SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 26, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

CORRECTED ORDER - APRIL 27, 2011

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3959 Jade Realty LLC, Index 603679/07
Plaintiff-Appellant,

-against-

Citigroup Commercial Mortgage Trust
2005-EMG, et al.,
Defendants-Respondents,

Capmark Finance, Inc.,
Defendant.

Greenberg Freeman LLP, New York (Michael A. Freeman of counsel), for appellant.

Zeichner Ellman & Krause LLP, New York (Jantra Van Roy of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered December 16, 2009, which, to the extent appealed from, granted defendants-respondents' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on its first cause of action for breach of contract, unanimously reversed, on the law, without costs, the motion denied, the complaint reinstated, and the cross motion

granted.

In 2003, plaintiff and defendants' predecessor in interest Emigrant Securities Corp. negotiated a refinancing of an outstanding commercial loan. The note provided that, during its 10-year term, plaintiff would pay, as a condition of prepaying the loan prior to maturity, a "Yield Maintenance" amount which varied as the loan matured. During the first six years, this amount would be calculated "by taking the positive difference (*if any*) between the Note Rate . . . minus the current yield, *on the actual date of default under the loan* . . . of U.S. Treasury Securities" (emphasis added). The note does not define "default." This note was subsequently sold to defendant Citigroup and securitized with other loans.

In 2007, plaintiff sought to prepay the loan and took the position that, since it had not defaulted on the loan, no yield maintenance was due. Defendant Capmark Finance refused to permit plaintiff to prepay the loan and insisted that plaintiff pay yield maintenance which it computed at $146,104.56. Plaintiff paid this amount under protest and with reservation of rights and demanded a refund from Capmark. When Capmark refused to refund the amount paid by plaintiff, this action ensued, alleging causes of action for breach of contract and for tortious interference

with contract. After discovery was conducted, defendants moved for summary judgment dismissing the complaint and plaintiff moved for summary judgment on its cause of action for breach of contract.

The court granted defendants' motions and denied plaintiff's cross motion, finding it "absurd and illogical" to accept plaintiff's argument that no yield maintenance amount is due during the first six years of the term, but that such amounts would be due in the later years. The court added the words "prepayment or" before the term "default" in the note to encompass the situation created by plaintiff's prepayment of the loan.

Generally, "courts may not by construction add . . . terms . . . and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks and citations omitted]). Although "courts may as a matter of interpretation carry out the intention of a contract by . . . supplying words to make the meaning of the contract more clear" (*Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 547 [1995]), "such an approach is appropriate only in those limited instances where some absurdity has been identified or the contract would

otherwise be unenforceable" (*id.* at 547-548). The fact that contractual terms are "novel or unconventional" does not bring them or the contract in question to the level of absurdity (*id.* at 548). This rule has even greater force where, as here, "the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*id.* at 548; *see also Flag Wharf, Inc. v Merrill Lynch Capital Corp.*, 40 AD3d 506, 507 [2007]). Moreover, "[a]n omission or mistake in a contract does not constitute an ambiguity [and] . . . the question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence" (*Reiss v Financial Performance Corp.* at 199, quoting *Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 157 [1983]).

Under the particular facts of this case, the motion court erred in rejecting plaintiff's interpretation of the subject note. In an effort to carry out the terms of the contract the court added terms to the note, when application of the literal language of the note results neither in absurdity nor in an unenforceable contract. While plaintiff's interpretation of the note could possibly lead to the prepayment premium being lower in the early years rather than the later years of the prepayment period, that is the way that Emigrant's counsel drafted the note.

Nor does plaintiff's interpretation of the note make it unenforceable or "render a contractual provision meaningless or without force or effect" (*Ronnen v Ajax Elec. Motor Corp.*, 88 NY2d 582, 589 [1996]). While it is true that plaintiff's interpretation is very technical and is apparently not what the defendant's predecessor intended, it is not a court's function to imply a term to save defendant from the consequences of an agreement that it drafted, especially here where defendant admittedly used an old form without fully correcting it (*see Reiss* at 199, 201).

Plaintiff's second cause of action for tortious interference with contract was dismissed on the sole basis that plaintiff had failed to establish a breach of contract. However, since plaintiff has established a breach of contract, we reinstate the tortious interference claim.

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

ENTERED: APRIL 26, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Abdus-Salaam, Román, JJ.

3368-
3369 IDX Capital, LLC, et al., Index 102806/07
Plaintiffs-Respondents,

-against-

Phoenix Partners Group LLC, et al.,
Defendants,

Wesley Wang,
Defendant-Appellant.
- - - - -
IDX Capitol LLC, et al.,
Plaintiffs-Respondents,

-against-

Phoenix Partners Group LLC, et al.,
Defendants-Appellants,

Wesley Wang, et al.,
Defendants.

_____

Dewey & Leboeuf, New York (John M. Nonna of counsel), for Wesley Wang, appellant.

Nixon Peabody LLP, New York (Frank H. Penski of counsel), for Phoenix Partners Group LLC, Phoenix Partners Group LP, Nicholas Stephan, Marcos Brodsky and Patrick Nihan, appellants.

Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York (Jeffrey A. Udell and Lori M. Marks-Esterman of counsel), for IDX Capital LLC, James Cawley, Helen Cawley, James Cawley, Sr., Ron Neal, Bhanu Patel and Starlight Investments, LTD., respondents.

Graubard Miller, New York (Lawrence D. Bernfeld of counsel), for Brady Halper, respondent.

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Order, Supreme Court, New York County (Richard B. Lowe III,

J.), entered June 8, 2010, which, insofar as appealed from as limited by the briefs, denied defendant Wesley Wang's motion for summary judgment dismissing the "earn-out" portion of plaintiffs' alleged damages, and denied the motion of defendants Phoenix Partners Group LLC, Phoenix Partners Group LP, Nicholas Stephan, Marcos Brodsky, and Patrick Nihan for summary judgment dismissing the second verified amended complaint as against them, modified, on the law, to dismiss the claim for earn-out damages and to dismiss the complaint as against the Phoenix Partners companies, Stephan and Brodsky, and otherwise affirmed, without costs.

Plaintiffs failed to establish with reasonable certainty that IDX Capital LLC, an eight-month-old, money-losing, start-up, is entitled to damages based on the provision in its proposed agreement with a prospective acquirer calling for earn-out payments by the acquirer based on IDX hitting certain revenue targets. Absent evidence discussing the projections or specific strategies that likely would have resulted in IDX meeting the targets, such as an expert affidavit or an affidavit from a financial officer, plaintiffs' claim for earn-out damages is speculative and accordingly cannot be maintained (*see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]; *American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 419 [1998]).

Clearly, issue finding, not issue resolution, is a court's proper function on a motion for summary judgment, resolving, in the process, all inferences in favor of the plaintiff (*see Cruz v American Export Lines,* 67 NY2d 1, 13 [1986], *cert denied* 476 US 1170 [1986]). However, only the existence of a bona fide issue raised by evidentiary facts, not one based on conclusory or speculative allegations, will suffice to defeat a motion for summary judgment (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). Where competent evidence is presented by a defendant in support of a motion for summary judgment, the burden shifts to plaintiff to produce proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Miller v City of New York*, 253 AD2d 394, 395-396 [1998]).

We find plaintiffs' claim that Stephan and Brodsky participated in Wang's admitted campaign to interfere with the prospective acquisition to be speculative and based on unwarranted inferential leaps. With respect to Stephan, the text-message chain that plaintiffs rely on, even when read in a light most favorable to their complaint, does not indicate that Stephan knew of, let alone participated in, defendant Wang's campaign to derail the deal between IDX and Knight Capital Group.

At the time of the text messages in question, Wang had not commenced his activities and gave no indication to Stephan of what he had planned. If anything, the inference to be drawn from the exchange supports Stephan's claim that he was not involved in the planning or execution of Wang's plans to break up the deal between IDX and Knight.

We draw a similar conclusion with respect to Brodsky. There is nothing to indicate that Brodsky provided, at Wang's request, a link to a web site, http://www.pervscan.com, which shortly thereafter found its way into one of the e-mails Wang sent to Knight, with the intent to further Wang's campaign to interfere with the transaction. There is no evidence that Wang told Brodsky why he wanted the link or what, if anything, he intended to do with it. Indeed, Brodsky sent this link to other Phoenix employees. Further, other electronic messages relied on by plaintiff indicate that while Brodsky was aware that Wang wanted to interfere with the deal in some manner, he found Wang's fixation on the deal absurd, even comical. In fact, the electronic messages read in their entirety support Brodsky's position that he told Wang not to involve Phoenix in any schemes with respect to IDX.

Nor do we agree with the dissent that the message sent from

Brodsky's account to Knight CEO Thomas Joyce that "bad things happen when good people do nothing," raises a genuine issue of fact. Brodsky claims no knowledge of this e-mail, and given the fact that other defendants have been accused of "hacking" into IDX computer systems, this submission is equivocal at best. When read in the context of all the evidence submitted by defendants, it simply does not rise to the level of a genuine, triable issue of fact sufficient to defeat defendants' motion.

Although plaintiff Cawley alleges that Stephan and Brodsky had animosity toward him, and that both wanted to see the deal fail, this allegation is clearly insufficient to draw an inference that Stephan, Brodsky, Wang, Niham and others took "common action for a common purpose by common agreement or understanding . . . from which common responsibility derives" (*Goldstein v Siegel*, 19 AD2d 489, 493 [1963]; *see Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 479 [2009]). Accordingly, we dismiss the tortious interference and aiding and abetting causes of action as against Stephan and Brodsky (*see Home Town Muffler v Cole Muffler*, 202 AD2d 764 [1994]). However, we sustain such claims against Nihan based on evidence tending to show that while still employed by IDX, he gave Wang information about the proposed acquisition and revealed other confidential

information about IDX. This evidence is sufficient to raise an issue of fact as to whether Nihan conspired with Wang to derail the acquisition.

Concerning the claims against the Phoenix Partners companies, the record, viewed in a light most favorable to plaintiffs, demonstrates that Wang was a rogue employee whose tortious acts to derail the acquisition were outside the scope of his employment with Phoenix and not committed in furtherance of Phoenix's business. Accordingly, the Phoenix Partners companies cannot be held vicariously liable for such acts (*see Bowman v State of New York*, 10 AD3d 315, 316 [2004]; *Nicollette T. v Hospital for Joint Diseases/Orthopaedic Inst.*, 198 AD2d 54, 55 [1993]).

The cause of action for injunctive relief against Stephan is dismissed. Given the lack of evidence that Stephan participated in the campaign against IDX or otherwise engaged in or threatened to engage in any disparagement of plaintiff Cawley in violation of a prior settlement agreement, there is no support for plaintiffs' claim that Stephan is likely to continue to disparage IDX and Cawley absent injunctive relief.

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

All concur except Acosta and Abdus-Salaam, JJ. who dissent in part in a memorandum by Abdus-Salaam, J. as follows:

ABDUS-SALAAM, J. (dissenting in part)

I would affirm the motion court's denial of summary judgment to the Phoenix Partners companies, Stephan, and Brodsky. I disagree with the majority's assessment that plaintiffs' claim against these defendants is based on "unwarranted inferential leaps." Rather, "[m]indful that issue finding and not issue resolution is a court's proper function on a motion for summary judgment, and drawing all inferences in plaintiff[s'] favor as we are bound to do" (*Cruz v American Export Lines,* 67 NY2d 1, 13 [1986]), there is enough circumstantial evidence - including defendants' recruitment of Nihan, the timing of their various electronic conversations regarding the transaction and the beginning of Wang's pseudonymous e-mail campaign, their animus towards plaintiff Cawley, their knowledge of Wang's hostility directed at Cawley, Brodsky's e-mailing of the "pervscan" link to Wang, which Wang then sent to Knight - as well as direct evidence in the form of the mysterious email (with Wang's mantra about "bad things happen when good people do nothing") that went out under Brodsky's name to Knight, but of which Brodsky says he knows nothing - that leads me to conclude that if defendants' summary judgment motion dismissing the second amended complaint is decided on the version of the facts most favorable to

plaintiffs (*see Mullin v 100 Church LLC*, 12 AD3d 263, 264 [2004]), summary judgment was properly denied.

Defendants' avowed protestations of innocence do not render all of this circumstantial and direct evidence speculative. While the affidavits of Brodsky, Stephan and Wang purport to explain away the evidence, it is not this Court's function to make credibility determinations. And, although much of plaintiffs' evidence is circumstantial, "[c]ircumstantial evidence is not inherently weaker than direct evidence and frequently circumstantial evidence may be stronger than direct evidence" (1 NY PJI3d 1:70, at 105 [2011]). In granting summary judgment, the majority has disregarded the concept that "[a] determination based on circumstantial evidence is essentially one to be made by the fact-finder, guided by the legal principles appropriate to such a determination" (*Abramo v Pepsi-Cola Buffalo Bottling Co.*, 224 AD2d 980, 981 [1996]).

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

ENTERED: APRIL 26, 2011

CLERK

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

3772-
3773-
3773A-
3773B-
3773C

IRB-Brazil Resseguros, S.A.,
Plaintiff-Respondent,

-against-

Inepar Investments, S.A.,
Defendant,

Inepar S.A. Industria e Construções,
Defendant-Appellant.

Index 604448/06

Hoguet Newman Regal & Kenney, LLP, New York (Fredric S. Newman and Helene R. Hechtkopf of counsel), for appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Lea Haber Kuck of counsel), for respondent.

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 4, 2009, in favor of plaintiff and against defendants in the principal amount of $27,772,409.86, plus interest at the rate of 9.9% per annum from October 22, 2009 and postjudgment interest at the rate of 9.9%, and bringing up for review orders, same court and Justice, entered August 3, 2009, which denied defendant Inepar SA Industria e Construções (IIC)'s motion for summary judgment and granted plaintiff's motion for summary judgment as to liability, unanimously modified, on the law, to limit the rate of postjudgment interest to the statutory rate of 9% per annum, and otherwise affirmed,

without costs. Appeals from the aforementioned orders, from a judgment, same court and Justice, entered August 19, 2009, in favor of plaintiff on the issue of liability, and from an order, same court (Beverly S. Cohen, J.H.O.), entered November 9, 2009, unanimously dismissed, without costs, as subsumed in the appeal from the December 4, 2009 judgment.

Plaintiff established a prima facie case on its motion for summary judgment by submitting evidence of an absolute and unconditional guarantee, the underlying debt and the guarantor's failure to perform (*see Bank of Am., N.A. v Solow*, 59 AD3d 304 [2009], *lv dismissed* 12 NY3d 877 [2009]).

In support of its motion for summary judgment and in opposition to plaintiff's motion, IIC submitted admissible evidence, as well as an expert opinion on Brazilian law, to demonstrate that the two officers who signed the guarantee lacked actual authority under Brazilian law. However, the guarantee, which is in an amount greater than $250,000, contains a New York choice of law clause.

General Obligations Law (GOL) § 5-1401(1) provides, in pertinent part:

> "The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars . . . may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state."

GOL 5-1402(1) additionally provides, in pertinent part:

> "[A]ny person may maintain an action or proceeding against a foreign corporation, non-resident or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state."

These two statutes implement the public policy that favors New York courts retaining and determining actions where New York law is applicable to the dispute pursuant to the agreement of the parties and New York is the designated forum. Some federal

courts have held that the choice of law provisions within section 5-1401 are enforceable unless procured by fraud or overreaching (*see Sabella v Scantek Med., Inc.*, 2009 WL 3233703, *13, 2009 US Dist LEXIS 88170, *35-36 [SD NY 2009]; *Sun Forest Corp. v Shvili*, 152 F Supp 2d 367, 388-389 [SD NY 2001]; *Lehman Bros. Commercial Corp. v Minmetals Intl. Non-Ferrous Metals Trading Co.*, 179 F Supp 2d 118, 136 [SD NY 2000].

The enforcement of such clauses is favored since it "protect[s] the justifiable expectation of the parties who choose New York law as the governing law" in international financial transactions (*Banco Nacional De Mexico, S.A., Integrante Del Grupo Financiero Banamex v Societe Generale*, 34 AD3d 124, 130-131 [2006]; *Lehman Bros. Commercial Corp.*, 179 F Supp 2d at 136-137).

Thus, where, as here, the parties affirmatively choose New York law and a New York forum in a transaction in United States dollars, New York law will be applied to determine whether the agreement, allegedly executed by a person lacking actual authority under foreign law, is enforceable by a third party (*Indosuez Intl. Fin. v National Reserve Bank*, 98 NY2d 238 [2002]).

Under New York law, an agreement executed without proper authority may be enforceable under the doctrines of apparent

authority and ratification (*id.* at 245-246). Plaintiff failed to establish its entitlement to summary judgment pursuant to the doctrine of apparent authority since it submitted no evidence that it relied on any words or conduct of IIC that the two officers were authorized to execute the guarantee (*see Standard Funding Corp. v Lewitt*, 89 NY2d 546, 551 [1997]; *Hallock v State of New York*, 64 NY2d 224, 231 [1984]). However, as in *Indosuez*, the transaction was implicitly ratified by IIC since, as a result of the transaction, IIC's subsidiary received $30 million, which was used for investments undertaken pursuant to a strategy set by IIC's Administrative Council. IIC's acceptance of benefits flowing from an agreement that it now asserts was unauthorized when executed constitutes an affirmance of the agreement giving rise to a ratification (*see Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360, 363-364 [2008]), *lv denied* 14 NY3d 703 [2010]; *Matter of Cologne Life Reins. Co. v Zurich Reins. [N. Am.]*, 286 AD2d 118, 127 [2001]).

Plaintiff demonstrated its status as a relevant account holder entitled to sue on the guarantee by submitting Euroclear account statements identifying BB Securities as the account holder and a disavowal and assignment agreement executed by BB

Securities in favor of plaintiff (*see IRB-Brasil Resseguros S.A. v Eldorado Trading Corp. Ltd.*, 68 AD3d 576 [2009]; *see also Applestein v The Province of Buenos Aires*, 415 F3d 242 [2d Cir 2005]). Regardless of when it obtained proof of its right to bring suit, plaintiff timely commenced the action, and, in any event, IIC waived any affirmative defense of untimeliness by failing to plead it.

Since the guarantee does not contain a clear, unambiguous, and unequivocal expression that interest will be paid at the rate higher than the statutory rate until the judgment is satisfied, the statutory rate of interest will be applied (*see Banque Nationale De Paris v 1567 Broadway Ownership Assoc.*, 248 AD2d 154, 155 [1998]; CPLR 5004; *compare Retirement Accounts, Inc. v Pacst Realty, LLC*, 49 AD3d 846, 846-847 [2008]).

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

ENTERED: APRIL 26, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4400 Verizon New York Inc., Index 603280/06
Plaintiff-Respondent,

-against-

Choice One Communications of
New York Inc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about February 17, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 13, 2011,

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

ENTERED: APRIL 26, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4463 In re David Melzer, Index 115565/09
Petitioner,

-against-

The New York State Department of
Motor Vehicles, et al.,
Respondents.

_____

Jonathan I. Edelstein, New York, for petitioner.

Andrew M. Cuomo, Attorney General, New York (Ann P. Zybert of counsel), for respondents.

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Determination after hearing by respondent The New York State Traffic Violations Bureau Appeals Board, dated September 30, 2009, affirming petitioner's traffic conviction, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [O. Peter Sherwood, J.], entered January 20, 2010), dismissed, without costs.

The determination that petitioner violated Vehicle and Traffic Law § 1128(a) is supported by substantial evidence. The testimony of the police officer that she had a clear, unobstructed view of petitioner and that petitioner changed lanes without signaling, causing her to hit her brakes, is not incredible as a matter of law and is sufficient to sustain the

determination that petitioner made an unsafe lane change (*see Matter of Neiman v State of N.Y. Dept. of Motor Vehs. Appeals Bd.*, 265 AD2d 558 [1999]; *Matter of Miranda v Adduci*, 172 AD2d 526 [1991]). The Administrative Law Judge's follow-up question regarding the delineation of the traffic lanes was asked merely to clarify the evidence already presented, and thus did not violate 15 NYCRR 124.4(b). Petitioner's challenges to the officer's testimony raise an issue of credibility which was primarily for the fact-finder to resolve (*see Matter of Silberfarb v Board of Coop. Educ. Servs. Third Supervisory Dist., Suffolk County*, 60 NY2d 979 [1983]; *Matter of Levy v Jackson*, 266 AD2d 636 [1999]).

We reject petitioner's argument, based on his attorney's unsubstantiated hearsay affidavit, that the Board abdicated its judicial role. The record indicates that the Board "ha[d] the means to make an informed decision . . . based on knowledge sufficient for 'wise and proper judgment,'" (*Matter of Taub v Pirnie*, 3 NY2d 188, 194 [1957], quoting *Matter of Joyce v Bruckman*, 257 App Div 795, 798 [1939]), made an "independent

appraisal" and reached an "independent conclusion" (*Matter of New York Pub. Interest Research Group Straphangers Campaign v Metropolitan Transp. Auth.*, 309 AD2d 127, 139 [2003], *lv denied* 100 NY2d 513 [2003], quoting *Taub*, 3 NY2d at 195 [internal quotation marks omitted]).

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

ENTERED: APRIL 26, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4589 Gloria Torres, Index 15456/07
Plaintiff-Appellant,

-against-

City of New York,
Defendant,

Consolidated Edison,
Defendant-Respondent.

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

Helman R. Brook, New York, for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 25, 2010, which granted the motion of defendant Consolidated Edison (Con Ed) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, the motion denied, and the complaint and the cross claims reinstated.

Plaintiff claims that in October 2006 she tripped and fell as the result of a three-inch-deep depression in the roadway at the intersection of Walton Avenue and 161st Street in the Bronx. Con Ed seeks summary judgment dismissing the complaint as against it on the ground that it did not create the defect. Although Con Ed denies that it ever worked at the exact location of the

accident, its records indicate that in 2005 codefendant and cross claimant the City of New York issued several permits to Con Ed to perform work requiring excavation and repaving of the street at the intersection where plaintiff fell. The City's witness testified that, apart from the City's repair of two potholes nearby on Walton Avenue in 2006, there was no record of any street work in the vicinity of the intersection in 2005 and 2006 by any party other than Con Ed.

The motion court erred in granting summary judgment to Con Ed because the circumstantial evidence linking Con Ed to the alleged hazardous condition is sufficient to preclude summary judgment (*see DeSilva v City of New York*, 15 AD3d 252, 254 [2005]; *see also Feder v Tower Air, Inc.*, 12 AD3d 190, 191 [2004]).

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

ENTERED: APRIL 26, 2011

CLERK

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

4876 The People of the State of New York, Ind. 5319/08
Respondent,

-against-

Lincoln Clark,
Defendant-Appellant.

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Richard M. Greenberg, Office of The Appellate Defender, New York (Matthew L. Mazur of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert H. Straus, J. at hearing; Robert Stolz, J. at plea and sentencing), rendered July 8, 2009, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 2½ years, unanimously affirmed.

Since the record does not establish that the court ever issued an order finally denying defendant's motion to suppress physical evidence, the issue is forfeited by his guilty plea (*see* CPL 710.70[2]; *People v Fernandez*, 67 NY2d 686, 688 [1986]). In any event, regardless of whether defendant's suppression claims are properly before this Court, we have conducted an in camera

review of the minutes of the hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]). After reviewing those minutes and all of the arguments raised by defendant on appeal, we find no basis for suppression.

We adhere to our prior decision in which we denied defendant's motion for disclosure of the sealed hearing minutes and similar relief (M-4108, 2010 NY Slip Op 85328[U] [Oct 19, 2010]).

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

ENTERED: APRIL 26, 2011

CLERK

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

4877 In re Akilino R.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about August 3, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and imposed a period of probation. The court adopted the least restrictive dispositional alternative consistent with appellant's

needs and the needs of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), given the seriousness of the offense and appellant's poor school record. Appellant brought a knife to school and brandished it at a schoolmate, which resulted in injury to the other boy.

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

ENTERED: APRIL 26, 2011

CLERK

Renwick, J.P., DeGrasse, Freedman, Richter, JJ.

4878 Nathan Bezoza, Index 103696/09
Plaintiff-Appellant,

-against-

Ira Bezoza, etc., et al.,
Defendants-Respondents,

Superior Abstract Corporation, etc., et al.,
Defendants.

_____

Robert K. Fischl, Garden City, for appellant.

Snitow Kanfer Holtzer & Millus, LLP, New York (Kenneth A. Kanfer of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 21, 2010, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the first, second, sixth, seventh, and eighth causes of action, unanimously affirmed, with costs.

Plaintiff Nathan Bezoza, the father of defendant Ira Bezoza and the father-in-law of defendant Lynn Martell, Ira's wife, alleges that defendants defrauded him into resigning his interest in property that he co-owned with Ira, and that defendants then sold the property and retained the proceeds for themselves.

The complaint, insofar as asserted against defendant Darbtex, should be dismissed for failure to properly serve the

corporation in accordance with the requirements of CPLR 311(a)(1). Although the doorman of the individual defendants' apartment building could properly accept service on behalf of the individual defendants (*see* CPLR 308[2]; *F.I. duPont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 797 [1977]; *Al Fayed v Barak*, 39 AD3d 371 [2007]; *Charnin v Cogan*, 250 AD2d 513, 517 [1998]), plaintiff failed to show that the doorman was "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service" on behalf of the corporation (CPLR 311[a][1]; *see Albilia v Hillcrest Gen. Hosp.*, 124 AD2d 499 [1986]). Contrary to the individual defendants' contention, the record shows that plaintiff also met the mailing requirements of CPLR 308(2). The timely-filed affidavits of service indicate that the summons and complaint were mailed on April 22, 2009, two days after the delivery date, and CPLR 308(2) imposes no requirement that a defendant actually receive the mailing before jurisdiction is acquired (*see Coppola v Matarasso*, 184 AD2d 283 [1992]; *Oxhandler v Sekhar*, 88 AD2d 817, 818 [1982]). Further, the requirement that the summons and complaint be mailed "in an envelope bearing the legend 'personal and confidential' and not indicating on the outside thereof, by return address or otherwise, that the

communication is from an attorney or concerns an action against the person to be served," pertains only to mailings made to a defendant's "actual place of business," and not to the defendant's residence (CPLR 308[2]; *see Ridgeway v St. John's Queens Hosp.*, 199 AD2d 490 [1993]).

The fraud and breach of fiduciary claims as asserted against the individual defendants should be dismissed as untimely. While the action was commenced on March 17, 2009, the fraud claim accrued when plaintiff resigned his interest in the corporation on February 27, 2003, and the two-year discovery accrual rule does not apply, as he could have discovered the fraud with reasonable diligence when he, a sophisticated businessman, signed the resignation or when he received the K-1 schedule tax form for the tax year 2003 stating that he owned a zero percent interest in WSA (*see* CPLR 213[8], 203[g]). Although the six-year statute of limitations applies to the breach of fiduciary duty claim (*see Kaufman v Cohen*, 307 AD2d 113, 119 [2003]; *Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 119-121 [1985], *affd* 67 NY2d 981 [1986]), the claim is time-barred for the same reason. Similarly, the fraudulent conveyance claims (*see* Debtor and Creditor Law §§ 274-276) stemming from plaintiff's resignation of his partnership interest in 2003 are untimely.

To the extent plaintiff's fraudulent conveyance claims stem from his signing of the mortgage satisfaction on February 3, 2007, the action is timely. However, the allegations related to these claims "contain only legal conclusions and no specific factual allegations" (*NTL Capital, LLC v Right Track Recording, LLC*, 73 AD3d 410, 412 [2010]). Also, plaintiff failed to allege how his signing of the satisfaction of mortgage effected the transfer of the property, or how he was a creditor of defendants at the time of the transfer. Accordingly, the fraudulent conveyance claims should also be dismissed for failure to state a cause of action.

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

ENTERED: APRIL 26, 2011

CLERK

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

4879 Bobby Edwards, Index 303171/07
Plaintiff-Respondent, 84093/08

-against-

Acadia-PA 161st Street LLC,
Defendant-Appellant.
- - - - -
[And A Third Party Action]

_____

Eustace & Marquez, White Plains (Heath A. Bender of counsel), for appellant.

Keogh Crispi, P.C., New York (Pat James Crispi of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 8, 2010, which, in an action for personal injuries, denied defendant/third-party plaintiff's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Defendant failed to establish its entitlement to judgment as a matter of law *(see generally Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]). In support of the motion, defendant submitted, inter alia, plaintiff's deposition testimony wherein he stated that he cut his finger on the jagged edge of a metal paper towel dispenser in the bathroom of defendant's building. Although the burden did not shift to plaintiff to raise a triable issue of

fact (*id.*), it is noted that contrary to defendant's contention, plaintiff's affidavit, the supervisor's report and the hospital record are all consistent with the account plaintiff provided at his deposition (*cf. Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]).

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

ENTERED: APRIL 26, 2011

CLERK

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

4880 Antoine L. Knox, etc., Index 7312/06
Plaintiff-Appellant,

-against-

George O. Piccorelli, M.D.,
Defendant,

John R. Zambito, M.D., et al.,
Defendants-Respondents.

_____

Alexander J. Wulwick, New York, for appellant.

Mauro Lilling Naparty LLP, Great Neck (Jennifer B. Ettenger of counsel), for John R. Zambito, M.D., respondent.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital, respondent.

_____

Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered January 4, 2010, after a jury trial in an action alleging medical malpractice, dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to preserve his claim that the verdict was inconsistent (*see Arrieta v Shams Waterproofing, Inc.*, 76 AD3d 495, 496 [2010]; *see Lowenstein v Normandy Group*, LLC, 51 AD3d 517, 518 [2008]). The fact that plaintiff argued that the verdict was against the weight of the evidence is of no moment, because he may not avoid the consequence of his failure to

preserve his inconsistency argument by attempting to characterize it as an argument addressed to the weight of the evidence (*see Sims v Comprehensive Community Dev. Corp.*, 40 AD3d 256, 258 [2007]).

Were we to review the contention that the verdict was inconsistent as a result of the jury finding defendants departed from good and accepted medical practice without a finding of proximate cause as to the decedent's alleged injuries, we would find that the verdict was neither inconsistent nor against the weight of the evidence (*see generally Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). There exists no basis to disturb the jury's credibility determinations (*see e.g. Bykowsky v Eskenazi*, 72 AD3d 590 [2010], *lv denied* 16 NY3d 701 [2011]).

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

ENTERED: APRIL 26, 2011

CLERK

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

4881 Wilson Castillo, Index 302760/08
Plaintiff-Respondent,

-against-

Jose M. Collado, et al.,
Defendants-Appellants.

_____

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

Laura Rosenberg & Associates, PLLC, New York (Ivan J. Rodriguez of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about October 26, 2010, which denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established the absence of serious injury by submitting an affirmed report by an orthopedic surgeon who found, on physical examination, that the range of motion in plaintiff's left knee was normal and, on review of the MRI taken about three weeks after the accident, that there were no signs of recent trauma to the knee. Defendants also submitted an affirmed report by a radiologist who reviewed the MRI and concluded, based on the absence of evidence of current inflamation or recent trauma, that

the tear she found in the medial meniscus was degenerative in origin (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]; *Tsamos v Diaz*, 81 AD3d 546 [2011]). In opposition, plaintiff raised an issue of fact by submitting an affirmation by the orthopedic surgeon who performed the arthroscopic surgery on the left knee, in which he stated that plaintiff "is left with a significant permanent loss of use of the left leg," and explained the objective testing methods he employed that supported his conclusion that the injury was causally related to the accident. Plaintiff also submitted an affirmation by a radiologist who stated that he found no degenerative changes in the left knee (*see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [2011]). Further, plaintiff was only 21 at the time of the accident (*see Malloy v Matute*, 79 AD3d 584 [2010]).

Plaintiff also raised an issue of fact in opposition to defendants' prima facie showing as to his 90/180-day claim, by submitting his deposition testimony and affidavit setting forth the extent to which he was prevented from performing his usual activities, and an affirmation by his orthopedic surgeon, who provided the requisite objective medical evidence to support the

claim (*see Gaddy v Eyler*, 79 NY2d 955, 958 [1992]; *Thompson v Abbasi*, 15 AD3d 95, 100 [2005]; *Nelson v Distant*, 308 AD2d 338 [2003]).

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

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

ENTERED: APRIL 26, 2011

CLERK

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

4883 In re Amilya Jayla S.,

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

Princess Debbie A.,
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

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

Neil D. Futerfas, White Plains, attorney for the child.

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Order of disposition, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about October 23, 2009, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed the custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). The record shows that the agency exercised diligent efforts to encourage and strengthen the parental relationship by, among

other things, offering the mother referrals for required services and scheduling visitation (*see Matter of Lady Justice I.*, 50 AD3d 425, 426 [2008]). Despite these efforts, the mother failed during the statutorily relevant time period to maintain contact with the child through consistent and regular visitation or to plan for the child's future by completing required programs (*see id.; see also Matter of Lamikia Shawn S.*, 276 AD2d 279 [2000]).

A preponderance of the evidence shows that it would be in the child's best interests to transfer her custody and guardianship to the petitioning agency and free her for adoption by her foster mother, with whom she has lived for more than four years (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]).

Given the mother's history of nonappearance, Family Court providently exercised its discretion in refusing to grant the mother further adjournments and in striking her testimony in the fact-finding and dispositional hearings upon her failure to appear for cross-examination (*see Matter of Leala T.*, 55 AD3d 997, 998 [2008]).

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

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

ENTERED: APRIL 26, 2011

CLERK

CORRECTED ORDER - APRIL 27, 2011

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

4885 Katrine Gjeloshaj, Index 15561/06
4885A Plaintiff-Appellant,

-against-

2979 LLC,
Defendant-Respondent.

Kelner and Kelner, New York (Gail S. Kelner of counsel), for appellant.

Mound Cotton Wollan & Greengrass, New York (Steven A. Torrini of counsel), for respondent.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about June 4, 2010, which granted defendant's motion for summary judgment, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered September 7, 2010, which, upon reargument, adhered to its original determination, unanimously dismissed, without costs, as academic.

Plaintiff alleges she was injured when an exterior stair at the subject premises broke as she stepped onto it. The record shows that the superintendent of the building, who happened to be plaintiff's son, had repaired the stair a few months prior to her fall.

Since defendant, plaintiff's son's employer, failed to satisfy its initial burden to establish, as a matter of law, that it did not cause or create the alleged defect, the motion court should have denied defendant's motion for summary judgment (*see Zisa v City of New York*, 39 AD3d 313 [2007]; *Cuevas v City of New York*, 32 AD3d 372, 373 [2006]; *see also Serano v New York City Hous. Auth.*, 66 AD3d 867 [2009]).

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

ENTERED: APRIL 26, 2011

CLERK

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

4889 Jamal Tannous, Index 108633/07
Plaintiff-Respondent,

-against-

MTA Bus Company,
Defendant-Appellant,

"John Doe," etc.,
Defendant.

_____

Sullivan & Brill, LLP, New York (Tara Ganguly of counsel), for appellant.

Jaghab, Jaghab & Jaghab, P.C., Mineola (Matthew Fleischer of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered August 17, 2010, which, in an action for personal injuries sustained in a motor vehicle accident, denied defendant MTA Bus Company's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured when, while driving his vehicle, he struck the back of defendant's bus, which was double-parked in a traffic lane on a city street. The evidence, viewed in the light most favorable to plaintiff, showed that the accident occurred in the early morning hours of a rainy and foggy night and that neither

the headlights nor the hazard lights of the bus were activated. Accordingly, the record presents triable issues as to whether the accident was foreseeable and whether defendant's conduct was a proximate cause of this rear-end collision (*see White v Diaz*, 49 AD3d 134, 139-140 [2008]).

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

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

ENTERED: APRIL 26, 2011

CLERK

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

4890 Elite 29 Realty LLC, Index 104271/04
Plaintiff-Respondent,

-against-

George R. Pitt, et al.,
Defendants-Appellants.

_____

Mango & Iacoviello, LLP, New York (Anthony G. Mango of counsel), for appellants.

Katten Muchin Rosenman LLP, New York (James Tampellini of counsel), for respondent.

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered October 1, 2010, which, to the extent appealed from, granted plaintiffs' motion for contempt insofar as it directed defendants to make specified alterations in their erected partition wall and to remove metal mesh and bars covering the window openings, within 60 days of service of a copy of the order with notice of entry, and denied defendants cross motion for revocation of the easement, unanimously affirmed, with costs.

This action involves a dispute between adjoining neighbors who share a common wall, except where plaintiff's building extends further back to the rear property line and overlooks defendants' enclosed garden courtyard. Defendants erected a three-story solid steel wall, which blocked plaintiff's windows

overlooking the courtyard, as well as plaintiff's ground floor side door that exited into the courtyard. We find that the motion court's order abided by the clear terms of the parties' settlement agreement, which had been entered into in open court and reduced to writing (*see* CPLR 2104; *Hallock v State of New York*, 64 NY2d 224 [1984]). The agreement provided for window cuts to be made into the wall matching the configuration of plaintiff's courtyard windows (i.e., five feet high by three feet wide), except to the extent that defendants could demonstrate that smaller windows were necessary to avoid compromising the wall's structural integrity. Defendants inexplicably made window cuts of two feet high by four feet wide at each courtyard window and failed to offer any evidence other than the conclusory expert opinion that the downsized openings made were structurally warranted. As to the heavy iron mesh coverings placed over the window cuts, along with a single metal bar used in the window cuts, the court correctly found, based on the photographic evidence, that these window coverings did not permit the degree of light and air reasonably intended by the agreement, notwithstanding that the agreement allowed defendants to cover the windows with typical window screens or grates.

While the agreement provides for revocation of the easement

if plaintiff opened its side door leading to defendants' courtyard for non-emergency (i.e., fire) or non-authorized purposes on more than three occasions in a 90-day period, here, the motion court properly ruled, on the basis of the evidence available to it, that defendants had not offered evidence to refute plaintiff's assertion that it opened the door only to address flood conditions allegedly caused by heavy rain channeled towards its building, in part, by defendants' courtyard landscaping. The motion court appropriately declined to penalize plaintiff, given its potentially reasonable and protective action taken to safeguard its property and the lack of definitive proof that plaintiff deliberately violated the terms of the stipulation regarding its side door.

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

ENTERED: APRIL 26, 2011

CLERK

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

4891 The People of the State of New York, Ind. 5750/08
Respondent,

-against-

Ramiz Povataj,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about October 20, 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 26, 2011

CLERK

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

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

4892 Tirso Vincente, Index 13204/04
4892A Plaintiff-Appellant, 84179/04

-against-

Silverstein Properties, Inc., et al.,
Defendants-Respondents.
- - - - -
Silverstein Properties, Inc.,
Third-Party Plaintiff-Respondent,

-against-

American Building Maintenance Co. of New York, etc.,
Third-Party Defendant-Respondent.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Silverstein Properties, Inc., River Place I, LLC, River Place Holdings Limited Partnership and River Place I Holdings, LLC, respondents.

Jeffrey Samel & Partners, New York (Judah Z. Cohen of counsel), for American Building Maintenance Co. of New York, respondent.

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Judgment, Supreme Court, Bronx County (John A. Barone, J.), entered September 17, 2009, dismissing the complaint pursuant to an order, same court and Justice, entered March 6, 2009, which, upon reargument, adhered to its prior order, entered May 22, 2008, granting defendants' motion for summary judgment, unanimously affirmed, without costs. Appeal from the May 22,

2008 order, unanimously dismissed, without costs, as academic.

In this personal injury action, plaintiff was defendants' special employee, which entitled defendants to rely on the exclusive remedy provisions of the Workers' Compensation Law (*see* Workers' Compensation Law §§ 11, 29[6]; *see also Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co., Inc.*, 37 AD3d 155 [2007]). "A key factor in determining whether a special employment relationship exists is who controls and directs the manner, details and ultimate result of the employee's work" (*id.* at 156 [citation and internal quotation marks omitted]). The evidence established that defendants, the owner and property manager of the work site, supervised, directed and controlled plaintiff's work (*see e.g. Ayala v Mutual Hous. Assn., Inc.*, 33 AD3d 343 [2006]; *Duque v Pace Univ.*, 308 AD2d 422 [2003], *lv dismissed* 14 NY3d 903 [2010]; *Lane v Fisher Park Lane Co.*, 276 AD2d 136, 139-140 [2000]).

We reject plaintiff's contention that the evidence failed to establish that he was a special employee of the "River Place" defendants. Pursuant to the plain language of § 3.2 of defendants' property management agreement, the supervisory staff of the defendant property manager were also employees of the defendant owner, thus, plaintiff's work on the premises was

exclusively directed by employees of both entities.

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

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

ENTERED: APRIL 26, 2011

CLERK

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

4893 Etex Apparel, Inc., Index 601301/08
Plaintiff-Respondent,

-against-

Tractor International Corp.,
Defendant,

HDT Holdings Corp., et al.,
Defendants-Appellants.

_____

Wollmuth Maher & Deutsch LLP, New York (John D. Giampolo of counsel), for appellants.

Ross & Asmar LLC, New York (Steven Ross of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 28, 2010, which, in this action alleging, among other things, breach of contract, denied the motion of defendants-appellants HDT Holdings Corp., Howard Mensch, Diane Kuczer, and Thomas Piraneo for "partial" summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against defendants-appellants.

Defendants-appellants satisfied their prima facie burden of demonstrating their entitlement to judgment as a matter of law.

In opposition, plaintiff failed to raise a triable issue of fact (*see Nassau County v Richard Dattner Architect, P.C.*, 57 AD3d 494 [2008]). Even if the evidence is viewed in a light most favorable to plaintiff, at most, it shows that, among other things, HDT and defendant Tractor International Corp. had common owners, shared an office, and that, after Tractor ceased its operations, HDT continued in the business Tractor previously engaged in and, together with a new licensee, sold goods to "some" of Tractor's former customers. Such facts are not sufficient to satisfy the "heavy burden" necessary to pierce the corporate veil or to establish an alter ego relationship (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). The record is replete with indicia that defendants-appellants, although related to Tractor, still maintained their separate corporate or individual identities. Further, the record is devoid of evidence

that defendants-appellants completely dominated and controlled Tractor so as to perpetuate a fraud or commit a wrong against plaintiff (*see Matter of Island Seafood Co. v Golub Corp.*, 303 AD2d 892, 895 [2003]).

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4895 & M-1603 The People of the State of New York, Respondent,

-against-

Benjamin Stephens, Defendant-Appellant.

Ind. 3431/07

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Richard M. Greenberg, Office of The Appellate Defender, New York (Joseph M. Nursey of counsel), and Cadwalader, Wickersham & Taft LLP, New York (Trevor M. Wilson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (James A. Yates, J. at CPL 190.50(5)(c) dismissal motion; Carol Berkman, J. at suppression hearing, jury trial and sentencing), rendered June 11, 2008, convicting defendant of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The element of physical injury was established by evidence that, as a result of defendant's efforts to pull her necklace off her neck, the victim sustained bloody scratches that required a tetanus shot, and neck bruises that

hurt her for months afterwards (*see e.g. People v Haith*, 44 AD3d 369 [2007], *lv denied* 9 NY3d 1034 [2008]).

The court properly exercised its discretion in modifying its *Sandoval* ruling based on defendant's trial testimony (*see People v Fardan*, 82 NY2d 638, 645-647 [1993]). In disregard of a caution the court gave defendant at the time of its initial ruling, defendant gave a misleading account of his prior record that suggested that he had remained out of trouble during the 19 years between two convictions. Accordingly, the court properly permitted the People to elicit the fact that defendant was incarcerated for about 17 of those 19 years, so as to cure the impression that the first conviction (which the People were only permitted to identify as an unspecified felony) was too remote to affect his credibility. In any event, any error in the court's modification of its prior ruling was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant's other claim regarding the *Sandoval* ruling is without merit.

The court properly denied defendant's suppression motion. An officer's succinct and accurate response to defendant's inquiry about the victim's condition was not the functional equivalent of interrogation and thus did not require *Miranda* warnings (*see People v Rivers*, 56 NY2d 476, 480 [1982]; *People v*

Lynes, 49 NY2d 286, 294-295 [1980]). Defendant's incriminating statement, made immediately after the officer's brief answer, was genuinely spontaneous. Defendant's remaining arguments concerning his confession are without merit.

Defendant did not preserve any of his challenges to the prosecutor's summation and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

After a thorough evidentiary hearing, the motion court properly rejected defendant's contention that he was deprived of his right to testify before the grand jury. There is no basis for disturbing the court's credibility determinations.

The sentencing court properly adjudicated defendant a second violent felony offender after sufficient inquiry into his claim that his 1983 predicate conviction had been unconstitutionally obtained. Defendant did not raise any issue warranting an evidentiary hearing (*see People v Rivera*, 203 AD2d 196 [1994]). Defendant asserted that his attorney in the 1983 case rendered ineffective assistance by failing to challenge defendant's post-arrest statements on the ground that he lacked mental competence

to waive his *Miranda* rights. Despite being granted a one-week adjournment, defendant offered no evidence other than his own assertions. After examining documents relating to the predicate conviction and postjudgment proceedings, the court properly rejected defendant's claim. The court also properly exercised its discretion in declining to grant a further adjournment. "Supreme Court was not required, as a matter of law, to grant defendant an adjournment to try to put together a more persuasive case" (*People v Diggins*, 11 NY3d 518, 525 [2008]).

M-1603 - (*People v Benjamin Stephens, Jr.*)

Motion seeking to file pro se reply brief denied.

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4896 In re Anthony N.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about April 29, 2010, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act that, if committed by an adult, would constitute the crime of menacing in the second degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and imposed a conditional discharge. The court adopted the least restrictive dispositional alternative consistent with appellant's

needs and the needs of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). This was a case in which the seriousness of the underlying conduct, by itself, justified at least a conditional discharge, which provided a longer period of supervision than an ACD. Appellant swung a bicycle chain at a much younger child in an effort to intimidate and punish him. This resulted in injury to the child. The record fails to support appellant's claimed excuse for his behavior.

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Román, JJ.

4898 Richard Djeddah, Index 111319/95
Plaintiff,

Rachel Djeddah,
Plaintiff-Respondent,

-against-

Daniel Turk Williams,
Defendant-Appellant.

_____

Callan, Koster, Brady & Brennan, LLP, New York (Michael P. Kandler of counsel), for appellant.

Rachel Djeddah, respondent pro se.

_____

Order, Supreme Court, New York County (Joan B. Carey, J.), entered December 17, 2009, which denied defendant's motion to renew his prior motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

As plaintiff husband's action for medical malpractice was voluntarily withdrawn by him without prejudice to plaintiff wife's claim for loss of consortium, the motion court properly permitted the wife's claim to proceed. Although dismissal of the husband's claims on the merits would mandate dismissal of the wife's derivative claim (*see e.g. Camadeo v Leeds*, 290 AD2d 355 [2002]), where, as here, the claims were brought simultaneously and the primary action was voluntarily withdrawn without

prejudice, there is no bar to the loss of consortium claim (*see Champagne v State Farm Mut. Auto. Ins. Co.*, 185 AD2d 835 [1992], *lv denied* 81 NY2d 704 [1993]).

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4900 The People of the State of New York, Ind. 4796/02
Respondent,

-against-

Jose Arce,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John P. Collins, J.), entered on or about April 12, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court appropriately exercised its discretion in determining that substantial justice required denial of defendant's application (*see People v Gonzalez,* 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]). Defendant has demonstrated a complete inability to control his behavior. During his incarceration on the underlying conviction he committed 27 disciplinary infractions. In addition, he has repeatedly refused to enter or failed to complete drug treatment programs, and his

lengthy criminal record includes numerous drug-related crimes committed while on parole or other forms of release.

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4901 Brax Capital Group, LLC, et al., Index 600398/07
Plaintiffs,

The Crown Advisors #3, et al.,
Plaintiffs-Respondents,

-against-

WinWin Gaming, Inc.,
Defendant,

Arthur Petrie,
Defendant-Appellant.

_____

Simon & Partners LLP, New York (Kenneth C. Murphy of counsel), for appellant.

Reed Smith LLP, New York (Gil Feder of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 8, 2009, after a jury trial, to the extent appealed from as limited by the briefs, awarding the Crown plaintiffs the principal sum of $500,000 on a guarantee, unanimously affirmed, with costs.

Jurisdiction over defendant guarantor pursuant to CPLR 302(a)(1) was established by a preponderance of the evidence at the hearing (*see Elm Mgt. Corp. v Sprung*, 33 AD3d 753, 754-755 [2006]). Defendant had made numerous telephone calls to an individual in New York to procure investors for a corporation

that defendant chaired and in which he had substantial holdings; he had sent others to New York who acted on his behalf in dealing with investment bankers involved in obtaining financing for the corporation (*see East N.Y. Sav. Bank v Republic Mtge. Corp.*, 61 AD2d 1001, 1002 [1978]). He was subject to a forum selection clause in the notes underlying his guarantee (*see Ameritrust Co. N.A. v Chanslor*, 803 F Supp 893 [1992]). While defendant made the telephone calls and dispatched the agents in his capacity as a corporate executive, his corporate and personal roles in the transaction were intertwined. Defendant's attempts to distinguish *Ameritrust* are in vain, since the distinctions are without a difference. Whether a forum clause is permissive, as here, or mandatory, as in *Ameritrust*, is relevant only if an action is brought in a forum other than the one selected (*see Faberge USA, Inc. v Ceramic Glaze, Inc.*, 1988 WL 31853, *2, 1988 US Dist LEXIS 2469, *7 [SD NY 1988]). Contrary to defendant's contention, documents executed at about the same time and covering the same subject matter are to be interpreted together, even if one does not incorporate the terms of the other by reference, and even if they are not executed on the same date, so

long as they are "substantially" contemporaneous (*Nau v Vulcan Rail & Constr. Co.*, 286 NY 188, 197 [1941]; *see Components Direct v European Am. Bank & Trust Co.*, 175 AD2d 227, 230-231 [1991]). The finding of jurisdiction did not violate defendant's right to due process, since his conduct and connection with this State were such that he should reasonably have anticipated being brought into court (*see World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 292 [1980]).

There was no error in the jury charge, which substantially comported with defendant's request and was not prejudicial.

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

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4902-
4903

Cantor Fitzgerald Securities,
Petitioner-Respondent,

Index 105354/10
601057/10

-against-

Refco Securities, LLC,
Respondent-Appellant.

- - - - -

Refco Securities, LLC,
Petitioner-Appellant,

-against-

Cantor Fitzgerald Securities,
Respondent-Respondent.

_____

SNR Denton US LLP, New York (Arthur H. Ruegger of counsel), for appellant/appellant.

Saul Ewing LLP, New York (Ruth A. Rauls of counsel), for respondent/respondent.

_____

Judgments, Supreme Court, New York County (Barbara Jaffe, J.), entered August 3, 2010 and August 9, 2010, which denied the petition to vacate an arbitration award, granted the petition to confirm the same award, and awarded petitioner-respondent Cantor Fitzgerald Securities the principal amount of $11,193,466 plus interest, unanimously affirmed, without costs.

Judicial review of the award in this matter is governed by the Federal Arbitration Act (FAA) (9 USC § 1 *et seq.*), which mandates the enforcement of written arbitration agreements

relating to transactions affecting interstate commerce (*see* 9 USC § 2; *see also Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith*, 85 NY2d 173, 180 [1995]). It is undisputed that none of the grounds for vacating an arbitration award set forth in the FAA applies here (*see* 9 USC § 10[a]). Contrary to Cantor's contention, the judicially-created "manifest disregard of the law" ground for vacating an arbitration award under the FAA is still viable, notwithstanding the Supreme Court's decision in *Hall Street Assoc., L.L.C. v Mattel, Inc.* (552 US 576, 585 [2008]) (*see Stolt-Nielsen S.A. v AnimalFeeds Int'l Corp.*, 559 US _, 130 S Ct 1758, 1768 n 3 [2010]; *see generally Gemstar-TV Guide Intl., Inc. v Yuen*, 61 AD3d 478, 479 [2009], *lv denied* 13 NY3d 701 [2009]).

Here, the arbitration award was properly confirmed since there was no showing that the arbitration panel manifestly disregarded the law or exceeded its authority. Specifically, there is no basis to conclude that the panel ignored or refused to apply controlling and explicit law on the issue of lost volume sellers. Even if the panel erred in making its legal conclusion on that issue or failed to understand the law, such error does

not equate to a manifest disregard for the law (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480-486 [2006], *cert dismissed* 548 US 940 [2006]).

The panel's interpretation of the parties' fee agreement, particularly that appellant had an obligation to make the payments and that its failure to do so was a breach of the agreement, was supported by the agreement's plain language and the uncontroverted testimony of Cantor Fitzgerald's witness. In any event, the manifest disregard standard does not permit review of the panel's interpretation of the parties' agreement even if that interpretation was erroneous (*see T.Co Metals, LLC v Dempsey Pipe & Supply, Inc.*, 592 F3d 329, 339 [2d Cir 2010]).

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

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, JJ.

4904 Damaris Rosado, etc., et al., Index 21874/03
Plaintiffs-Respondents,

-against-

Njie Alhati, et al.,
Defendants-Respondents,

The City of New York,
Defendant-Appellant.

_____

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

McMahon, McCarthy & Verrelli, Bronx (Matthew J. McMahon of counsel), for Rosado respondents.

Russo, Keane & Toner, LLP, New York (John A. Corring of counsel), for Njie Alhati and Balla Sisse, respondents.

Rivkin Radler LLP, Uniondale (Merril S. Biscone of counsel), for The Catholic Charities of The Archdiocese of New York and Sts. Peter and Paul Church, respondents.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered July 15, 2010, which denied the motion of defendant City of New York for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The City established its entitlement to judgment as a matter of law on plaintiffs' claim that it negligently failed to ensure

that a crossing guard was present at the crosswalk near infant plaintiff's school at the time she was struck by a car. In opposition, plaintiffs failed to raise a triable issue of fact as to whether they justifiably relied on the City to provide a crossing guard where infant plaintiff's use of the crosswalk was unanticipated and her father did not think it unusual that the crossing guard was not present. Indeed, the record demonstrates that the father dropped off his daughter at the "barricades," a cordoned-off area where the children could play, as he usually did, which did not require her to cross the street at all, and instructed her to stay inside the barricades. He then left, fully aware that the crossing guard was not at his post (*compare Florence v Goldberg*, 44 NY2d 189 [1978]). Under these circumstances, the special relationship necessary to trigger a duty toward plaintiffs was not demonstrated (*see Cuffy v City of New York*, 69 NY2d 255 [1987]; *Valdez v City of New York*, 74 AD3d 76 [2010]).

Defendant school's cross claims against the City should also be dismissed in light of its failure to raise triable questions

of fact regarding whether it justifiably relied on the City to have a crossing guard on duty at the time of the accident.

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4906 The People of the State of New York, Ind. 6263/08
Respondent,

-against-

Reginald Hodge,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered December 10, 2009, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence clearly satisfied the element of physical injury (Penal Law § 10.00[9]) under the standards articulated by the Court of Appeals. Minor injuries causing moderate pain may suffice (*see People v Chiddick*, 8 NY3d 445, 447 [2007] [fingernail injury]), as may injuries that did

not require any medical treatment (*see People v Guidice*, 83 NY2d 630, 636 [1994]). Here, defendant punched the victim in the face five times, causing her to fall to the ground. As a result of the beating, the victim sustained swelling and bruising to the right side of her face and bloodied lips, as well as headaches, blurred vision, and pain in the jaw, making chewing difficult, for approximately two to three weeks after the incident. To the extent defendant challenges the credibility of the victim's description of her injuries, we find no basis for disturbing the jury's credibility determinations. Accordingly, the evidence warrants the conclusion that the victim sustained physical injury (*see e.g. People v Bravo*, 295 AD2d 213, 214 [2002], *lv denied* 99 NY2d 556 [2002]; *People v Smith*, 283 AD2d 208 [2001], *lv denied* 96 NY2d 907 [2001]).

The court's main and supplemental jury instructions regarding physical injury sufficiently conveyed the applicable standards and did not set an inaccurately low threshold. The court correctly stated that impairment of physical condition does not require incapacitation or serious and protracted impairment (*see People v Tejeda*, 165 AD2d 683, 684 [1990], *affd* 78 NY2d 936 [1991]), that substantial pain has to be "more than slight or

trivial pain" but need not be "severe or intense" (*see People v Chiddick*, 8 NY3d at 447), and that pain from "petty slaps, shoves, and kicks" is insufficient (*see Matter of Philip A.*, 49 NY2d 198, 200 [1980]). It was within the court's discretion to go beyond the statutory language to reflect judicial elucidation of that language (*see People v Samuels*, 99 NY2d 20, 25 [2002]). To the extent it quoted from judicial opinions, "the quoted language artfully expresses general and well-recognized legal principles" (*People v Hommel*, 41 NY2d 427, 429 [1977]), and the court did not invade the jury's province as sole judge of the facts.

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4907 In re Taysean S.,

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

_____

Randall S. Carmel, Syosset, for appellant.

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

_____

Order, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about May 3, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if by committed by an adult, would constitute the crimes of attempted robbery in the second degree, attempted grand larceny in the fourth degree, assault in the third degree and menacing in the third degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The record

fails to support appellant's assertion that the victim exaggerated the extent of appellant's unlawful conduct.

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4908 N.J.R. Associates, etc., Index 600392/10
Petitioner-Respondent,

-against-

Nicole Tausend, etc.,
Respondent-Appellant.

_____

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (John G. Nicolich of counsel), for appellant.

Wilk Auslander LLP, New York (Alan D. Zuckerbrod of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered November 15, 2010, which, to the extent appealed from, granted the petition to stay arbitration of respondent's fraud-based counterclaims, denied respondent's motion to dismiss the petition, and denied respondent's request for sanctions, unanimously modified, on the law, the petition denied, and the motion to dismiss the petition granted, and otherwise affirmed, without costs.

Respondent's filing of a CPLR article 75 petition to stay the arbitration sought by petitioner on the grounds that the arbitration agreement was invalid due to fraud did not constitute

a waiver of her right to arbitrate her counterclaims (*see Matter of Heilman [Casella]*, 188 AD2d 294 [1992], *lv denied* 82 NY2d 652 [1993]). Given that petitioner initiated the arbitration and successfully moved to dismiss respondent's petition to stay the arbitration, petitioner is not entitled to stay the arbitration of respondent's counterclaims on statute of limitations grounds (*see* CPLR 7503[b]; *Morfopoulos v Lundquist*, 191 AD2d 197 [1993]).

Sanctions against petitioner are not warranted.

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Abdus-Salaam, Román, JJ.

4909 Mini Mint Inc., Index 104944/09
Plaintiff-Respondent,

-against-

Citigroup, Inc.,
Defendant-Appellant.

_____

Borah Goldstein Altschuler Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant.

Jeffrey S. Goldberg, White Plains, for respondent.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered September 2, 2010, which, to the extent appealed from as limited by the briefs, granted so much of plaintiff subleasee's motion for summary judgment as sought a declaration that plaintiff had no obligation to repair a leak at its own cost or otherwise, and so declared, and denied defendant subleasor's cross motion for partial summary judgment on plaintiff's third cause of action alleging trespass to the extent it is predicated on partial actual eviction, unanimously modified, on the law, to the extent of searching the record and granting defendant summary judgment dismissing the complaint's first cause action for a permanent injunction, denying the part of plaintiff's motion for summary judgment seeking a declaration that plaintiff had no

obligation to repair a leak at its own cost or otherwise and vacating the declaration, and otherwise affirmed, without costs.

The conflicting expert affidavits raise issues of fact as to whether the horizontal waste line that leaked "exclusively serv[ed]" the leased premises so as to require plaintiff to repair the leak pursuant to the terms of the lease (*see generally Kumar v Stahlunt Assoc.*, 3 AD3d 330 [2004]).

We agree with the motion court that plaintiff failed to establish a prima facie case for a permanent injunction requiring defendant to fully repair the premises' employee bathroom and restore it to its original condition. In particular, plaintiff failed to establish that it does not have an adequate remedy at law, namely monetary damages (*see Severino v Classic Collision*, 280 AD2d 463, 463-464 [2001]). Given the absence of any material issues of fact, we search the record and grant summary judgment to defendant with respect to the complaint's first cause of action (*see* CPLR 3212[b]; *Rodless Props., L.P. v Westchester Fire Ins. Co.*, 40 AD3d 253, 254-255 [2007], *lv denied* 9 NY3d 815 [2007]).

The affidavit of defendant's plumber raised an issue of fact as to whether the condition of the bathroom after the repair of

the leak amounted to a partial actual eviction (*see Whaling Willie's Roadhouse Grill, Inc. v Sea Gulls Partners, Inc.*, 17 AD3d 453, 454 [2005]).

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4910 American Curtainwall, Inc., Index 601984/09
Plaintiff-Appellant,

-against-

NTD Construction Corp., et al.,
Defendants-Respondents,

Midwest Curtainwall, Inc., et al.,
Defendants.

_____

Charles A. Singer, Great Neck, for appellant.

Mazur, Carp & Rubin, P.C., New York (Brian G. Lustbader of counsel), for respondents.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered on or about March 10, 2010, which, inter alia, granted defendants NTD Construction Corp. and MUS23, LLC's motion to dismiss the second and third causes of action as against them, unanimously affirmed, with costs.

The documentary evidence annexed to the complaint contradicts the allegations in the complaint underlying the second cause of action, which alleges breach of contract (*see Wilson v Hochberg*, 245 AD2d 116 [1997]). Defendant NTD was justified in terminating its contracts with plaintiff based on plaintiff's failure to pay its subcontractor, defendant Midwest Curtainwall. By refusing to pay Midwest after NTD offered to

reverse the termination of the contracts if it did, plaintiff effectively waived the 15-day cure period by demonstrating that it would have similarly rejected a written notice to cure.

The third cause of action, which seeks recovery in quantum meruit, is precluded by the valid and enforceable written contracts governing the subject matter in dispute (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

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

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

ENTERED: APRIL 26, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4911 The People of the State of New York, Ind. 6093/08
Respondent,

-against-

Albert Nitti,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about September 1, 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 26, 2011

CLERK

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

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4912N Robert Ledonne, et al., Index 601761/09
Plaintiffs-Respondents,

-against-

Orsid Realty Corp., et al.,
Defendants,
- - - - -
790 RSD Acquisition LLC, et al.,
Nonparty-Appellants.

_____

Michael J. Berman & Associates, P.C., New York (Michael J. Berman of counsel), for appellants.

Alterman & Boop LLP, New York (Arlene F. Boop of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 8, 2010, which, to the extent appealed from, granted plaintiffs' motion to compel compliance with subpoenas seeking production of certain surveillance equipment and tapes, and denied the nonparty appellants' cross motion for a protective order, unanimously affirmed, without costs.

CPLR 3101(a) "mandates full disclosure of all matter material and necessary in the prosecution or defense of an action," and the person seeking to quash a subpoena bears "the burden of establishing that the requested documents and records

are utterly irrelevant" *(Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 108, 112 [2006]). The court properly exercised its discretion in determining, upon review of all the facts, that the nonparties had not shown that the surveillance materials sought are utterly irrelevant to plaintiffs' claims, brought derivatively on behalf of the cooperative corporation, which allege that defendant, while employed as managing agent for the corporation, acted for the sole benefit of the nonparties and allowed corporate resources and assets to be used for the nonparties' benefit.

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

ENTERED: APRIL 26, 2011

CLERK

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

4110 The People of the State of New York, Dkt. 58014C/07
Respondent,

-against-

Miguel Garcia,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Denise Fabiano of counsel), and Kramer Levin Naftalis & Frankel, LLP, New York (Matan A. Koch of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Maureen L. Grosdidier of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered March 12, 2009, reversed, on the law and the facts, the judgment vacated, the suppression motion granted, and the information dismissed.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
John W. Sweeny, Jr.
Rolando T. Acosta
Helen E. Freedman
Sheila Abdus-Salaam, JJ.

4110
Dkt. 58014C/07

_____x

The People of the State of New York,
Respondent,

-against-

Miguel Garcia,
Defendant-Appellant.
_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Seth L. Marvin, J.), rendered March 12, 2009, convicting him, upon his plea of guilty, of two counts of attempted unlawful possession of an air pistol or air rifle in violation of Administrative Code of the City of New York § 10-131(b)(1) and imposing sentence.

Steven Banks, The Legal Aid Society, New York (Denise Fabiano of counsel), and Kramer Levin Naftalis & Frankel, LLP, New York (Matan A. Koch of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Maureen L. Grosdidier and Stanley R. Kaplan of counsel), for respondent.

ACOSTA, J.

The issue in this case is whether the nervousness of occupants of a car stopped for a traffic infraction gives rise to a founded suspicion of criminality such that an officer's question regarding the presence of weapons in the vehicle was permissible under the common-law right of inquiry. We hold that it does not.

On September 19, 2007, uniformed officers Cleri, Manning, and Payton pulled over defendant's Honda because its brake light was not working. There were five occupants in the car, two in the front and three in the back. Officer Manning's testimony confirms that he stopped the car only because of the broken tail light. The officers did not feel there was anything suspicious about the vehicle. Officer Manning testified that the three passengers in the rear seat kept looking behind them, "turning around, [and] looking side to side." When he approached them, they "kind of stiffened up." Officer Cleri, who approached the driver's side, also observed that the passengers became very stiff and nervous and stared directly ahead. Cleri testified that he feared for his physical safety.

Officer Cleri immediately asked defendant for his license and registration. Defendant was polite and compliant and provided the requested documents. After defendant handed Cleri

his license and registration, Cleri asked defendant whether there was any weapon in the car. The passenger in the rear middle seat answered, "Yes, I have a knife." Cleri had him place the knife on the floor and directed him to keep his hands in view. Following this, each passenger was frisked as he exited the car.

After the last passenger had exited, Officer Manning saw what appeared to be a weapon in the car. With the aid of a flashlight, he identified the object as "either a gun or some sort of weapon." Upon further inspection, the object turned out to be an air pistol between the front seat and the door. Throughout the entire encounter, all of the men were polite, respectful and completely compliant.

At the precinct, in an inventory search of the vehicle, Cleri discovered a second air rifle in the trunk. Also at the precinct, a little less than three hours after the officers had first encountered defendant, defendant was given his *Miranda* rights, which he waived. He was questioned for 15 or 20 minutes, and admitted that he was the owner of the air guns. Defendant was then charged with two counts of misdemeanor possession of an air pistol or rifle in violation of Administrative Code of City of NY § 10-131(b).[1]

[1]Although at some point Officer Cleri issued a summons to defendant for the defective tail light, the summons had vanished

Defendant moved to suppress the evidence. In a decision and order dated November 17, 2008, the court granted defendant's motion. It found that the officers' testimony about the nervous behavior by the passengers did not give rise to a founded suspicion of criminality, which would be necessary to allow a common-law inquiry. However, the court held that defendant's statement admitting ownership of the guns was voluntarily made and therefore admissible.

On January 15, 2009 the People moved to reargue that part of the November 17, 2008 decision that suppressed the physical evidence. Relying on *People v Alvarez* (308 AD2d 184 [2003], *lv denied* 3 NY3d 657 [2004]), the People argued that an inquiry about weapons did not reach the level of a common-law right of inquiry because it was less intrusive than asking drivers or passengers to get out of a stopped car, an action officers are clearly entitled to take.

By order dated February 27, 2009, the motion court, relying on *Alvarez*, reversed its prior order. The court found that Officer Cleri's inquiry regarding the presence of weapons was permissible even though a founded suspicion of criminality had not been established. Defendant subsequently pled guilty to two

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by the time of the hearing, and there was no record of a disposition of the summons.

counts of attempted possession of an air pistol or rifle, in violation of Administrative Code § 10-131(b), and was sentenced to a conditional discharge. Defendant now appeals from that judgment.

It is well established that in requesting a driver's credentials during a typical traffic stop, it is perfectly appropriate for an officer to ask the occupants of a vehicle to exit the vehicle (*People v Robinson*, 74 NY2d 773, 774 [1989], *cert denied* 493 US 966 [1989]; *People v McLaurin*, 70 NY2d 779, 781-782 [1987]). This is so even if the police do not have "a particularized reason" to believe that anyone in the vehicle has a weapon (*Robinson*, 74 NY2d at 774). Any further intrusion, however, must be justifiable under *People v De Bour* (40 NY2d 210, 217 [1976]) and *People v Hollman* (79 NY2d 181, 184-85 [1992]) (*see People v Faines*, 297 AD2d 590, 594 [2002], *lv denied* 99 NY2d 558 [2002]; *People v Barreras*, 253 AD2d 369, 373 [1998]; *People v Berberena*, 264 AD2d 670 [1999], *lv denied* 94 NY2d 901 [2000]). The first two levels of inquiry in the *De Bour* framework are referred to as a "request for information" and a "common-law right of inquiry" (*Hollman*, 79 NY2d at 184-85). In discussing the difference between the two levels, the Court of Appeals has observed:

> "If a police officer seeks simply to request information from an individual, that request must be supported by an objective, credible reason, not necessarily indicative of criminality. The common-law right of inquiry, a wholly separate level of contact, is 'activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion.'
>
> . . .
>
> "[A] request for information involves basic, nonthreatening questions regarding, for instance, identity, address or destination. As we stated in *De Bour*, these questions need be supported only by an objective credible reason not necessarily indicative of criminality. Once the officer asks more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation, the officer is no longer merely seeking information. This has become a common-law inquiry that must be supported by a founded suspicion that criminality is afoot."

(*id.* [citation omitted]).

In applying *De Bour/Hollman*, this Court has expressly identified an inquiry about weapons, such as the one posed here, as a common-law inquiry requiring founded suspicion (*see People v Ward*, 22 AD3d 368, 368 [2005], *lv denied* 6 NY3d 782 [2006] ["the officer had a founded suspicion that criminality was afoot, which justified the officer in asking defendant whether he had any weapons on him"]). Such inquiries must therefore be supported by the presence of circumstances that are sufficient to justify a founded suspicion of criminal activity.

Police observation of the occupants of a vehicle "acting

nervous" does not provide the police with a founded suspicion of criminality (*People v Banks*, 85 NY2d 558, 562 [1995], *cert denied* 516 US 868 [1995] ["defendant's nervousness and the innocuous discrepancies in his and (other passenger's) answers to the Trooper's questions . . . did not alone, as a matter of law, provide a basis for reasonable suspicion of criminality"]; *People v Milsaki*, 62 NY2d 147 [1984] [holding that the two different reasons given by defendant for his presence in the parking area, along with defendant's nervousness and other inconsistencies in his statements, provided no indication of criminal conduct]; *People v Barreras*, 253 AD2d 369 [1998] [holding that even shaking hands, avoidance of eye contact and extreme nervousness disproportionate to what would be expected with a routine traffic stop is insufficient to give rise to the common-law right of inquiry]). There must be something more than mere nervousness on the part of the people in the stopped vehicle to establish a founded suspicion of criminal activity (*see People v Gonzalez*, 298 AD2d 133 [2002], *lv denied* 99 NY2d 558 [2002]; *People v Smith*, 280 AD2d 340, 341 [2001]; *People v Cisnero*, 226 AD2d 279 [1996], *lv denied* 88 NY2d 1020 [1996]). Here, by describing unspecified motions as furtive, the officers were making conclusory assertions that the conduct was suspicious. The officers' unspecific testimony does not support a finding of

founded suspicion of criminal activity.[2] Such a conclusion is buttressed by the fact that defendant was polite and answered all the officers' questions without resistance.

Having first made the correct decision in suppressing the evidence, Supreme Court erroneously reversed itself, operating under the mistaken assumption that *People v Alvarez* permitted intrusive questions of passengers without some basis for a founded suspicion. In *Alvarez*, however, unlike the present case, the police clearly had a founded suspicion that criminal activity was afoot. There, a livery cab was stopped for a traffic infraction in a high crime area around 11:30 P.M. The cab was part of the Taxi/Livery Robbery Inspection Program (TRIP) under which passengers were notified that the cab was subject to stop and visual inspection by the police.[3] After making the stop, a highly experienced police sergeant perceived the defendant passenger acting suspiciously. The passenger looked back as the police officers approached the cab, and then was hesitant and unsure when asked about his destination -- conduct that was

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[2]Indeed, the motion court in its first order found that "there was no testimony adduced at the hearing that Officer Manning and Cleri observed any occupant of the Accord doing anything suspicious other than acting nervous."

[3]The Court of Appeals upheld the constitutionality of the TRIP program in *People v Abad* (98 NY2d 12, 17-18 [2002]).

somewhat odd considering he was in a taxi and would be presumed to know where he was going. These circumstances led this Court to conclude that "the sergeant possessed the requisite common-law right of inquiry to question the defendant as to whether he had any weapons" (308 AD2d at 188). Here, other than the occupants of the vehicle being nervous, there was no evidence indicating criminality, and thus, *Alvarez* is inapposite (*People v Barreras*, 253 AD2d at 373 ["(o)nce defendant's papers were all found to be in order, the officers, without more, were obligated to issue the stop-sign summons and allow defendant to resume his journey, i.e., the initial justification for seizing and detaining defendant . . . was exhausted"] [internal quotation marks and citations omitted]). While the *Alvarez* decision took into consideration the dangers to police associated with traffic stops, it did not announce a new rule that an inquiry about the presence of weapons in a stopped car is outside the *DeBour/Hollman* framework, and we find no basis to do so here.

The initial ruling below -- that Officer Cleri violated defendant's rights by asking whether he or his fellow passengers had any weapons -- was correct. New York State law requires a founded suspicion that criminality is afoot to engage in a common-law inquiry as Officer Cleri did, and no such suspicion is supported by the record here. Moreover, defendant's statement to

the police was fruit of the poisonous tree, as the custodial interrogation was itself predicated on unconstitutional behavior (*People v Dodt*, 61 NY2d 408, 417 [1984] [where the evidence sought to be suppressed "followed directly from the illegal arrest and detention of defendant, it (is) error to admit (that) evidence . . . at trial"]).

Accordingly, the judgment of the Supreme Court, Bronx County (Seth L. Marvin, J.), rendered March 12, 2009, convicting defendant, upon his plea of guilty, of two counts of attempted unlawful possession of an air pistol or air rifle in violation of Administrative Code of the City of New York § 10-131(b)(1), and sentencing him to a conditional discharge, should be reversed, on the law and the facts, the judgment vacated, the suppression motion granted, and the information dismissed.

All concur.

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

ENTERED: APRIL 26, 2011

CLERK