FIRST DEPARTMENT

APRIL 14, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4112-
4113 In re Jahloni G.,

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

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Michael S. Bromberg, Sag Harbor, for appellant.

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

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Order of disposition, Family Court, Bronx County (Robert R. Reed, J. at fact-finding determination; Nancy M. Bannon, J. at disposition), entered on or about March 4, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of possession of an imitation firearm, and placed him on probation for a period of 12 months, reversed, on the facts and in the exercise of discretion, without costs, the finding of juvenile delinquency and placement on

probation vacated, and the matter remanded with the direction to order an adjournment in contemplation of dismissal pursuant to Family Court Act § 315.3(1).

According to the two police officers who testified at the suppression hearing and trial, Officers Sammarco and Budney, they received a radio run that a few young men with a firearm were a few blocks away and that one of them was black, wearing a blue shirt, blue jeans and sneakers. They saw three young men, one of whom (not appellant) fit the description, running in front of their car and away from bystanders. The officers yelled, "Stop!" after bystanders yelled, "That's them!" All three stopped. The officers first searched the one who fit the description and found nothing. Then Sammarco testified that they searched appellant, who had a sweat-shirt over his arm, found something that looked like a broken nine millimeter Smith and Wesson "gun" wrapped in his sweat-shirt and cuffed the three young men and placed them on the ground. Officer Budney testified that he saw the gun sticking out of the sweat-shirt. Over objection, the officers were allowed to testify that bystanders said the young men were pointing the gun and passing it around. Although Officer Sammarco testified at the suppression hearing that he recovered the toy gun from appellant, he equivocated when reminded that he

testified otherwise at a preliminary hearing. He agreed that he might have told others, including appellant's mother, that he did not recover the gun from appellant. He also averred that he was unable to obtain the names of any witnesses who claimed to have seen all of the boys handling the gun. Officer Budney testified similarly, stating that there was no need to interview witnesses.

A witness to the arrest, Sharona Casterlow, who was employed by the New York City Department of Education in the medical office at PS 111 and was in charge of dismissal, testified that she observed from about eight feet away that the gun was retrieved from an olive green jacket taken from one of the other boys. She recognized appellant because he came to her school to pick up his younger siblings and a cousin at dismissal time. She described the boy that the police took the firearm from as wearing a royal blue polo shirt and blue jeans. She did not know his name. She also stated that none of the bystanders rushed over to say "That's them." Victoria Gamble, appellant's mother, testified that she went to the precinct and spoke to Officer Sammarco and asked him if her son had the gun. She stated that the officer said, "Let me see," left and came back and told her that her son did not have the gun, another juvenile did. She said that was all she wanted to know.

The court stated that it believed the officers. However, the court discounted the testimony of Ms. Casterlow because she said she did not see people jumping up and down or hear anyone say "That's them," and because she could not have been eight feet away when the police officers were arresting suspects. The court also discounted the testimony of appellant's mother because she had reason to protect her son.

Although the issue is close, we do not question the finding that the police had reasonable suspicion to support a stop and frisk of the boys. The police had received a radio message stating that there were a few males with a firearm, one wearing a blue shirt, blue jeans and sneakers, and it appears that bystanders pointed to the boys and said, "That's them." Assuming the truth of that evidence, there was a sufficient basis for the frisk and subsequent arrest (*see People v Herold*, 282 AD2d 1, 6-7 [2001], *lv denied* 97 NY2d 682 [2001]). Nor was appellant deprived of the effective assistance of counsel or of due process by his counsel's failure to seek to reopen the suppression hearing based on the testimony at the fact-finding hearing. The evidence could not have affected the suppression ruling.

However, the police officers' testimony at the fact-finding hearing that unnamed bystanders told them that the boys had been

passing the gun around and pointing it at persons outside the school building, was clearly inadmissible hearsay and should not have been admitted. These statements unlike the res gestae statement, "That's them," were not excited utterances. Further, the court's complete rejection of Ms. Casterlow's and appellant's mother's testimony that the gun was not retrieved from appellant appears to have been arbitrary. The police officers testified from memory, and, their testimony regarding retrieval of the toy gun was not completely consistent. They also saw no need to obtain the names of any of the bystanders who supposedly told them what the boys had been doing with the toys before they were apprehended; such evidence might have corroborated the hearsay testimony that the police officers proffered.

Because appellant was briefly a joint possessor of the broken toy gun, which possession violated Administrative Code of the City of New York § 10-131(g)(1), it is not appropriate to dismiss the petition entirely. However, the testimony of the officers that they obtained the toy from appellant was unreliable. In view of appellant's very limited role in the incident and lack of a prior record, any imposition of a supervised adjournment in contemplation of dismissal, which is the "least restrictive available alternative" (Family Ct Act §

352.2[2]), would adequately serve the needs of appellant and society.

All concur except Gonzalez, P.J. and Sweeny, J. who dissent in part by Sweeny, J. in a memorandum as follows:

SWEENY, J. (dissenting in part)

I agree with the majority that the court properly denied appellant's motion to suppress the imitation pistol, although I do not agree that it is a "close" question. The police had, at the very least, the requisite reasonable suspicion to support a stop and frisk of appellant. The officers received a radio message that reported several males with a firearm and provided a description of one of the suspects. Upon arriving at the specified location moments later, they saw three young men running, one of whom fit the description transmitted to them by the police dispatcher. Pursuant to the common-law right of inquiry, the police properly directed the group, which included appellant, to stop. At that moment, bystanders in the area excitedly pointed at the youths, exclaimed, "That's them!" and told the police the youths had been passing around a handgun and pointing it at other people. At this point, the information possessed by the police was far beyond an uncorroborated anonymous tip (*see People v Herold*, 282 AD2d 1, 6-7 [2001], *lv denied* 97 NY2d 682 [2001]; *compare Florida v J.L.*, 529 US 266 [2000]), and it warranted a frisk for weapons. The police observed the excited demeanor of the bystanders (*see People v Govantes*, 297 AD2d 551, 552 [2002], *lv denied* 99 NY2d 558

[2002]), who were clearly reporting what they had just observed (*see People v Johnson*, 46 AD3d 415, 416 [2007], *lv denied* 10 NY3d 812 [2008]).

Moreover, appellant was not deprived of the effective assistance of counsel or of due process by his counsel's failure to seek to reopen the suppression hearing, or the court's failure to do so sua sponte, based on evidence elicited at the fact-finding hearing. The allegedly inconsistent evidence could not have affected the suppression ruling (*see People v Clark*, 88 NY2d 552, 555-556 [1996]; *People v Logan*, 58 AD3d 439, 440 [2009], *lv denied* 12 NY3d 926 [2009]).

The majority would reverse the Family Court's decision on the facts and in the exercise of discretion, vacate the finding of juvenile delinquency and placement on probation and remand the matter with the direction to order an adjournment in contemplation of dismissal (ACD) pursuant to Family Court Act § 315.3(1). On the basis of the record before this Court, I cannot agree.

Initially, despite the majority's argument to the contrary, there is no question that the underlying case was proven beyond a reasonable doubt. The Family Court, which had appellant before it, conducted a suppression hearing and a fact-finding hearing.

It had a full opportunity to weigh all the evidence and the credibility of the witnesses. The evidence unequivocally revealed that a group of individuals, one of whom was appellant, were passing between each other what clearly appeared to be a handgun. Additionally, witnesses at the scene pointed out these individuals and advised the police that they were pointing the gun at persons outside a school building. All of this occurred in an area where a number of schools were located, and was seen by students, parents and teachers during dismissal time when a significant number of people were on the street. This was not an "act of thoughtlessness" while appellant was "fooling around with some friends," which might, under other circumstances, justify an ACD (*cg. Matter of Israel M.*, 57 AD3d 274, 276, [2008]*; Matter of Justin Charles H*, 9 AD3d 316, 317 [2004]). These actions created the potential for injury to both bystanders and police and the disposition was appropriate (*see Matter of Alrick J.*, 58 AD3d 457 [2009] [possession of a gravity knife in a public park was a serious matter and Family Court appropriately imposed a conditional discharge]. The majority's criticism of the testimony and the trial court's findings based on that testimony is, on this record, unwarranted. While there was some inconsistent testimony by the police witnesses, the court, which

had the full opportunity to observe all the witnesses, credited their testimony. Additionally, the fact that it discredited some of the civilian witnesses' testimony cannot be characterized as "arbitrary." It has long been held that the credibility of the presentment agency's witnesses is primarily an issue to be determined by the trier of fact, who saw and heard the witnesses (*see People v Hill,* 176 AD2d 755, 755 [1991], *lv denied* 79 NY2d 818 [1992]). Its determination should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record (*see People v Garafolo*, 44 AD2d 86, 88 [1974]).

Here, the fact-finding determination was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the court's determinations regarding credibility, and the inconsistencies in the witnesses' testimony do not warrant a different conclusion (*Matter of Jasmine H.*, 44 AD3d 303, 304, [2007]).

Moreover, it should be noted that appellant did not ask the Family Court to grant an ACD, and thus, this issue was not preserved for our review (*see Matter of Derrick H.*, 80 AD3d 468, 469 [2011]). Although not dispositive, such a request would have put the issue before both the Family Court and this Court for a full examination of its merits. Nevertheless, the facts of this

case do not lend themselves to the disposition suggested by the majority. Indeed, in those cases where we have found an ACD to be "the least restrictive available alternative," those appellants' actions did not pose a threat to the community (*see Israel M.*, 57 AD3d at 276; *Matter of Joel J.*, 33 AD3d 344 [2006]). The same cannot be said in this case.

As a result, the Family Court acted within its discretion and **I** see no reason to disturb its findings or disposition.

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

ENTERED: APRIL 14, 2011

CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2803-
2804 In re Eugene L. Jr.,

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

Julianna H., et al.,
Respondents-Appellants,

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

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John J. Marafino, Mount Vernon, for Julianna H., appellant.

Steven N. Feinman, White Plains, for Eugene L., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

Law Offices of Randall S. Carmel, P.C., Syosset (Randall S. Carmel of counsel), attorney for the child.

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Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about March 6, 2009, which, upon a fact-finding that respondents neglected their child, placed the child in petitioner's custody pending the completion of the next scheduled permanency hearing, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (Family Ct Act § 1046[b][i]). Undisputed evidence

established that police officers, acting under a warrant, recovered a large quantity of cocaine (1½ ounces), empty ziploc bags and $1,451 from respondents' residence while respondents' three-month-old child was present.

The officer who testified also stated that two undercover buys had taken place in the apartment before the search. Although that testimony is hearsay, neither respondent objected to it and the statement was elicited on cross-examination. In view of this additional testimony, and, drawing the strongest inference the opposing evidence permits against respondents on account of their failure to testify (*see Matter of Nassau County Dept. Of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]), we conclude that either both respondents engaged in the sale of cocaine in the apartment or one of them did with the knowledge of the other. Thus, the evidence demonstrates such an impaired level of parental judgment as to permit the requisite finding of

an imminent danger to the three-month-old child's physical, mental or emotional condition (*see* Family Ct Act § 1012[f][i]; *Matter of Andrew DeJ. R.*, 30 AD3d 238 [2006]; *Matter of Michael R.*, 309 AD2d 590 [2003]).

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

ENTERED: APRIL 14, 2011

CLERK

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

3777 Triax Capital Advisors, LLC, Index 118004/09
Plaintiff-Respondent,

-against-

Mitchell Rutter, et al.,
Defendants-Appellants.

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Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellants.

Zisholtz & Zisholtz, LLP, Mineola (Stuart S. Zisholtz of counsel), for respondent.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered on or about May 14, 2010, which, in an action for breach of contract, inter alia, denied defendants' motion to dismiss the complaint based on documentary evidence, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

On or about October 3, 2005, defendants, the owners of the premises located at 255 Fourth Avenue, Brooklyn, entered into a construction building loan agreement with nonparty Astoria Federal Savings and Loan Association (Astoria) for $14,950,000. Defendants planned to develop the premises, a 12-story apartment building, into a condominium containing 41 units. On or about

May 1, 2008, defendants and Astoria modified the loan agreement, extending the maturity date until November 1, 2009. In addition to the loan, defendants maintained an unsecured line of credit with nonparty Amalgamated Bank in the sum of $5,000,000. As of December 31, 2008, defendants had drawn down the entire line of credit, owing Amalgamated $5,000.000.

On or about June 30, 2009, based on Amalgamated's recommendation, defendants entered into an Advisory Agreement with plaintiff, by which plaintiff agreed to provide financial and restructuring advisory services to defendants, assisting them with raising additional debt and/or equity capital to be used to complete the development and recapitalize the debt. The Advisory Agreement provided that for its services, plaintiff was to be paid 7.5% of the capital raised upon the closing of the financing. The Advisory Agreement was effective upon its execution and was to be terminated after 60 days from the execution date. Despite the scheduled expiration of the Advisory Agreement, the "compensation of services" section of the agreement provided that plaintiff could still receive payment for its services under certain circumstances for a six-month tail:

> "For a period of six months following termination of this Agreement, Triax shall be entitled to receive the Transaction Fee in the event the Company or its successors

> consummate a transaction with any party who Triax has introduced as set forth on Exhibit A (as amended) during the term of this Agreement. The agreement cannot be terminated, changed or any of its provisions waived except by written agreement signed by all parties."

No amended "Exhibit A" was attached to the agreement. The "Exhibit A" attached to the agreement is strictly an indemnification and hold harmless agreement,[1] which makes not a single reference to the term "parties who [plaintiff] has introduced."

On August 20, 2009, prior to the 60 days from the execution of the Advisory Agreement, defendants and plaintiff agreed to extend the Advisory Agreement for another 30 days. Prior to the extension, defendants had engaged in negotiations with Astoria and Amalgamated to refinance and restructure the debt and equity of the development project and premises. Finally, on or about November 3, 2009, defendants closed a deal with Astoria and Amalgamated, thereby obtaining an additional sum of capital of $9,094,509 for the project.

When defendants refused to pay plaintiff a fee from the additional capital funding raised from Astoria and Amalgamated,

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[1] The hold harmless and indemnification agreement requires defendants, in essence, to defend and indemnify plaintiff from any liability arising from the services plaintiff provided to defendants under the Advisory Agreement.

plaintiff commenced this action alleging defendants' breach of the Advisory Agreement. Plaintiff alleged, inter alia, that it had provided all the services required under the agreement and that, despite this, defendants failed to notify plaintiff of the closing and failed to pay the fee as set forth in the Advisory Agreement.

In lieu of an answer, defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). Defendants argued that documentary evidence, namely the Advisory Agreement, establishes that plaintiff was not entitled to a fee because it was not the party who introduced defendants to the additional source of funding. In opposition, plaintiff argued defendants were not entitled to a dismissal of the action because the contract was ambiguous as to when it was entitled to a fee at the tail period of the agreement, therefore requiring extrinsic evidence to clarify the ambiguity. Supreme Court denied defendants' motion, reasoning that summary judgment might be the more appropriate vehicle where the interpretation of the submitted documents was in dispute.

Whether a contract is ambiguous is a question of law for the court and is to be determined by looking "within the four corners of the document" (*Kass v Kass*, 91 NY2d 554, 566 [1998], citing

W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162-163 [1990]). A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning" (*Greenfield v Philles Records*, 98 NY2d 562, 570 [2002]; *see also Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Conversely, "[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings" *(Feldman v National Westminster Bank*, 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003] [internal quotation marks and citations omitted]).

The existence of ambiguity is determined by examining the "entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed," with the wording to be considered "in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Kass* at 566). The "'intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations'" (*Del Vecchio v Cohen*, 288 AD2d 426, 427 [2001], quoting *Slamow v Del Col*, 174 AD2d 725, 726 [1991], *affd* 79 NY2d 1016 [1992]).

Applying these principles, we find that the term "with any

party who [plaintiff] has introduced . . .” as used in the Advisory Agreement to trigger a transaction feed at the tail period, clearly does not refer to either Astoria or Amalgamated. Indeed, plaintiff entered into the Advisory Agreement at the behest of Amalgamated, with whom it already had a line of credit for $5,000,000. Similarly, at the time of the execution of the Advisory Agreement, defendant also had a financial relationship with Astoria, in the form of a $14.95 million loan, which was extended. Under the circumstances, it would be contrary to the plain meaning of the Advisory Agreement, as well as to the parties' reasonable expectations, to interpret the term “with any party who [plaintiff] has introduced,” as applying to either Astoria or Amalgamated, rather than only to new sources of funding “who [plaintiff] has introduced” to defendants.

The linchpin of the dissent’s reasoning for finding the contract ambiguous rests on the fact that the term in question, “any party who [plaintiff] has introduced,” is accompanied by the phrase “as set forth in Exhibit A (as amended)” but no “Exhibit A (as amended)” was attached to the Advisory Agreement. Rather, as noted above, the “Exhibit A” attached to the agreement contains an indemnification and hold harmless agreement, which makes no reference, and therefore sheds no light, on the term “any party

who [plaintiff] has introduced." Nor does plaintiff make any claim, in the complaint, or anywhere else, that Exhibit A was ever amended to address such term. Contrary to the dissenter's allegations, such omission does not leave the term "'any party' undefined" since the term "any party" is unambiguously limited to those parties "who [plaintiff] has introduced." Extrinsic evidence such as the e-mails referred to by the dissent may not be used to create an ambiguity in an otherwise clear agreement *(see e.g. W.W.W. Assoc. v Giancontieri*, 77 NY2d at 163).

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

MOSKOWITZ, J. (dissenting)

I dissent and would affirm because the agreement is ambiguous. The parties' financial and restructuring advisory services contract, dated June 26, 2009, expired 60 days after its signing, but plaintiff remained entitled to a fee for six months following termination of the agreement if defendants closed "with any party who [plaintiff] has introduced as set forth on Exhibit A (as amended) during the term of this Agreement." By defendants' own admission, there was no Exhibit A to the contract. This omission leaves the term "any party" undefined, rendering the above quoted language ambiguous and permitting consideration of extrinsic evidence to determine its meaning (*see Chimart Assoc. v Paul*, 66 NY2d 570, 572-573 [1986]; *see also 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [dismissal warranted under CPLR 3211(a)(1) only if the documentary evidence conclusively establishes a defense to the asserted claim as a matter of law]).

Moreover, on August 20, 2009, the parties extended their agreement for an additional 30 days via e-mail. This e-mail extension was without any specific time frame for closing, but provided that plaintiff was to receive payment "on all amounts that Amalgamated lends to acquire the Astoria note." In

addition, plaintiff was entitled to a commission on certain "forgiveness of principal indebtness" from Amalgamated.

Defendants assert that the parties intended plaintiff to receive a fee for introducing only new sources of financing and note that the transaction for which plaintiff seeks to recover a fee involved a lender that was not a new source. However, the word "new" does not appear in the contract and defendants submit no extrinsic evidence tending to show that "new" was part of the meaning of the words "any party."

The majority believes that the term "any party who [plaintiff] has introduced" cannot refer to Astoria or Amalgamated because defendant already had a financial relationship with these entities in connection with the same underlying construction project for which defendants were seeking additional financing. However, one should not ignore that the raison d'etre for this agreement was "to provide financial and restructuring advisory services . . . to assist with raising additional debt and or equity capital . . ." Given that the agreement does not use the word "new," a party whom plaintiff introduces could mean a party that plaintiff introduces to any additional financing arrangement, even if defendants had a prior financial relationship with that party. And, as discussed, the

e-mail extending the agreement tends to show that the parties intended for plaintiff to receive payment for certain types of financing from Amalgamated (*see generally 511 W. 232nd Owners Corp.*, 98 NY2d at 152 [on a motion to dismiss, complaint's allegations and any submissions in opposition accepted as true and accorded benefit of every possible favorable inference]; *Whitebox Convertible Arbitrage Partners, L.P. v Fairfax Fin. Holdings, Ltd.*, 73 AD3d 448 [2010] [affirming denial of motion to dismiss because unclear language rendered agreement susceptible of two meanings]).

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

ENTERED: APRIL 14, 2011

CLERK

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

4000 AIG Financial Products Corp., Index 603529/08
Plaintiff-Appellant,

-against-

Penncara Energy, LLC,
Defendant-Respondent.

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Vinson & Elkins LLP, New York (Clifford Thau of counsel), for appellant.

Klestadt & Winters, LLP, New York (Patrick J. Orr of counsel), and Manion McDonough & Lucas, P.C., Pittsburgh, PA (Kevin P. Lucas of the bar of the Commonwealth of Pennsylvania, admitted pro hac vice of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 6, 2009, which granted defendant's motion to dismiss the action pursuant to CPLR 3211(a)(4) to the extent of staying the action pending the resolution of the parties' Pennsylvania action, and denied as moot plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

The determination to stay this action pending the resolution of the Pennsylvania action was a provident exercise of discretion (*see Whitney v Whitney*, 57 NY2d 731 [1982]; *White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 99 [1997]). The record establishes that there is a substantial identity of the parties and claims in the two actions and the Pennsylvania action will

necessarily resolve the sole cause of action asserted in this action. Moreover, the Pennsylvania action is more comprehensive, was commenced reasonably close in time to this one and "offers more" than this action because it includes plaintiff's affiliates as parties and will address defendant's claims (*see Continental Ins. Co. v Polaris Indus. Partners*, 199 AD2d 222, 223 [1993]).

The court also properly considered that this dispute has a significant nexus with Pennsylvania since most of the subject "synfuel" plants were located in Pennsylvania, defendant performed its services in Pennsylvania, where it is headquartered, and numerous meetings relating to the parties' agreement took place in Pennsylvania (*see White Light Prods.*, 231 AD2d at 99).

Although this action was filed first, chronology is not dispositive, "particularly where both actions are at the earliest stages of litigation" (*San Ysidro Corp. v Robinow*, 1 AD3d 185, 186 [2003]). "The practice of determining priorities between pending actions on the basis of dates of filing is a general rule, not to be applied in a mechanical way, regardless of other considerations" (*White Light Prods.*, 231 AD2d at 97 [internal quotation marks and citations omitted]).

The motion court also reasonably concluded that plaintiff

commenced this action preemptively while aware that defendant would commence litigation if the parties failed to reach an agreement. The record shows that plaintiff commenced this action on the same day that the parties finally discussed settlement, after plaintiff had spent months avoiding defendant's requests for pertinent financial information and for an adjustment to its compensation, which indicates that plaintiff filed this case in an attempt to deprive defendant of its choice of forum and to gain a tactical advantage. "[T]he format of [this] suit, a declaratory action, [also] strongly suggests that it was responsive to [a] threat of litigation" (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 9 [2007]).

The parties' consulting agreement contained a New York choice of law clause and a forum selection clause providing New York courts with non-exclusive jurisdiction to settle disputes. Plaintiff contends that, pursuant to General Obligations Law (GOL) § 5-1402, the trial court had to enforce the forum selection clause and exercise jurisdiction, even though the clause was expressly non-exclusive and Pennsylvania was also an appropriate forum under the agreement.

GOL 5-1402 permits parties to maintain an action in New York state courts pursuant to a contractual agreement providing for a

choice of New York law and forum in cases involving $1 million or more. Thus, it "preclude[s] a New York court from declining jurisdiction even where the only nexus is the contractual agreement" (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 230 [1999][emphasis deleted]). Indeed, CPLR 327, which allows a court to dismiss or stay a case on the basis of inconvenient forum, specifically states that it has no application to an action arising out of an agreement to which GOL 5-1402 applies (subd[b]). Thus, GOL 5-1402 and CPLR 327(b) prevent a party that has agreed to jurisdiction in New York from later asserting that the New York courts are inconvenient or that they lack jurisdiction.

However, defendant did not base its motion on either lack of jurisdiction or forum non conveniens. Rather, defendant based its motion on the circumstance that a more complete action was pending in Pennsylvania and that plaintiff had filed this preemptive declaratory judgment action to deprive it (the true plaintiff), of its choice of forum. We doubt that the Legislature intended GOL 5-1402 to sanction preemptive and piecemeal litigation (*see L-3 Communications*, 45 AD3d at 8).

In view of the imposition of the stay, the motion court appropriately denied plaintiff's cross motion as moot.

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: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

4643 James M. Gortych, Index 102014/05
Plaintiff-Respondent,

-against-

Robert Brenner,
Defendant,

Big Apple Triathlon Club, Inc., sued herein as New York Triathlon Club,
Defendant-Appellant-Respondent,

The City of New York,
Defendant-Respondent-Appellant,

The New York City Department of Parks and Recreation,
Defendant-Respondent.

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Savona, D'Erasmo & Hyer LLC, New York (Raymond M. D'Erasmo of counsel), for appellant-respondent.

Michael A. Cardozo, Corporation Counsel, New York (Francis F. Caputo of counsel), for municipal respondent-appellant/respondent.

Ephrem J. Wertenteil, New York, for Gortych respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered June 11, 2010, which denied the motion by the City defendants and the New York Triathlon Club defendants for summary judgment dismissing the complaint and granted the City defendants' motion for summary judgment on their claim for contractual indemnification against the Triathlon Club

defendants, unanimously affirmed, without costs.

Initially, we note that, although, as plaintiff points out, the Triathlon Club defendants did not separately move for summary judgment dismissing the complaint, they joined in the City defendants' motion to the extent it was premised on the doctrine of primary assumption of risk, and the motion court denied the motion as to both groups of defendants. We also reject plaintiff's contention that the doctrine of primary assumption of risk is not applicable here because he was engaged in recreational, rather than competitive, cycling (*see Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 395-396 [2010]). Nor did the blind curve in the roadway where plaintiff was struck by a cyclist competing in the biathlon constitute a defective condition that unreasonably heightened the risk of harm assumed by cyclists, thereby rendering the doctrine inapplicable (*see e.g. Cotty v Town of Southampton*, 64 AD3d 251, 257-258 [2009]; *Vestal v County of Suffolk*, 7 AD3d 613 [2004]). The blind curve in the roadway was not concealed but was part of the natural topography of Central Park that was open and obvious to all users of the roadway; thus, it was not the result of a breach by the City defendants of their "duty to exercise care to make the conditions as safe as they appear to be" (*Turcotte v Fell*, 68

NY2d 432, 439 [1986]; *see Fintzi v New Jersey YMHA-YWHA Camps*, 97 NY2d 669, 670 [2001]).

However, plaintiff raised an issue of fact whether he "fully comprehended," and therefore "consented to," the risks inherent in bicycling in Central Park on the day of a biathlon (*see Turcotte*, 68 NY2d at 439). He testified that, although he was aware that some cycling event was being held in the park on the day of his accident, he did not know exactly where in the park the event was to take place, and he did not see any signs indicating that the cycling phase of the biathlon would occur in the same location where he was bicycling and at the same time.

The contractual indemnification provision in the permit application filed by the Triathlon Club with the Department of Parks and Recreation is not subject to any section of the General Obligations Law that would render it void as against public policy for purporting, on its face, to indemnify the City defendants for their own negligence (*see e.g.* General Obligations Law §§ 5-321, 5-322, 5-322.1, 5-323, 5-324, 5-326). Furthermore, it requires permit recipients "to indemnify and hold harmless the City and the Department from any and all claims *whatsoever* that may result from such use" (emphasis added), and is thus broad enough to cover claims arising from the City defendants' own

negligence (*see e.g. Levine v Shell Oil Co.*, 28 NY2d 205, 210-211 [1971]; *Cortes v Town of Brookhaven*, 78 AD3d 642, 644-645 [2010]).

We have considered the City defendants' and the Triathlon Club defendants' remaining contentions and find them unavailing.

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4775 The People of the State of New York, Ind. 1279/04
Respondent,

-against-

Everton Hurst,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about February 3, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the motion (*see generally People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]). The court properly considered the totality of the circumstances, including defendant's history of recidivism and his failure to profit from rehabilitation opportunities while not

in custody. These factors outweighed the positive factors cited by defendant, including his prison record.

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4776 Aurelia Bernardez, Index 302836/09
Plaintiff-Respondent,

-against-

Mame Y. Babou, et al.,
Defendants-Appellants.

_____

Feinman & Grossbard, P.C., White Plains (Steven N. Feinman of counsel), for appellants.

The Law Offices of Ross Legan Rosenberg Zelen & Flaks, LLP, New York (Richard H. Rosenberg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about October 15, 2010, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to meet their prima facie burden with respect to plaintiff's claim of permanent consequential and significant limitations in use of the lumbar spine, since their orthopedist did not find full range of motion and noted objective signs of injury upon examination (*see Feaster v Boulabat*, 77 AD3d 440 [2010]). Although the medical expert characterized plaintiff's response as subjective, there was no finding that her limitations were self-imposed or deliberate (*compare Mercado-Arif v Garcia*, 74 AD3d 446 [2010]), and she apparently complied with

all other tests. Defendants did not submit any medical opinion concerning the cause of the claimed lumbar spine injury. Thus, we do not examine plaintiff's submissions in opposition (*Offman v Singh*, 27 AD3d 284, 285 [2006]).

Defendants also failed to meet their burden on the 90/180-day claim.

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4777 Chappo & Co., Inc., Index 602562/09
Plaintiff-Appellant-Respondent,

-against-

Ion Geophysical Corporation,
Defendant-Respondent-Appellant,

Barclays Capital Inc., et al.,
Defendants-Respondents.

_____

David Scott, New York (Paul Biedka of counsel), for appellant-respondent.

Cohen & Gresser LLP, New York (Daniel H. Tabak of counsel), for respondent-appellant.

Linklaters LLP, New York (Joseph B. Schmit of counsel), for Barclays Capital Inc., respondent.

Mazzeo Song & Bradham LLP, New York (John M. Bradham of counsel), for Icon, respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 30, 2010, which granted the motions by defendants Barclays Capital Inc., Icon Capital Corp. and Icon Ion, LLC to dismiss the cause of action for tortious interference with contract, and granted so much of defendant Ion Geophysical Corporation's motion to dismiss the cause of action for fraud in the inducement and denied so much of its motion to dismiss the breach of contract cause of action, unanimously modified, on the

law, to grant Ion's motion as to the breach of contract cause of action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

The cause of action alleging fraud in the inducement is barred by the merger clause contained in the engagement letter (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]; *Gosmile, Inc. v Levine*, 81 AD3d 77 [2010]). In any event, it is duplicative of the breach of contract cause of action (*see Manas v VMS Assoc., LLC*, 53 AD3d 451, 453 [2008]).

The cause of action for breach of contract must be dismissed because plaintiff fails to allege its own performance under the contract or an actionable breach by defendant Ion (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [2009]). Although plaintiff alleges that it found a lender, the documentary evidence shows that no terms had been finalized and that the loan amount was less than half the amount required by the engagement letter. As Ion was not required to pay plaintiff a fee until a lender had been secured, its nonpayment was not a breach of the agreement. In addition, the documentary evidence contradicts plaintiff's assertion of non-cooperation by Ion. In any event, plaintiff's damages were limited to the $50,000 breakage fee, of

which plaintiff is already in possession *(see e.g. FCS Advisors, Inc. v Fair Fin. Co., Inc.*, 378 Fed Appx 65, 68 [2d Cir 2010] [break-up fee is form of liquidated damages]).

The cause of action for tortious interference with contract fails because it is unsupported by any factual allegations concerning the conduct of defendants Barclays and Icon. Plaintiff contends that it would be unfair to dismiss this claim before discovery, but "[it] will not be allowed to use pretrial discovery as a fishing expedition when [it] cannot set forth a reliable factual basis for what amounts to at best, mere suspicions" (*Devore v Pfizer Inc.*, 58 AD3d 138, 144 [2008], *lv denied* 12 NY3d 703 [2009]). In any event, the cause of action for tortious interference cannot stand because the complaint does not allege a breach of contract against Barclays and Icon (*New York Pepsi-Cola Distribs. Assn. v Pepsico, Inc.*, 240 AD2d 315, 316 [1997]).

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4778 In re Brianna L.,

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

Brandon L.,
Respondent-Appellant,

Catholic Guardian Society and
Home Bureau, et al.,
Petitioners-Respondents.

_____

Steven N. Feinman, White Plains, for appellant.

Magovern & Sclafani, New York (Frederick J. Magovern of counsel), for respondents.

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

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about October 2, 2009, which, after a hearing, determined that the consent of respondent father was not required for the placement of his daughter for adoption, unanimously affirmed, without costs.

The evidence established that the father failed to satisfy the requirement of Domestic Relations Law § 111(1)(d) that he provide consistent financial support for his out-of-wedlock child (*see Matter of Maxamillian*, 6 AD3d 349 [2004]). The father testified that although he was required to participate in a work-

release program as a condition of his parole, he was unemployed and did not want to work. The court did not credit the father's testimony that he personally provided for the child, and the fact that the father or his family provided occasional gifts is insufficient to demonstrate his full commitment to the responsibilities of parenthood (*see id.* at 351).

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4779 Laurie Katz, Index 107821/07
Plaintiff-Appellant,

-against-

Board of Managers, etc.,
Defendant-Respondent,

American Insurance Company,
Defendant.

_____

Craig F. Wilson, New York, for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Angela Lurie Milch of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered November 9, 2009, which, to the extent appealed from as limited by the briefs, granted defendant condominium board's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs.

The record demonstrates that defendant acted within the scope of its authority pursuant to § 6.3-1 of the bylaws to plan and arrange for the restoration of plaintiff's fire-damaged unit, that its actions were undertaken pursuant to a legitimate corporate purpose to restore the building's living spaces, and that it acted in good faith in fulfilling its obligations (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530,

537-538 [1990]; *Lorne v 50 Madison Ave. LLC*, 65 AD3d 879 [2009], *lv dismissed* 15 NY3d 732 [2010]). The record demonstrates further that, while defendant worked diligently and professionally to effect the restoration, plaintiff was uncooperative and indecisive and otherwise engaged in delay-causing conduct that prolonged the restoration process. Plaintiff's conclusory affidavit regarding the present unfinished condition of her unit fails to raise an issue of fact. Thus, the record demonstrates that there was no breach of contract and no breach of the implied covenant of good faith and fair dealing.

Plaintiff appears to have abandoned her arguments as to the causes of action for constructive eviction and breach of the implied warranty of habitability. In any event, those arguments are unavailing absent a landlord/tenant relationship between the parties (*see e.g. Linden v Lloyd's Planning Serv.*, 299 AD2d 217 [2002], *lv denied* 99 NY2d 509 [2003]; *Frisch v Bellmarc Mgt.*, 190 AD2d 383 [1993]).

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4780-
4781-
4781A-
4781B

Index 300662/08

Jane Wheeler,
Plaintiff-Respondent,

-against-

Robert C. Wheeler,
Defendant-Appellant.

_____

The Law Offices of Linda L. Mellevold, New York (Linda L. Mellevold of counsel), for appellant.

Aronson Mayefsky & Sloan, LLP, New York (John A. Kornfeld of counsel), for respondent.

Bender Rosenthal Isaacs & Richter LLP, New York (Randi S. Isaacs of counsel), attorney for the child.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered August 12, 2010, which, insofar as it held defendant-father in contempt of an order entered December 8, 2008, unanimously affirmed, with costs. Appeal from so much of the August 12, 2010 order as awarded plaintiff-mother temporary sole custody of the parties' child and ordered that defendant-father's visitation with the child be supervised, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered on or about November 9, 2010, which, insofar as it held defendant-father in contempt of the December 8, 2008 order and

ordered that he be sentenced to 45 days of incarceration, unanimously affirmed, with costs. Appeal from so much of the November 9, 2010 order as ordered that defendant-father's visitation with the parties' child be supervised, unanimously dismissed, without costs, as academic.

The father's request that the Justice presiding over the matter of contempt be recused and a new Justice assigned is improperly raised for the first time on appeal (*see Yoda, LLC v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 63 AD3d 424, 425 [2009]). Were we to consider the father's request, we would conclude that recusal is unwarranted (*Liteky v United States*, 510 US 540, 555-56 [1994]; *see R & R Capital LLC v Merritt*, 56 AD3d 370 [2008]).

Furthermore, the court properly exercised its discretion in finding the father in contempt of the December 8, 2008 order, insofar as it forbade the parties from introducing their child to anyone with whom he or she was having a "romantic relationship," and sentencing him to a period of incarceration. The order was not vague or ambiguous, indeed, it resulted from a motion originally made by the father (*see Matter of McCormick v Axelrod*, 59 NY2d 574 [1983]), and the court only sentenced him upon discovery of a second violation of the order.

We have considered the father's remaining contentions and find them without merit or academic, as set forth above.

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4782 The People of the State of New York, Respondent, Ind. 6805/05

-against-

William Schweitzer, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered April 11, 2007, convicting defendant, upon his plea of guilty, of leaving the scene of an accident without reporting, and sentencing him to a $1,000 fine, unanimously affirmed.

We agree with defendant that his plea allocution was defective, and that the exception to the preservation requirement discussed in *People v Lopez* (71 NY2d 662, 666 [1988]) applies. Viewed as a whole, the allocution does not establish that defendant understood he was admitting that, at the time he left the scene, he knew or had reason to know that personal injury had been caused to another person due to an incident involving his vehicle, as opposed to having learned later that he had struck and injured someone. Such contemporaneous knowledge is an

essential element of leaving the scene of an accident without reporting (Vehicle and Traffic Law § 600[2][a]).

Nevertheless, the only relief defendant requests is a dismissal in the interest of justice, and he expressly requests this Court to affirm his conviction if it does not dismiss the indictment. Since dismissal is not warranted (*see generally People v Stewart*, 230 AD2d 116 [1997], *appeal dismissed* 91 NY2d 900 [1998]), we affirm.

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4784 Hudson Insurance Company, Index 602106/09
Plaintiff-Respondent,

-against-

AK Construction Co., LLC, et al.,
Defendants,

Panasia Estates, Inc.,
Defendant-Appellant.

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Peckar & Abramson, P.C., New York (Michael S. Zicherman of counsel), for appellant.

White Fleischner & Fino, LLP, New York (Nicholas L. Paone of counsel), for respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 19, 2010, which, insofar as appealed from, denied defendant Panasia Estates, Inc.'s motion to dismiss the complaint as against it, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of Panasia Estates, Inc. dismissing the complaint as against it.

Given the motion court's ruling that plaintiff's declaratory judgment complaint constituted a timely action for anticipatory subrogation against defendant AK Construction Co., LLC, plaintiff's claims against Panasia, which were predicated solely

on the concern that it might have lost that potential subrogation right as a result of Panasia's failure to bring a timely suit against AK Construction, should have been dismissed as moot.

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4785 The People of the State of New York, Ind. 4704/07
Respondent,

-against-

Daniel James,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered March 18, 2009, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second drug felony offender, to a term of 5 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There was probable cause for defendant's arrest, based on the officer's observation, in a drug-prone location, of a pattern of behavior involving defendant and another individual, which included a suspicious exchange of small objects. Based on his training and experience, the officer recognized the overall pattern as characteristic of a narcotics transaction (*see People v Jones*, 90 NY2d 835 [1997]).

Defendant failed to preserve his arguments that the court improperly admitted expert testimony going to the ultimate issue of intent to sell, and failed to give a proper limiting instruction, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The testimony about quantities of drugs likely to be possessed by sellers as opposed to mere buyers was within the scope of expert evidence permitted under *People v Hicks* (2 NY3d 750 [2004]), and the court gave a sufficient limiting instruction (*see People v Brown*, 97 NY2d 500, 506 [2002]).

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4786 Estate of Saul Spitz, et al., Index 109854/08
Plaintiffs-Appellants-Respondents,

-against-

Gary Pokoik, etc., et al.,
Defendants-Respondents-Appellants,

Davin Pokoik,
Additional Counterclaim
Defendant-Appellant-Respondent.

_____

The Law Firm of Gary N. Weintraub, LLP, Huntington (Gary N. Weintraub of counsel), for Saul Spitz and Lee Pokoik, appellants-respondents.

Glen A. Suarez, Huntington, for Davin Pokoik, appellant-respondent.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for respondents-appellants.

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Order and judgment (one paper), Supreme Court, New York County (Joan M. Kenney, J.), entered August 19, 2010, which denied plaintiffs' and additional counterclaim defendant's cross motions to dismiss the counterclaims and granted so much of defendants/counterclaim plaintiffs' motion for summary judgment as sought the dismissal of the affirmative defenses and a declaration that plaintiff Lee a/k/a Leon Pokoik breached his fiduciary duty to them, and so declared, and denied so much of the motion as sought a money judgment, unanimously modified, on

the law, to grant the cross motions to dismiss the counterclaims to the extent of dismissing the third counterclaim for breach of fiduciary duty as against additional counterclaim defendant Davin Pokoik, to deny the part of defendants' motion that sought the declaration, and vacate the declaration, and otherwise affirmed, without costs.

Contrary to counterclaim defendants' contention, the release in a July 2006 settlement agreement among some, but not all, of the parties to the instant litigation does not bar the counterclaims (*see Cahill v Regan*, 5 NY2d 292, 299 [1959]; *see also Lexington Ins. Co. v Combustion Eng'g*, 264 AD2d 319, 322 [1999]). The release in the settlement agreement covers "all claims . . . arising out of or relating to [the parties'] dispute regarding various disbursements from the accounts maintained for [certain] . . . Properties." In turn, the April 2006 Agreement for Forensic Accounting, which is referenced in the settlement agreement, makes clear that the parties' dispute was "whether disbursements and/or expenses relating to [Lee's] Entities from the accounts maintained for the . . . Properties were properly disbursed from or paid out of the . . . accounts maintained for the . . . Properties." Lee's sale of apartment 5A/B at one of the Properties to his son Davin, allegedly at a below-market

price, does not fall within the scope of this release.

As the release limits the universe of "any and all claims, of whatever nature or description," to those "arising out of or relating to [the parties'] dispute regarding various disbursements from the accounts maintained for the . . . Properties," it is not a general release (*see Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381, 382 [2007]; *Lexington*, 264 AD2d at 321-322). Counterclaim defendants' argument that there is a question of fact as to what the parties intended by the release is improperly raised for the first time in their appellate reply brief, and we decline to consider it (*see e.g. Shia v McFarlane*, 46 AD3d 320 [2007]).

Counterclaim plaintiffs are correct that the motion court should have considered the appraisal performed by Arthur Shatles for Commerce Bank, which was sufficiently authenticated (*see* CPLR 3122-a; *People v Cratsley*, 86 NY2d 81, 89-91 [1995]) and submitted with their moving papers. However, in opposition to counterclaim plaintiffs' motion for summary judgment, counterclaim defendants raised an issue of fact as to the value of the apartment as of the date of its sale to Davin. Lee, who is a licensed real estate broker, submitted an affidavit saying that the amount paid by Davin in 2004 represented fair market

value and that the apartments in the building did not appreciate until much later, during a real estate bubble. On a motion for summary judgment, the court may not resolve an issue of fact by weighing one affiant's credibility against another's (*see e.g. Talansky v Schulman*, 2 AD3d 355, 357 [2003]). Even if the court had considered the affidavit and report of appraiser Brian Rogers, which counterclaim plaintiffs argue it should have done, there still would have been an issue of fact as to the value of the apartment.

As counterclaim plaintiffs admit, an element of breach of fiduciary duty is damages (*see e.g. Laub v Faessel*, 297 AD2d 28, 30 [2002]). Since the motion court found that issues of fact exist as to the fair market value of the apartment at the time of the sale, it erred in declaring, as a matter of law, that Lee breached his fiduciary duty. Furthermore, the co-tenancy agreement among Lee and counterclaim plaintiffs states that "Lee . . . shall have no liability to the other Co-Tenants other than for his . . . own act in bad faith or omission in bad faith or gross negligence." Lee asserted in a verified pleading that it was commonplace for family members and close family friends to enjoy preferential treatment, and he cited the example of the son of one of counterclaim plaintiffs who occupied an apartment at a

below-market rent at the same building where apartment 5A/B is located. Thus, an issue of fact exists as to Lee's bad faith (*see Riviera Congress Assoc. v Yassky*, 18 NY2d 540, 548-549 [1966]). Counterclaim plaintiffs' denial that there was any agreement relating to preferential treatment in the sale of apartments to family and friends merely creates an issue of fact.

The motion court properly declined to dismiss the counterclaims seeking injunctive relief and a constructive trust against Davin. It is clear that counterclaim plaintiffs' use of the word "plaintiffs" instead of "Leon and/or Davin" was a clerical error and that counterclaim defendants were not prejudiced by it. Therefore, the pleadings should be amended to conform to the proof (*see e.g. Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382 [2006]). The counterclaims alleged against Davin are a request for an injunction and, possibly, a request for a constructive trust and an accounting. Since counterclaim defendants do not discuss these counterclaims, they are deemed to have abandoned so much of their appeal as was directed against the motion court's refusal to dismiss those counterclaims (*see e.g. Matter of Metropolitan Museum Historic Dist. Coalition v De Montebello*, 20 AD3d 28, 34 [2005]). The counterclaim against Davin for aiding and abetting breach of

fiduciary duty must be dismissed, however, because neither the pleadings nor the affidavits and affirmations that counterclaim plaintiffs submitted in opposition to counterclaim defendants' cross motions adequately allege that Davin aided and abetted his father's alleged breach of fiduciary duty.

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4787 The People of the State of New York, Ind. 3108/06
Respondent,

-against-

Emanuel Sandoval,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman 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, Bronx County (Steven Barrett, J.), rendered on or about March 25, 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: APRIL 14, 2011

CLERK

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

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4788 Jose Arnaud, Index 24487/05
Plaintiff-Appellant,

-against-

140 Edgecomb LLC, et al.,
Defendants-Respondents.

_____

Blank & Star, PLLC, Brooklyn (Helene E. Blank of counsel), for appellant.

Stein McGuire Pangtages & Gigi, New York (Gerald J. Gunning of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered October 12, 2010, which denied plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) cause of action, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff was employed by non-party Galaxy Construction at a building owned by 140 Edgecomb LLC, and being renovated by general contractor, S&Z Construction Corp. Plaintiff and a co-worker were moving wood planks from the fourth floor to the second floor, by use of a pulley and ropes. While plaintiff was on the second floor, with his arms outstretched through a window to grab the wood as it was lowered, he was suddenly struck by a plank, which caused multiple fractures to his wrist and fingers.

The extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and the decisive question as to whether the statute applies to a particular accident is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against harm directly flowing from the application of the force of gravity to an object or person (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

In the context of falling objects, the risk to be guarded against is the unchecked or insufficiently checked descent of the object (*see Apel v City of New York*, 73 AD3d 406 [2010]). In this case, the wood was an object that required securing for the purposes of the undertaking (*see Outar v City of New York*, 5 NY3d 731 [2005]; *Baker v Barron's Educ. Serv. Corp.*, 248 AD2d 655 [1998]). A lack of certainty as to exactly what preceded plaintiff's accident does not create an issue of fact as to proximate cause (*see Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [2005]). Nor does the fact that plaintiff did not point to any particular defect in the pulley defeat his entitlement to summary judgment (*see Harris v 170 E. End Ave., LLC*, 71 AD3d 408 [2010], *lv dismissed* 15 NY3d 911 [2010]; *Orellano v 29 E. 37th St. Realty*

Corp., 292 AD2d 289 [2002]). Labor Law § 240(1) provides for liability where safety equipment such as hoists are not "placed and operated as to give proper protection." Thus, it is not necessary that plaintiff establish that the pulley was defective, only that he was not given "proper protection" (*see Williams v 520 Madison Partnership*, 38 AD3d 464 [2007]).

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, JJ.

4789 In re Paul Rasole, Index 109981/09
Petitioner-Appellant,

-against-

The Department of Citywide
Administrative Services, et al.,
Respondents-Respondents.

_____

Tarter Krinsky & Drogin, LLP, New York (David J. Pfeffer of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered February 19, 2010, which denied the petition seeking, inter alia, to annul the determination of respondent New York City Department of Buildings (DOB) denying petitioner's application for a Master Fire Suppression Piping Contractor's license and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DOB's determination denying petitioner's license application had a rational basis (*see Arbuiso v New York City Dept. of Bldgs.*, 64 AD3d 520, 522 [2009]). Petitioner's supervisors at two of the three companies he listed in his application submitted affidavits indicating that petitioner did not perform the type of

work necessary to satisfy the prior experience requirement for obtaining such a license (*see* Administrative Code of the City of New York § 26-146[b]; *see also Matter of Reingold v Koch*, 111 AD2d 688 [1985], *affd* 66 NY2d 994 [1985]). Although petitioner did present evidence that he performed the appropriate type of work pursuant to permits obtained by the supervisors at a third company, the time periods authorized for those projects falls well short of the required three years. Furthermore, contrary to petitioner's contention, he did not have a due process right to a hearing regarding his initial application for a license (*see Matter of Daxor Corp. v State of N.Y. Dept. Of Health*, 90 NY2d 89, 97-98 [1997], *cert denied* 523 US 1074 [1998]), and the record establishes that he was afforded "a full and fair opportunity to be heard" (*Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v New York City Bd. of Collective Bargaining*, 38 AD3d 482, 483 [2007], *lv denied* 9 NY3d 807 [2007]).

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

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4790 Alvaro D'Antonio, et al., Index 23939/06
Plaintiffs-Appellants, 7848/07

-against-

Maria T. Rothschild, et al.,
Defendants-Respondents.

_____

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

Kaplan, Hanson, McCarthy, Adams, Finder & Fishbein, Yonkers (Cristin E. Calvi of counsel), for Maria T. Rothschild, respondent.

Law Offices of Michael A. Barnett, Garden City (Jay M. Weinstein of counsel), for Singh, respondents.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered September 2, 2009, which, insofar as appealed from as limited by the briefs, granted defendant Maria T. Rothschild's motion for summary judgment dismissing the complaint as against her on the threshold issue of serious injury, unanimously affirmed, without costs.

The affirmed medical reports of defendant's physicians stating, inter alia, that each examined plaintiffs and found no evidence of limited range of motion or other residual injury as a result of the accident on November 23, 2005, suffice to show prima facie that plaintiffs did not sustain a permanent or

significant limitation as a result of the accident (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]).

In opposition, the plaintiffs' evidence failed to sufficiently rebut defendant's prima facie showing.

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4791 Robert Friedman, Index 115642/08
Plaintiff-Appellant,

-against-

BHL Realty Corp.,
Defendant-Respondent.

_____

Law Office of David Ascher, New York (David Ascher of counsel), for appellant.

Gallo Vitucci & Klar, LP, New York (Yolanda L. Ayala of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 11, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Even in light of the arguments raised and evidence submitted inappropriately for the first time in reply (*see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1993]), defendant failed to meet its burden to show prima facie that plaintiff's cause of action has no merit. In support of its argument that there was no dangerous condition on the exterior staircase on which plaintiff fell, allegedly because of a pooling of water on a cracked step, defendant relied exclusively upon the opinion of an expert who measured the coefficient of friction of the stairs

when they were dry and conceded that there is no available test to measure the friction of wet surfaces (*see Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 466 [2009]; *Styles v General Motors Corp.*, 20 AD3d 338, 339 [2005]).

In any event, plaintiff's expert offered opinions that conflict with those of defendant's experts, thereby precluding summary judgment.

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4792N Nakia Scott, Index 310702/08
Plaintiff-Respondent,

-against-

Shelly King,
Defendant,

Geeba Fofana, et al.,
Defendants-Appellants.

_____

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

Law Office of Alexander Bespechny, Bronx (Alexander Bespechny of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered September 7, 2010, which, insofar as appealed from as limited by the briefs, denied the motion by defendants Geeba Fofana and Sunrise Limo Enterprise to preclude plaintiff from offering or relying on at trial X rays or MRIs of her cervical or lumbar spine, unanimously affirmed, without costs.

In their moving papers, defendants asserted that, following plaintiff's response to their demand, they made "diligent" efforts to ascertain the location of the subject diagnostic films. However, they provided no details as to their "good faith" efforts to resolve this matter without the assistance of

the court (*see* 22 NYCRR 202.7(c)); *Reyes v Riverside Park Community [Stage I], Inc.*, 47 AD3d 599, 600 [2008]).

Moreover, plaintiff asserts that he does not possess copies of the diagnostic films at issue (*see Argo v Queens Surface Corp.*, 58 AD3d 656, 657 [2009]; *Sagiv v Gamache*, 26 AD3d 368, 369 [2006]), and it is undisputed that he produced authorizations for the last known identity and address of the healthcare providers that appear to have generated the films at issue. We agree with the motion court's implicit conclusion that plaintiff has not engaged in a willful failure to comply with his discovery obligations, warranting sanctions (*see Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [2003]). In addition, Supreme Court's resolution of the motion does not preclude reconsideration of appropriate limitations on the proof plaintiff may present at trial.

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

ENTERED: APRIL 14, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4793& Index 301223/00
M—3196 In re Farrin B. Ullah,
Petitioner,

-against-

Hon. Sara Lee Evans,
Respondent.

_____

Farrin B. Ullah, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Susan Anspach of counsel), for respondent.

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

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

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

ENTERED: APRIL 14, 2011

CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4795 Teletech Europe B.V., Index 108296/09
Plaintiff-Appellant,

-against-

Essar Services Mauritius, etc.,
Defendant-Respondent.

_____

McDermott Will & Emery LLP, New York (Andrew B. Kratenstein of counsel), for appellant.

Reed Smith LLP, New York (Peter D. Raymond of counsel), for respondent.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered on or about January 7, 2010, which, in this action alleging breach of the parties' Escrow Agreement due to the improper transfer of escrow funds, granted defendant's motion to compel arbitration and stay the action, unanimously reversed, on the law and the facts, with costs, and the motion denied.

Supreme Court, in compelling arbitration, held that the arbitration clause of the parties' Stock Transfer Agreement (STA) provided that the parties agreed to arbitrate disputes "arising out of or in connection with [the] Agreement." The court found that the STA arbitration provision controls over the forum selection clause of the parties' Escrow Agreement, which provided that the parties "consent[] to the jurisdiction of the courts

located in the State of New York." Supreme Court correctly noted that, for purposes of interpreting contemporaneous agreements which are part of the same transaction, the instruments should be read together (*see Nau v Vulcan Rail & Constr. Co.*, 286 NY 188, 197 [1941]). However, it does not follow that the arbitration clause in the STA applies to this dispute. Indeed, we find that it is the Escrow Agreement, not the STA, that contains the conditions precedent for release of the escrow funds. Moreover, paragraph 5(a) of the Escrow Agreement specifically states that in the event of a conflict between the Escrow Agreement and the STA, the Escrow Agreement controls. Accordingly, because the Escrow Agreement controls this dispute, arbitration is not required (*see Smith v Shields Sales Corp.*, 22 AD3d 942 [2005]).

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

ENTERED: APRIL 14, 2011

CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4798 Joshua Reyes, et al., Index 109808/06
Plaintiffs-Respondents, 590889/06
590145/08

-against-

Magnetic Construction, Inc., et al.,
Defendants-Appellants,

Universal Builders Supply, Inc.,
Defendant.

[And Other Third-Party Actions]

_____

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Sheryl A. Bruzzese of counsel), for appellants.

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

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 5, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment as to their Labor Law § 240(1) claim, and denied defendants' cross motion for summary judgment dismissing that claim, unanimously reversed, on the law, without costs, the motion denied, the cross motion granted and the Labor Law § 240(1) claim dismissed.

While working as a bricklayer foreman at the construction site of a hotel, plaintiff was injured when he tripped and fell

as he was ascending a temporary staircase from the first floor to the second floor of the hotel. The temporary staircase between the first floor and the second floor was constructed in a manner such that the top tread was "wedged" under the concrete slab that formed the second floor of the hotel. The riser height of the staircase measured an average of 8 to 8½ inches. However, because the concrete slab that formed the second floor landing was about nine inches thick, the riser height between the top tread of the staircase and top of the concrete slab (floor level) was about 16 to 19 inches. Plaintiff was holding onto a piece of plywood at the top of the staircase to pull himself up onto the second floor, when his right foot caught the edge of the slab, causing him to fall forward onto the floor.

The injuries sustained by plaintiff are not compensable under Labor Law § 240(1) because they did not occur as the result of an elevation-related or gravity-related risk (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). His trip and fall resulted from a hazard that was "wholly unrelated to the risk which brought about the need for the [stairs] in the first instance," and was the result of "the usual and ordinary dangers of a construction site" (*Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999]; *see also Sihly v New York*

City Tr. Auth., 282 AD2d 337 [2001], *lv dismissed* 96 NY2d 897 [2001]). That plaintiff fell while he was at an elevated level does not render the injury a result of an elevation-related risk, as the accident occurred at the same level of plaintiff's work site (*Auchampaugh v Syracuse Univ.*, 57 AD3d 1291, 1292-1293 [2008]; *Grant v Reconstruction Home*, 267 AD2d 555 [1999], *lv dismissed* 95 NY2d 825 [2000]; *Bonaparte v Niagara Mohawk Power Corp.*, 188 AD2d 853 [1992], *appeal dismissed* 81 NY2d 1067 [1993]).

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

ENTERED: APRIL 14, 2011

CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4800 Tribeca Community Index 101498/09
Association, et al.,
Plaintiffs-Petitioners-Appellants,

-against-

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

Friends of Hudson River Park,
Defendant-Respondent-
Intervenor-Respondent.

_____

McCallion & Associates LLP, New York (Kenneth F. McCallion of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for municipal respondents.

Sive, Paget & Riesel, P.C., New York (David Paget of counsel), for Hudson River Park Trust, respondent.

Alterman & Boop LLP, New York (Arlene F. Boop of counsel), for Friends of Hudson River Park, respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered January 12, 2010, which denied plaintiffs-petitioners' motion for injunctive and declaratory relief, and granted defendants-respondents' cross motions dismissing this combined declaratory judgment action and proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioners challenge the City respondents' determination to acquire and construct a proposed three-district sanitation garage and regional salt shed at Spring Street and the West Side Highway in Manhattan. Petitioners maintain, among other things, that they have standing to seek to invalidate a 2005 settlement agreement between the City respondents and Friends of Hudson River Park to relocate some of its sanitation facilities from the Gansevoort Peninsula at the Hudson River Park.

The court properly dismissed as untimely petitioners' first and fourth causes of action challenging the City respondents' actions in entering into the 2005 settlement agreement without permitting public comment. Petitioners' attempt to circumvent the four-month statute of limitations applicable to article 78 proceedings by characterizing this proceeding as a contract action, was properly rejected by the court. Petitioners are challenging the City respondents' approval of the project after land use and environmental reviews, not the City respondents' execution of the settlement agreement. Accordingly, the four-month statute of limitations (*see* CPLR 217[1]), rather than the six-year statute of limitations applicable to actions challenging the legality of contracts (*see* CPLR 213), applies.

Even if the petition had been timely commenced, it was

properly dismissed since petitioners lacked standing to challenge the 2005 settlement agreement. Indeed, petitioners failed to show that they were harmed by the provisions of the agreement setting forth deadlines for the removal of sanitation facilities from the Gansevoort Peninsula (*see generally New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207 [2004]). The record demonstrates that the agreement did not mandate that the sanitation facilities be relocated to the Spring Street location. Nor was the agreement a "proposed significant action affecting the park or community" requiring public notice and opportunity to comment under the Hudson River Park Act (L 1998, ch 592). As the court correctly found, the agreement enabled respondent Hudson River Park Trust to protect and enforce the Park plan while providing the City with the time it needed to find an alternative location for the facilities located on the Peninsula.

The court also properly found that the City respondents took the requisite "hard look" at the relevant areas of environmental concern and made a "reasoned elaboration" of the basis for their determination (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986] [internal quotation marks and citation omitted]). Respondent Department of Sanitation of the City of New York's (DSNY) final environmental impact statement

adequately assessed potential environmental impacts of, and mitigation measures for, the proposed project.

Contrary to petitioners' contention, DSNY's analysis of alternatives to the proposed project was sufficient. DSNY considered a reasonable range of alternatives (*see Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d 1, 7 [2006]), and was not required to consider every conceivable alternative (*see Matter of Jackson*, 67 NY2d at 417). DSNY's rejection of several alternative sites that were not large enough to accommodate the proposed buildings, were incompatible with surrounding land uses, had no ready access to arterial roadways and truck routes, or were too far from the districts to be served, was supported by evidence of record and was rational.

Contrary to petitioners' contention, there was no evidence that DSNY engaged in improper segmentation in its analysis by breaking the project into separate component parts "that, individually, would not have as significant an environmental impact as the entire project" (*Matter of Concerned Citizens for Envt. v Zagata*, 243 AD2d 20, 22 [1998], *lv denied* 92 NY2d 808 [1998]).

Lastly, DSNY conducted a meaningful analysis of the burdens associated with the project as it related to the equitable

distribution of public facilities throughout the City (see New York City Charter §§ 203, 204).

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

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

ENTERED: APRIL 14, 2011

CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4801 VBH Luxury, Incorporated,
Plaintiff,

Index 111342/07
590589/09

-against-

940 Madison Associates LLC,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

Excelsior Insurance Company,
Third-Party Defendant-Respondent,

The American Insurance Company,
Third-Party Defendant.

_____

Baker & Hostetler LLP, New York (Dennis O. Cohen of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for respondent.

_____

Judgment (denominated an order), Supreme Court, New York County (Debra A. James, J.), entered August 24, 2010, declaring that third-party plaintiff's claims are excluded from coverage under the policy issued by third-party defendant Excelsior Insurance Company, unanimously reversed, on the law, without costs, the declaration vacated, and it is declared that third-party plaintiff's claims are not excluded from coverage under the policy.

The parties agree that by its terms the policy's contractual liability exclusion does not apply to "insured contracts," which include leases, and that, since the liability here arises from a lease, it is not subject to the contractual liability exclusion. Nor, contrary to Excelsior's contention, are third-party plaintiff's claims subject to exclusion from coverage as "insured versus insured" claims, since there is no express exclusion in the policy for claims between the insured tenant (plaintiff) and the additional insured landlord (defendant/third-party plaintiff) (*see Royal Ins. Co. of Am. v 342 Madison Ave. Assoc.*, 208 AD2d 389, 390 [1994]; *see also Trustees of Princeton Univ. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 52 AD3d 247, 247 [2008], *lv dismissed* 11 NY3d 847 [2008] [noting policy's "insured versus insured" exclusion]).

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

ENTERED: APRIL 14, 2011

CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4802 Lynn Narvaez, Index 116134/04
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendant-Respondents,

Jane Doe(s), et al.,
Defendants.

_____

Douglas R. Dollinger, Goshen, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for City of New York and NYC Police Dept., respondents.

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

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered May 6, 2009, which granted the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing the complaint as against it and, upon a search of the record, granted summary judgment to defendants City of New York and the New York City Police Department (NYPD) dismissing the complaint as against them, and denied plaintiff's cross motion to strike NYCHA's and the City's answers, unanimously affirmed, without costs.

The motion court properly granted summary judgment to NYCHA

and the City as to the claims against them alleging false arrest, malicious prosecution, and violation of civil rights under 42 USC § 1983. As to the false arrest and malicious prosecution claims, the record establishes that NYCHA, the City and their employees did not participate in the arrest or prosecution of plaintiff except as witnesses (*see Mesiti v Wegman*, 307 AD2d 339, 340 [2003]). As to the section 1983 claims, these defendants also showed that they had no role in training or supervising the arresting officer. Plaintiff failed to present evidence demonstrating otherwise.

The court also properly dismissed the false arrest, malicious prosecution, and section 1983 claims against the NYPD, as plaintiff failed to raise a triable issue of fact as to whether the arresting officer lacked probable cause. The grand jury's indictment of plaintiff raised a presumption of probable cause, and plaintiff failed to demonstrate that this presumption was or could have been rebutted by evidence that was lost (*see Colon v New York*, 60 NY2d 78, 82 [1983]). Moreover, even if the officer lacked probable cause, this single arrest, standing by itself, was not so egregious as to demonstrate "inadequate training or supervision amounting to deliberate indifference or 'gross negligence' on the part of officials in charge" (*Turpin v Mailet*,

619 F2d 196, 202 [2d Cir 1980], *cert denied* 449 US 1016 [1980]).

The court properly denied plaintiff's cross motion pursuant to CPLR 3126 to strike NYCHA's and the City's answers due to spoliation. Those defendants cannot be held liable for the District Attorney's loss of the file concerning the NYPD's investigation of plaintiff. The District Attorney's Office is an independent entity, and not the agent of either the City or NYCHA (*see Leftenant v City of New York*, 70 AD3d 596, 597 [2010]).

We have considered plaintiff's remaining arguments, including that there is a triable issue of fact as to her wrongful termination claim, and find them unavailing.

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

ENTERED: APRIL 14, 2011

CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4803-
4803A The People of the State of New York, Ind. 1645/09
Respondent, SCI 3478/09

-against-

Angel Saltares,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Ronald Zweibel, J.), rendered on or about August 18, 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: APRIL 14, 2011

CLERK

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

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4805 Helen Bubul, Index 103407/07
Plaintiff-Respondent,

-against-

Port Parties, Ltd.,
Defendant-Appellant,

The Unconvention Center, et al.,
Defendants.

_____

Quinn McCabe LLP, New York (Todd J. DeSimone of counsel), for appellant.

The Ruth E. Bernstein Law Firm, New York (Ruth E. Bernstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Sue Anne Hoahng, Special Referee), entered September 13, 2010, which determined that plaintiff obtained personal jurisdiction over defendant-appellant, and denied appellant's order to show cause to vacate the default judgment, unanimously affirmed, without costs.

The Special Referee's findings that appellant was properly served in this action are substantially supported by the record, and we perceive no basis for disturbing the Referee's credibility

determinations (*Thomas v Thomas*, 21 AD3d 949 [2005], *lv denied* 6 NY3d 704 [2006]; *Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705 [1985]). We have considered the remainder of appellant's arguments and find them unavailing.

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

ENTERED: APRIL 14, 2011

CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4807 The People of the State of New York, Ind. 7072/02
Respondent,

-against-

Samuel Bravo,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about December 11, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant did not ask the hearing court for a downward departure from his presumptive risk level. Therefore, that claim is unpreserved (*see People v Arps*, 65 AD3d 939 [2009]). In any event, we find no basis for such a departure. Defendant's point score was well above the threshold for a level two offender, and the underlying sex crimes were committed against eight-year-old

children. The mitigating factors asserted by defendant were adequately taken into account by the risk assessment instrument.

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

ENTERED: APRIL 14, 2011

CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4811 Lincoln Payne, Index 112319/08
Plaintiff-Appellant-Respondent,

-against-

Jumeirah Hospitality &
Leisure (USA), Inc., et al.,
Defendants-Respondents-Appellants,

W.S. Atkins Consultants Ltd.,
Defendant-Respondent-Respondent,

John Does 1-10, et al.,
Defendants.

_____

Napoli Bern Ripka, LLP, New York (Denise A. Rubin of counsel), for appellant-respondent.

Kaplan, Massamillo & Andrews, LLC, New York (Lawrence Mentz of counsel), for respondents-appellants.

Mayer Brown LLP, New York (John Conlon of counsel), for respondent-respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered October 29, 2009, which, to the extent appealed from, granted defendants' motions only to the extent of dismissing the complaint on the ground of forum non conveniens, unanimously affirmed, without costs.

Plaintiff commenced this action for personal injuries sustained in an aquatic amusement park in Dubai. The motion

court, presuming, without deciding jurisdiction (*see Bader & Bader v Ford*, 66 AD2d 642, 647 [1979], *lv dismissed* 48 NY2d 649 [1979]), providently exercised its discretion in dismissing the action on forum non conveniens grounds (*see* CPLR 327[a]). The action was properly dismissed, even though plaintiff may have no alternative forum (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 481 [1984], *cert denied* 469 US 1108 [1985]). Here, dismissal was warranted since the core team of consultants who performed services with respect to the amusement park were residents of Dubai or the United Kingdom (*see World Point Trading PTE. v Credito Italiano*, 225 AD2d 153, 160-161 [1996]), litigating the matter in New York would involve the applicability of foreign law (*see Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 178 [2004]), and Dubai is the situs of the alleged injury, and presumably the place where plaintiff received initial medical treatment (*see Gillenson v Happiness Is Camping, Inc.*, 14 Misc 3d 240, 244 [2006]).

In view of the foregoing, we need not consider whether the

court should have dismissed the action for lack of personal jurisdiction.

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

ENTERED: APRIL 14, 2011

CLERK