to the extent they seek to annul DHCR's calculation

of the legal regulated rent and the imposition of treble damages for overcharges during the period of petitioner Bondam Realty Associates' ownership of the building, and otherwise affirmed, without costs.

After respondent tenant commenced the rent overcharge proceeding in October 2006, DHCR repeatedly asked petitioner Bondam to provide rent records, including leases and rent ledgers, in order to determine the correct legal regulated rent. Bondam did not respond until March 2007, when it informed DHCR that, as of February 12, 2007, petitioner 506-524 was the owner of the building. 506-524 responded that it could not provide the records because of a fee dispute between Bondam and its former property managers. However, neither Bondam nor 506-524 ever provided the Rent Administrator with any evidence that Bondam was involved in litigation with its property managers or that 506-524 had sought to intervene in that litigation. Given the owners' failure to produce any rent records or any proof to substantiate the alleged reason for the absence of records, DHCR's resort to its default procedure to establish the base rent was not

arbitrary and capricious (*see Matter of Mangano v New York State Div. of Hous. & Community Renewal*, 30 AD3d 267, 267 [2006]; *Matter of 61 Jane St. Assoc. v New York City Conciliation & Appeals Bd.*, 108 AD2d 636, 636-637 [1985], *affd* 65 NY2d 898 [1985]; 9 NYCRR 2526.1[a][3][ii]; *Matter of Round Hill Mgt. Co. v Higgins*, 177 AD2d 256, 258 [1991] ["default formula[] designed to give the tenant every benefit of the doubt created by an owner's failure to provide complete records"]).

As it is clear that DHCR made an erroneous finding as to the timeliness of a refund offer made by 506-524 and that the perceived untimeliness was a factor in its finding of willfulness, the court properly remanded the proceeding to DHCR for reconsideration of whether treble damages should be imposed for overcharges accruing during the period of 506-524's ownership of the building.

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

ENTERED: MARCH 11, 2010

CLERK

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Roman, JJ.

1940 James V. Sinkaus, et al., Index 112064/04
Plaintiffs-Appellants, 591247/05

-against-

Regional Scaffolding & Hoisting Co., Inc., et al.,
Defendants-Respondents,

Greenwich Renwick, LLC,
Defendant.

[And A Third-Party Action]

Levine & Slavit, Esqs., New York (Ira S. Slavitt of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Debra A. Adler of counsel), for Regional Scaffolding & Hoisting Co., Inc., respondent.

Devereaux Baumgarten, New York (Michael J. Devereaux of counsel), for York Hunter and Take One, respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered September 11, 2008, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the complaint and denied plaintiffs' motion for leave to serve and file a supplemental bill of particulars, unanimously affirmed, without costs.

Plaintiffs allege that defendants caused or permitted the ramp upon which plaintiff worker was pulling a cart filled with drywall to have an excessively steep slope, thus triggering the events leading to his injury when his coworkers pushed the cart

over his foot.

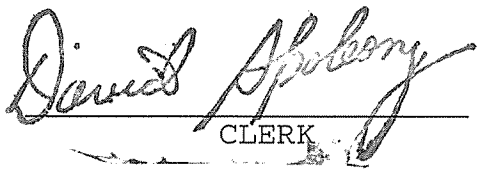
To recover under Labor Law § 240(1), a plaintiff must demonstrate a violation of the statute, proximately causing his injury (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]). The hazards that warrant the protection contemplated by this statute are "those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Here, the accident was not caused by the effects of gravity. To the contrary, the cart rolled over plaintiff's foot while his co-workers were pushing it back up the ramp, that is, while the cart was ascending.

Plaintiffs sought to assert in a supplemental bill of particulars the requirement in the Industrial Code (12 NYCRR 23-1.23[b]) and the New York City Building Code (Administrative Code of City of NY § 27-1051[d]) that ramps have a grade of no more than 25%. Even assuming that these provisions, dealing with earthen ramps, are applicable, defendants have submitted evidence that the slope of the ramp in question was less than 25% and thus not excessively steep. Plaintiffs' allegation in this regard is conclusory, does not create an issue of fact, and warrants dismissal of the claims under Labor Law § 241(6) (*see e.g. Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

The York Hunter and Take One defendants established prima facie entitlement to dismissal of the claims against them under Labor Law § 200 and common-law negligence by demonstrating that the accident was not proximately caused by any defect in or configuration of the ramp. In opposition, plaintiffs failed to raise a triable issue of fact. Defendant Regional Scaffolding & Hoisting also established its prima facie entitlement to judgment dismissing the claims for recovery under Labor Law § 200 and for common-law negligence because there was no evidence that it supervised or controlled the injured plaintiff's work, or created the allegedly dangerous condition (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]).

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

ENTERED: MARCH 11, 2010



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Mazzarelli, J.P., Acosta, Renwick, Freedman, JJ.

2146 Diane Babich, et al., Index 115521/06
Plaintiffs-Appellants,

-against-

R.G.T. Restaurant Corp.,
doing business as Punch, et al.,
Defendants-Respondents.

S. John Bate, P.C., Staten Island (S. John Bate of counsel), for appellants.

Mintzer Sarowitz Zeris Ledva & Meyers LLP, New York (Erika L. Omundson of counsel), for R.G.T. Restaurant Corp., respondent.

Thomas D. Hughes, New York (Richard Rubinstein of counsel), for Harold Scher, respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 2, 2009, which, in an action for personal injuries sustained in a slip and fall down a staircase, granted defendants' motions for summary judgment dismissing the complaint, reversed, on the law, without costs, the motion denied and the complaint reinstated.

Defendants established their prima facie entitlement to summary judgment by submitting evidence that the subject staircase was in compliance with the applicable Building Code provisions (*see* Administrative Code of City of NY § 27-375[f], [h]; § 27-381[a]). In opposition to the motion, plaintiffs submitted an affidavit from an expert, an architect, stating that he visited the building in question and observed that the

existing stair was "steel with a matte black non-slip finish that is applied to it as required by the New York City Building Code," but the "non-slip finish on the nosing of each tread and top platform is severely worn off," thereby "creating an extremely slippery condition at the edge nosing of the top platform and at each stair tread." This expert evidence submitted by plaintiffs raised a triable issue of fact as to whether the tread of the stairs complied with the pertinent regulations of the Building Code. Moreover, the injured plaintiff's testimony that she slipped on the top step of the subject stairway, coupled with her expert's testimony of the slippery condition of such steps due to worn-off treads, provided sufficient circumstantial evidence to raise an issue of fact as to whether her fall was caused by the allegedly defective condition (*see Garcia v New York City Tr. Auth.*, 269 AD2d 142 [2000]; *Gramm v State of New York*, 28 AD2d 787 [1987], *affd* 21 NY2d 1025 [1968]).

All concur except Freedman, J. who dissents in a memorandum as follows:

FREEDMAN, J. (dissenting)

In my view, plaintiffs fail to raise a triable issue of fact to rebut defendants' showing that they are entitled to summary judgment in this negligence action. Accordingly, I would affirm the motion court's order dismissing the complaint.

In January 2006, plaintiff Diane Babich was injured in a Manhattan restaurant by falling down a flight of stairs that connected the premises' ground floor to restrooms in the basement. After discovery was completed, defendants separately moved for summary judgment on the grounds, among other things, that plaintiffs could not show the stairs were defective and that Diane Babich was unable to identify what caused her to fall. In support, defendants submitted affidavits from two professional licensed engineers who had inspected the stairway and had measured both the steps' coefficient of friction (their slipperiness) and the illumination in the stairway (expressed in foot-candles). The engineers found that the stairway's construction and maintenance fully complied with the New York City Building Construction Code, including its requirements about step geometry, handrails, surfacing with non-slip materials, and lighting.

Defendants also submitted Babich's deposition testimony, in which she stated that the accident occurred when she fell from the landing at the top of the stairs. When asked what caused her

fall, she stated, "My foot slipped, that's all I can tell you." She indicated that she lost consciousness and did not remember anything further until she later awoke in the hospital. She also stated that she did not know which foot had slipped.

In opposition to defendants' motions, plaintiffs submitted the expert affidavit of an architect who had visually inspected the staircase after the accident but had not performed any tests on it.[1] This expert opined that the non-slip finish on the stairs was inadequately maintained because it was worn at the nosings[2] of the treads and top landing, which made their fore edges slippery.[3]

Plaintiffs also submitted an affidavit from Diane Babich, prepared in response to the summary judgment motions, stating that her testimony was "consistent" with the architect's theory as to what caused her fall.

At most, plaintiffs have raised an issue as to whether the worn finish on the nosing of the landing complied with the

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[1]All three experts examined the staircase in June 2007, some 17 months after the accident.

[2]"Nosings" are the rounded edges of stair treads that project over the risers.

[3]Plaintiffs' expert also stated that although the Building Code did not require a second handrail, the defendant restaurant owner should have installed one, "given the fact that the stair was to be used to connect the restaurant, which serves alcoholic beverages [*sic*] to the public restrooms below." Plaintiffs largely abandoned this argument on appeal.

Building Code. However, Babich's testimony fails to show that the worn finish caused her fall, which is necessary to establish a prima facie case (*Telfeyan v City of New York*, 40 AD3d 372, 373 [2007] [a negligence claim must be established by the injured plaintiff's testimony about what caused the accident]; *see also Wilson v New York City Tr. Auth.*, 66 AD3d 602 [2009]. Babich has no idea what made her slip on the landing, and no evidence connects Babich's fall with the alleged Building Code violation (*see Batista v New York City Tr. Auth.*, 66 AD3d 433 [2009]; *Daniarov v New York City Tr. Auth.*, 62 AD3d 480 [2009]; *McNally v Sabban*, 32 AD3d 340 [2006]).

I disagree with the majority's finding that plaintiffs' expert's affidavit, coupled with Babich's testimony that she "slipped," constituted sufficient circumstantial evidence to raise the issue of whether the alleged defect caused the accident. Under the circumstances here, it is equally if not more likely that Babich fell for completely unrelated reasons.

To find for plaintiffs, a factfinder would have to speculate about what caused Babich to slip on the stairs, and accordingly, summary judgment was properly granted to defendants.

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

ENTERED: MARCH 11, 2010

CLERK

CORRECTED ORDER - MARCH 15, 2010

Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2181 Lourdes Rivera-Irby, et al., Plaintiffs-Respondents, Index 15242/05

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for appellants.

Kenneth J. Gorman, New York for respondents.

_____

Order, Supreme Court, Bronx County (Lucy Billings, J.), entered March 9, 2009, which, insofar as appealed from, as limited by the briefs, granted plaintiffs' cross motion for sanctions to the extent of precluding defendants from submitting evidence of the lack of prior written notice, relieved plaintiffs of the burden of proving that defendants received such notice and resolved the issue against defendants, unanimously reversed, on the law and in the exercise of discretion, without costs, the cross motion denied, the sanction vacated, and defendants are directed to expand their search for their records of repair, maintenance and complaints for the two years prior to and including the date of the accident and provide a detailed affidavit of their efforts within 30 days of service of a copy of this order.

Sanctions for spoliation were unwarranted. Since the parks

supervisor who discarded his notebook after conducting inspections of the steps where the alleged accident occurred testified that he was unaware of the accident and he did not state when he discarded the notebook sought by plaintiffs, there is no evidence that he improperly did so with knowledge of a pending or imminent lawsuit (*see Bach v City of New York*, 33 AD3d 544, 545 [2006]).

Discovery sanctions were inappropriate because plaintiffs waived further disclosure by filing a note of issue not reserving their rights or preserving objections (*see Melcher v City of New York*, 38 AD3d 376, 377 [2007]; *cf. Horizon Inc. v Wolkowicki*, 55 AD3d 337, 338 [2008]). However, we note that the affidavit of the Parks Department Deputy Chief of Administration, which was offered by the City to support its denial that prior written notice of the defective condition had been given, was insufficient. The affidavit states merely that a search had been "initiated" for incident reports pertaining to plaintiff and for "any work orders or complaints" concerning the subject steps. The affidavit is insufficient because the affiant was not the individual who purportedly conducted the search (*see Donovan v City of New York*, 239 AD2d 461 [1997]; *Virola v New York City Housing Auth.*, 185 AD2d 122 [1992]). Furthermore, the affidavit fails to state specifically that a search had been conducted for reports of prior incidents. The affidavit fails to set forth where the relevant reports were likely to be kept; what efforts,

if any, were made to preserve them; whether such reports were routinely destroyed; or whether a search had been conducted in every location in which incident reports were likely to be found (*see Jackson v City of New York*, 185 AD2d 768 [1992]).

Although discovery or spoliation sanctions are not warranted under these circumstances, the notebook was clearly relevant and material to the issue of whether the City created the allegedly defective condition. At trial, it will be within the court's discretion to render an appropriate charge regarding the inference, if any, to be drawn from the loss of the notebook.

Plaintiffs should be allowed to avail themselves of defendants' offer in their brief to expand the scope of their records search.

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

ENTERED: MARCH 11, 2010

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, JJ.

2337 The People of the State of New York, Ind. 3825/06
Respondent,

-against-

Ricardo Jiminez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Rither Alabre of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert Torres, J.), rendered August 16, 2007, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 22 years to life, 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 determinations concerning credibility. Two witnesses (one of whom was acquainted with defendant) having no connection with each other identified the same person and gave essentially similar accounts of the incident. Moreover, defendant's confession to an informant contained significant details that confirmed the informant's credibility. The jury could have reasonably concluded that these factors outweighed the alleged deficiencies in the People's case.

The court properly declined to charge justification.

Defendant did not preserve his argument that a justification charge was supported by a portion of his statement to the informant (a statement defendant claims to be the informant's fabrication), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Viewing the evidence, including the statement to the informant, in a light most favorable to defendant, and with recognition of a defendant's right to assert inconsistent theories of defense (*see People v Steele*, 26 NY2d 526, 529 [1970]), we conclude that no reasonable view of the evidence supported a justification defense (*see People v Watts*, 57 NY2d 299, 301-302 [1982]; *People v Hubrecht*, 2 AD3d 289, 290 [2003], *lv denied* 2 NY3d 741 [2004]). In any event, any error in declining to charge justification was harmless.

Defendant did not preserve any of his challenges to the prosecutor's summation. Since defendant did not request any further relief after his objections were sustained, in each instance the court's curative action "must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944 [1994]; *see also People v Medina*, 53 NY2d 951, 953 [1981]). We decline to review these claims in the interest of justice. As an alternative holding, we find that the court's actions were sufficient to prevent any prejudice, and

that there is no basis for reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We have considered and rejected defendant's claim of excessive preindictment delay (*see People v Decker*, 13 NY3d 12 [2009]; *People v Vernace*, 96 NY2d 886 [2001]). Any procedural error in the manner in which the court determined the motion to dismiss was harmless (*see People v Dickens*, 259 AD2d 450, 451 [1999], *lv denied* 93 NY2d 1002 [1999]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 11, 2010

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2339 In re Samantha Stephanie R., and Another,

Children Under the Age of
Eighteen Years, etc.,

Yolanda O.,
Respondent-Appellant,

Coalition for Hispanic Family Services,
Petitioner-Respondent.

John J. Marafino, Mount Vernon, for appellant.

Law Offices of Raymond L. Colon, New York (Raymond L. Colon of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about July 16, 2008, terminating respondent appellant's parental rights to the subject children following her admission of permanent neglect, and committing the guardianship and custody of the children to petitioner agency and the Commissioner of Social Services for purposes of adoption by the children's foster parents, unanimously affirmed, without costs.

No basis exists to disturb Family Court's finding that respondent's "laudable" progress in correcting most of the conditions that led to the placement of the children "does not outweigh the need of these children to have a permanent and

stable home" (*see* Family Ct Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *see also Matter of Irene O.*, 38 NY2d 776, 777 [1975]). First, given respondent's history of drug abuse and prior relapses, and her at best uncertain prospects of obtaining permanent housing and a steady income, Family Court's concern that respondent was still a "work-in-progress" in becoming "a reliable parent" is well-grounded. Second, the children have bonded with their foster parents, who have been providing a stable, secure, and loving home environment for the children since early 2004, when one was two years old and the other two months old. Under the circumstances, a suspended judgment would not be in the children's best interests (*see Matter of Jada Serenity H.*, 60 AD3d 469 [2009]; *Matter of Saraphina Ameila S.*, 50 AD3d 378 [2008], *lv denied* 11 NY3d 709 [2008]; *Matter of Rutherford Roderick T.*, 4 AD3d 213 [2004]).

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

ENTERED: MARCH 11, 2010

David Apolony
CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2340 Alejandro Santiago, et al., Index 7705/07
Plaintiffs-Respondents,

-against-

Omar Bhuiyan, et al.,
Defendants-Appellants,

Edwin M. Lopez, et al.,
Defendants-Respondents.

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

Pena & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for Alejandro Santiago and Gretchen Rosario, respondents.

Jeffrey K. Kestenbaum, Brooklyn, for Yvette Lopez, respondent.

Richard T. Lau & Associates, Jericho (Gene W. Wiggins of counsel), for Edwin M. Lopez and Pentecostal Church Freed by Jesus Christ, respondents.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered August 19, 2009, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motions for summary judgment dismissing the complaints of plaintiffs Rosario and Lopez, unanimously reversed, on the law, without costs, the motions granted, said complaints dismissed as against defendants-appellants, and, upon a search of the record, as against the remaining defendants' as well. The Clerk is directed to enter judgment in favor of all defendants dismissing said complaints.

Defendants-appellants met their initial burden of presenting objective medical evidence that the injured plaintiffs had not

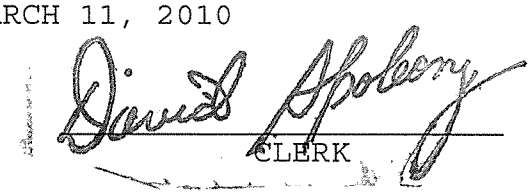
suffered a permanent consequential limitation of a body organ or a significant limitation of use of a body function or system through the affirmed reports of their medical experts (*see* Insurance Law § 5102[d]; *Christian v Waite*, 61 AD3d 581 [2009]; *Blackmon v Dinstuhl*, 27 AD3d 241 [2006]). The burden having shifted, summary judgment was warranted because plaintiffs' experts failed to sufficiently raise triable issues of fact.

Plaintiffs also failed to raise triable issues of fact as to whether they were incapacitated from performing substantially all of their usual and customary activities for at least 90 of the first 180 days after the accident, having failed to offer the requisite competent medical proof to substantiate their claims (*see Antonio v Gear Trans Corp.*, 65 AD3d 869 [2009]; *Glover v Capres Contr. Corp.*, 61 AD3d 549 [2009]; *Lattan v Gretz Tr. Inc.*, 55 AD3d 449 [2008]).

Upon a search of the record pursuant to CPLR 3212(b), we find that the non-appealing defendants' summary judgment motions should also be granted (*see Nickolson v Albishara*, 61 AD3d 542 [2009]; *Lopez v Simpson*, 39 AD3d 420 [2007]).

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

ENTERED: MARCH 11, 2010



CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2341 Cabrini Terrace Joint Venture, Index 570255/08
Petitioner-Respondent,

-against-

Charles O'Brien,
Respondent-Appellant.

Charles O'Brien, Bronx, appellant pro se.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

Order of the Appellate Term of the Supreme Court, First Department, entered April 30, 2009, which affirmed a judgment, Civil Court, New York County (Gerald Lebovits, J.), entered on or about March 7, 2008, after a nonjury trial, awarding petitioner possession, unanimously affirmed, without costs.

The trial court's findings, based largely on credibility, are not against the weight of the evidence (*see Thoreson v Penthouse Intl.*, 80 NY22d 490, 495 [1992]). The conditions in tenant's apartment were properly found harmful to the health, safety and comfort of others based on testimony of roach and rodent infestation, clutter, offensive odors, and stacked newspapers and wiring in disarray, as well as of tenant's refusal of access (*see 12 Broadway Realty, LLC v Levites*, 44 AD3d 372 [2007]; *Zipper v Haroldson Ct. Condominium*, 39 AD3d 325 [2007], *lv dismissed* 9 NY3d 919 [2007]; *Stratton Coop. v Fener*, 211 AD2d 559 [1995]). A posttrial opportunity to cure was properly denied

upon a finding, based on the testimony and the trial court's own inspection, that the nuisance conditions had existed over a substantial period, had not abated although tenant had been given ample opportunity to do so, and were unlikely to be abated (*see Matter of Chi-Am Realty, LLC v Guddahl*, 33 AD3d 911, 912 [2006], citing, inter alia, *Stratton*, 211 AD2d 559 [*supra*]; *see also Zipper*, 39 AD3d at 326). Tenant's contentions regarding the admissibility of evidence are unavailing.

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

ENTERED: MARCH 11, 2010

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2343 The People of the State of New York, Ind. 318/09
Respondent,

-against-

Augusta Legrand,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about April 15, 2009, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 11, 2010

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, JJ

2344 Risa Fisher, et al., Index 110081/08
Petitioners-Appellants,

-against-

The New York City Board of
Standards and Appeals, et al.,
Respondents-Respondents.

Jack L. Lester, New York, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for The New York City Board of Standards and Appeals, respondent.

Cullen and Dykman LLP, New York (Cynthia B. Okrent of counsel), for College of Saint Francis Xavier, respondent.

Stroock & Stroock & Lavan LLP, New York (Joseph E. Strauss of counsel), for Clothing Workers Center Inc., respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 24, 2008, which dismissed the petition brought pursuant to CPLR article 78 seeking to annul a resolution of respondent Board of Standards and Appeals (BSA), dated June 24, 2008, granting an amendment to a 1963 zoning variance to, inter alia, allow respondent College of St. Francis Xavier to merge its zoning lot with the adjacent lot owned by respondent Clothing Workers Center Incorporated, unanimously affirmed, without costs.

There was a rational basis for BSA's determination that Xavier's application to modify its variance sought only a minor modification in the previously approved variance, that the modification did not change any conditions of the 1963 variance

pertinent to the building and side and rear yards authorized by the variance, and that no new non-compliance will be created as a result of the lot merger. Accordingly, BSA's decision to consider the variance as amended without conducting a new analysis pursuant to New York City Zoning Resolution § 72-21 (pertinent to applications for new variances) because the 1963 variance had been granted on findings that the requirements contained in section 72-71 had been satisfied, was not arbitrary or capricious (*see Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 418-419 [1998]; *Matter of East 91st St. Neighbors to Preserve Landmarks v New York City Bd. Of Stds. & Appeals*, 294 AD2d 126 [2002]). Furthermore, because BSA's approval of the application was ministerial in nature, it was not an "action" requiring an environmental impact quality study pursuant to the State Environmental Quality Review Act and/or the City Environmental Quality Review (*see* ECL 8-0105 [5][ii]; 8-0109[2]; *Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d 322, 326 [1993]; *see also Matter of 220 CPS "Save Our Homes" Assn. v New York State Div. of Hous. & Community Renewal*, 60 AD3d 593 [2009]).

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

ENTERED: MARCH 11, 2010

David Spolony

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2345-
2346 The People of the State of New York, Index 30186/07
Respondent,

-against-

David Newman,
Defendant-Appellant.

Sarafa Law LLC, New York (Melinda Sarafa of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about October 30, 2008, which, upon reargument of a prior order, same court and Justice, entered on or about August 5, 2008, adjudicating defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-c), modified the prior order only to the extent of reducing defendant's presumptive risk level to level two, but departing upward to level three, unanimously affirmed, without costs. Appeal from the order of August 5, 2008 unanimously dismissed, without costs, as superseded by the appeal from the order of October 30, 2008.

Regardless of whether defendant's correct point score would make him a presumptive risk level one or two offender, a discretionary upward departure to level three is warranted by aggravating factors. The risk assessment instrument did not

adequately account for the seriousness of defendant's criminal record, which consisted of a lengthy pattern of sexual offenses against children, demonstrating a very high risk of reoffending (*see e.g. People v Sullivan*, 46 AD3d 285 [2007], *lv denied* 10 NY3d 704 [2008]).

We also reject defendant's arguments concerning certain point assessments made by the court in determining that he is a presumptive level two offender (*see* Correction Law § 168-n[3]; *People v Mingo*, 12 NY3d 563 [2009]).

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

ENTERED: MARCH 11, 2010

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2347 Discovision Associates, Index 601859/07
Plaintiff-Appellant, 591099/07

-against-

Fuji Photo Film Co., Ltd., et al.,
Defendants-Respondents.

[And A Third-Party Action]

Hughes Hubbard & Reed LLP, Los Angeles, CA (William T. Bisset of counsel), for appellant.

Hogan & Hartson L.L.P., New York (Eric J. Lobenfeld of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 23, 2009, which, in an action for breach of contract, denied plaintiff's motion for partial summary judgment, unanimously affirmed, with costs.

A contract is ambiguous if it is "susceptible to more than one reasonable interpretation" (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]), and while, in an appropriate case, summary judgment may be granted even if a contract is ambiguous (*see e.g. Hudson-Port Ewen Assoc. v Chien Kuo*, 165 AD2d 301, 303 [1991], *affd* 78 NY2d 944 [1991]), this is not such a case. Here, in opposition to plaintiff's motion, defendant Fuji Photo Film Co., Ltd. submitted admissible evidence (*compare Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 553-554 [1982]), including plaintiff's

contract with another licensee (*see e.g. Cibro Petroleum Prods., Inc. v Sohio Alaska Petroleum Co.*, 602 F Supp 1520, 1551-1552 [ND NY 1985], *affd* 798 F2d 1421 [1986], *cert dismissed* 479 US 979 [1986]), and the parties' course of dealing (*see Lantis Eyewear Corp. v Luxottica Group*, 294 AD2d 127, 128 [2002]) to show that its interpretation of the relevant sections of the subject contract, i.e., that it owes royalties only on products that use plaintiff's patents, is reasonable. Contrary to plaintiff's claim, section 1.5 of the contract does not resolve the ambiguity in its favor.

Furthermore, the parties are reminded that they are in New York state court, not federal court, and therefore, if they do not submit affidavits, they must comply with CPLR 2106 rather than 28 USC § 1746.

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

ENTERED: MARCH 11, 2010

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2348-
2349 Edgewater, Growth Capital Partners, L.P., Plaintiff-Appellant-Respondent, Index 600919/08

-against-

Allied Capital Corporation, et al., Defendants-Respondents-Appellants.

Vedder Price P.C., New York (Michael G. Davies of counsel), for appellant-respondent.

Robinson, Bradshaw & Hinson, P.A., Charlotte, NC (Garland S. Cassada of the North Carolina Bar, admitted pro hac vice, of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered November 7, 2008, that in this breach of contract action, granted defendants' motion to dismiss plaintiff's first cause of action and denied the motion to dismiss the second cause of action, and order, same court and Justice, entered July 20, 2009, granting plaintiff's motion to reargue, and, upon reargument, adhering to its prior determination dismissing the first cause of action, unanimously affirmed, with costs.

Plaintiff and defendants are junior lenders under a credit agreement dated as of January 3, 2006 (Credit Agreement). Pursuant to section 15.12 of the Credit Agreement, the agent for the junior lenders, defendant Allied Capital Corp. (Allied), could not release any liens that affected or impaired the borrower's obligations.

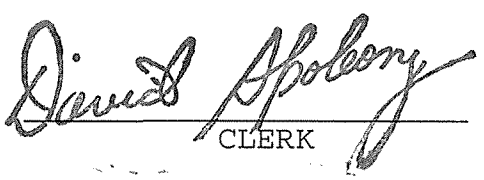
The court properly dismissed plaintiff's first cause of action alleging that defendants breached section 15.12 of the Credit Agreement by releasing all or substantially all of the liens on collateral securing loans the parties funded. Plaintiff asserts that: (1) by entering into a Stipulation Agreement and agreeing to a foreclosure of the borrower's assets that the senior lender initiated, and (2) by releasing liens under that agreement, defendants Allied and Maps CLO Fund I, LLC (Maps) necessarily affected or impaired the borrower's obligations under the Credit Agreement. However, when plaintiff became a junior lender, it executed a "Fourth Amendment" to the Credit Agreement, whereby, under section 4(o), it gave up certain voting rights under the Credit Agreement, including those rights section 14.1 (f) contained. Section 14.1 (f) required the agent Allied to obtain the consent of affected junior lenders before releasing any lien, "other than as permitted by Section 15.12." Thus, with proper consent, Allied had authority to release liens that it could not otherwise release under 15.12. Because plaintiff waived its right to consent under this provision, only the consent of Maps, the other junior lender, was necessary. MAPS clearly consented because MAPS executed the Settlement Agreement that releases the liens at issue.

The court also properly declined to dismiss plaintiff's second cause of action. This cause of action alleges that

defendants breached sections 14.1(c) and (i) of the Credit Agreement by reducing or releasing, or agreeing to reduce or release obligations the borrowers had to the junior lenders. Sections 14.1(c) and (i) require the consent of all junior lenders to reduce the principal or interest on any loan, or to release the borrower from any obligation. Section 4(a) of the Settlement Agreement states that it does not release these obligations. However, it also expressly purports to release any claims for breach of the Credit Agreement. By releasing the liens and any claims under the Credit Agreement, and by agreeing to the foreclosure sale, defendants may have impaired the ability of the junior lenders to recover because foreclosure would strip the borrower of any assets with which to satisfy claims by the junior lenders. That Allied and Maps could have assigned their loans, pursuant to Article 13 of the Credit Agreement is of no moment. Any such assignment would still be subject to the Credit Agreement, and, to the extent enforceable, to the Settlement Agreement.

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

ENTERED: MARCH 11, 2010



CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2350 The People of the State of New York, Respondent, Ind. 466/07 2648/05

-against-

Tykei Garner, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J. at suppression hearing; Arlene R. Silverman, J. at plea and sentence), rendered September 11, 2007, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony. As part of a long-term operation, an undercover officer made a drug buy from defendant and identified him from a photo array six weeks later, and from a lineup two months after that. Neither procedure was unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). In each procedure, the participants were generally similar in appearance and, given the particular description given by the undercover officer, there was nothing that highlighted

defendant (*see e.g. People v Carroll*, 303 AD2d 200, 201 [2003], *lv denied* 100 NY2d 560 [2003]). To the extent the photo array could be viewed as suggestive, that suggestiveness was attenuated by the passage of time between the two procedures. Although the undercover officer received a copy of the photo array, there is no evidence that this influenced his lineup identification of defendant.

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

ENTERED: MARCH 11, 2010

David Spolcony

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2351 Cynthia Frees, Index 113981/06
Plaintiff-Appellant,

-against-

Frank & Walter Eberhart L.P.
No.1, et al.,
Defendants-Respondents.

Law Office of Erik L. Gray, New York (Erik L. Gray of counsel), for appellant.

Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for respondents.

Order, Supreme Court, New York County (Martin Shulman, J.), entered February 4, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Defendants failed to establish their prima facie entitlement to judgment as a matter of law in this action for personal injuries sustained when cabinets in plaintiff's kitchen fell from the wall and struck plaintiff. Although the deposition testimony offered on the motion demonstrated that defendants had no notice of the alleged dangerous condition, defendants' witness had no personal knowledge of how the subject cabinets were actually installed. Thus, since defendants' "witness was unaware of whether the installation . . . was satisfactory, and [defendants] failed to produce a witness who would have had direct knowledge

of such facts, [defendants] failed to establish a prima facie case that [they] did not create the defective condition" (*Cuevas v City of New York*, 32 AD3d 372, 373 [2006]). Furthermore, to the extent that the motion court may have considered the report from defendants' expert in deciding the motion, this was error. Indeed, the report was unsworn, was not made in the regular course of business, and thus was inadmissible and could not be considered in support of the motion (*see Bendik v Dybowski*, 227 AD2d 228, 229 [1996]).

Defendants' failure to meet their initial burden of establishing a prima facie case renders it unnecessary to consider plaintiff's opposition to the motion (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: MARCH 11, 2010

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2352N Beatrice Morris, Claim No. 100694-A
Claimant-Appellant,

-against-

The State of New York,
Defendant-Respondent.

Milbank, Tweed, Hadley & McCloy LLP, New York (Gabrielle Ruha of counsel), for appellant.

Andrew M. Cuomo, Attorney General, Albany (Robert M. Goldfarb of counsel), for respondent.

Order of the Court of Claims of the State of New York (Alan C. Marin, J.), entered January 15, 2009, which granted defendant's motion to preclude claimant from litigating the amount of compensatory damages on the claims asserted and limited claimant's potential recovery of compensatory damages to the amount awarded in a prior federal court action, unanimously reversed, on the law, without costs, and the motion denied.

There is no identity of issues between those claims litigated and dismissed against former Correction Officer Eversley in a federal action relating to injuries allegedly resulting from his sexual assault (*see Morris v Eversley*, 282 F Supp 2d 196 [SD NY 2003]) and those the claimant seeks to litigate against the State in the instant action. Claimant now alleges injuries that are separate and distinct from those

inflicted by Eversley (*see CIBC Mellon Trust Co. v Samuel Montagu & Co. Ltd.*, 25 AD3d 492 [2006]; *Jordan v Bates Adv. Holdings*, 292 AD2d 205 [2002]), including that the State subjected her to injury by failing to remove Eversley from his position following her complaint, by failing to promptly investigate her claim, and by transferring her to another prison, as well as the claim that the State's negligent training and supervision of Eversley resulted in a pattern of ongoing harassment and intimidation leading up to and the following the actual sexual assault. Although claimant offered testimony in the federal action as to the conduct of the State, the federal court explicitly charged the jury to compensate claimant only for injuries she sustained as a direct consequence of Eversley's conduct, and there is no basis to conclude that the jury considered in its award the amount by which claimant may have been damaged as a result of the State's alleged misconduct.

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

ENTERED: MARCH 11, 2010

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2353N Grand Manor Health Related Facility, Inc., Plaintiff-Respondent, Index 301880/08

-against-

Hamilton Equities Inc., et al., Defendants-Appellants.

Macron & Cowhey, PC, Rockaway Park (John J. Macron of counsel), for appellants.

Neiman & Mairanz, P.C., New York (Marvin Neiman of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered September 29, 2009, which granted plaintiff's application to modify the *Yellowstone* injunction set forth in the parties' stipulation, unanimously reversed, on the law, without costs, and the application denied.

The IAS court improperly broadened the *Yellowstone* injunction set forth in the parties' so-ordered stipulation. This Court previously determined that the stipulation is an enforceable contract and cannot be revised by the IAS court (65 AD3d 445, 446-447 [2009]). Moreover, we specifically held that defendants' service of a 30-day notice on the ground that no lease exists did not violate the underlying stipulation. This Court's prior decision is binding because it is the law of the

case (*see generally In re Liquidation of Midland Ins. Co.*, __ AD3d __, 2010 NY Slip Op 209 [2010]).

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

ENTERED: MARCH 11, 2010

CLERK