SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 28, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2101-
2102-
2102A-
2102B Index 601736/04

Alexander M. Frame,
Plaintiff-Respondent,

-against-

Kenneth L. Maynard, et al.,
Defendants-Appellants.

- - - - -

R.H. Guthrie, et al.,
Cross-Claimant Plaintiffs-Respondents,

Caroline Paulson, et al.,
Cross-Claimant Plaintiffs-
Respondents-Appellants,

-against-

Kenneth L. Maynard, et al.,
Defendants-Appellants.

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Kennedy Johnson Gallagher LLC, New York (James W. Kennedy of counsel), for appellants.

William J. Dockery, New York, for respondents-appellants.

Leslie Trager, New York, for Alexander M. Frame, respondent.

B. Joseph Golub, P.C., New York (Benjamin J. Golub of counsel), for Guthrie respondents.

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Judgment, Supreme Court, New York County (Paul G. Feinman,

J.), entered October 27, 2008, after a bench trial, inter alia, awarding the principal amounts of $421,220.80 to plaintiff, $325,598.54 to cross claimant Beatrice Guthrie and $162,799.27 to cross claimant Paulson, and dismissing the cross claims of cross claimant Hines, unanimously modified, on the law and the facts, the amounts awarded to Guthrie and Paulson vacated, Hines's cross claims for breach of fiduciary duty and constructive fraud reinstated, and the matter remanded for further proceedings on damages in accordance with the opinion herein. Appeals from order, same court and Justice, entered on or about October 7, 2008, unanimously dismissed, without costs, as subsumed in the appeal from the judgment, and appeals from orders, same court and Justice, entered February 5, 2009 and April 24, 2009, unanimously dismissed, without costs, as academic.

Plaintiff Frame and defendant Maynard were the two general partners of a limited partnership (the Partnership), formed in 1980, to acquire and operate a building at 5008 Broadway, and they acquired the underlying land as tenants in common. The eight limited partnership shares were acquired by Maynard, Guthrie, Paulson, Hines and others. Under the limited partnership agreement (the Agreement), the net proceeds of a sale or refinancing of the "Project," defined as the building, were to be split 60-40 between the limited partners and the general

partners. Following a settlement agreement entered into in 1986, Frame conveyed his half-interest in the underlying land to the Partnership and resigned as general partner. The Agreement was amended to provide that Frame would receive 20% of the net proceeds of a sale or refinancing of the "real property in the Project," with the remainder to be split 25% to the general partner and 75% to the limited partners.

In May 2001, Maynard offered to acquire the limited partners' interest in the Partnership property for $842,427. Maynard provided schedules to the limited partners representing that the value of the building, based on its cash flow as shown in historical profit and loss statements, was $665,074 or $842,427, depending on the capitalization rate used. A majority of the limited partners consented to Maynard's proposed acquisition of the property, i.e., the building and the 50% ownership interest in the land owned by the partnership, on his own behalf or for a wholly owned entity.

However, Maynard did not disclose to the limited partners that, since March 2001, he had been negotiating with the Community Preservation Corporation (CPC) to obtain a mortgage loan on the property at 5008 Broadway from the Federal Home Loan Mortgage Corporation (Freddie Mac) in the proposed amount of $1,550,000. During those negotiations, Maynard provided CPC with

"adjusted" historical profit and loss numbers, which supported the proposed loan amount. An appraisal prepared by an independent appraiser in connection with Maynard's loan application valued the building and land in the range of $2.2 million as of June 2001. In November 2001, Maynard sent checks in the amount of about $40,000 per share to the limited partners purportedly representing their share of the sale of the Partnership property.

On February 7, 2002, Maynard assigned his right to acquire the Partnership property to defendant 5008 Broadway Associates, LLC (5008 LLC) for nominal consideration, and a deed conveying the property to 5008 LLC was filed. On the same date, 5008 LLC received a mortgage loan from CPC in the amount of $1,485,000, leaving net proceeds of about $1 million. In late February, Maynard made an additional distribution to the limited partners of about $5,000 per share, purportedly representing final distribution of the Partnership's assets.

At trial, Maynard testified that he never disclosed any facts concerning his negotiations with CPC for the proposed $1.5 million loan to the limited partners because he "simply didn't see any connection." He denied knowing that any appraisal had been prepared in connection with his mortgage application, and insisted that the representations he made to the limited partners

concerning value were true, while CPC and Freddie Mac were overvaluing the property. Regarding Frame's interest under the Agreement, Maynard testified that he did not distribute any amounts to Frame because, after deducting the value of the half-interest in the land, there were no sales proceeds to distribute to him.

It is well established that the decision of the fact-finding court should not be disturbed unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). Here, we defer to the trial court's findings that Maynard was not a credible witness, and that the limited partners, the loan mortgage officer from CPC and the appraiser who appraised the property generally were credible. We note as well that Maynard's testimony was at odds with common sense in important respects and was undermined by documentary evidence, including contemporaneous documents tending to establish what can scarcely be doubted in any event, i.e., that Maynard well knew of the appraisal.

The record amply supports the trial court's conclusion that Maynard breached his fiduciary duty. As a general partner, Maynard owed a fiduciary duty to the limited partners that continued "until the moment the buy-out transaction closed" (*Blue*

Chip Emerald v Allied Partners, 299 AD2d 278, 279 [2002]; *see Madison Hudson Assoc. LLC v Neumann*, 44 AD3d 473, 483 [2007]). That duty imposes a stringent standard of conduct that requires a fiduciary to act with "'undivided and undiluted loyalty'" (*Blue Chip Emerald* at 279, quoting *Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989], citing *Meinhard v Salmon,* 249 NY 458, 463-464 [1928]). "Consistent with this stringent standard of conduct, . . . when a fiduciary . . . deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make 'full disclosure' of all material facts," meaning those "'that could reasonably bear on [the beneficiary's] consideration of [the fiduciary's] offer'" (*Blue Chip Emerald* at 279, quoting *Dubbs v Stribling & Assoc.*, 96 NY2d 337, 341 [2001]). It is beyond dispute that the facts relating to Maynard's negotiation of a mortgage loan of about $1.5 million, which required that the property be valued at over $2 million, had a bearing on the limited partners' consideration of Maynard's offer to acquire the property based on a valuation of $842,427 (*see Littman v Magee*, 54 AD3d 14, 17-18 [2008]; *Blue Chip Emerald*, 299 AD2d at 280). Since the consents were revocable and the partnership was not dissolved, Maynard had a continuing duty to inform the limited partners of material facts.

The trial court correctly found that Paulson and Guthrie, as

beneficiaries of this fiduciary relationship, were entitled to rely on Maynard's "representations and his complete, undivided loyalty" (*TPL Assoc. v Helmsley-Spear, Inc.*, 146 AD2d 468, 471 [1989]), and were not required to perform "independent inquiries" in order to reasonably rely on their fiduciary's representations (*id.*; *see also Andersen v Weinroth,* 48 AD3d 121, 136 [2007]). Guthrie was entitled to rely on her husband's assessment of the offer letter, and Paulson could rely on Maynard's affirmative duty to disclose material information when she questioned him about the "amazingly low" price. Neither was aware of any information that rendered their reliance unreasonable, or would cause them to question Maynard's representations (*see Littman*, 54 AD3d at 17; *cf. Global Mins. & Metals Corp. v Holme*, 35 AD3d, 93, 98-101 [2006], *lv denied* 8 NY3d 804 [2007]). Even if they had investigated further, there is no basis for finding that they would have uncovered the concealed facts (*see Anderson,* 48 AD3d at 136).

For the same reasons, we conclude that Hines justifiably relied on Maynard's oral and written representations concerning the value of the Partnership property. Hines lived in South Carolina and, as an investor in three limited partnerships managed by Maynard, had relied on him for 20 years. Although he had doubts about aspects of the offer letter and had questioned

Maynard over the years about expenses, it was only in hindsight, after he learned that Maynard had created adjusted historical figures that supported a property valuation of over $2 million, that he realized that the offer letter was full of falsehoods. Under these circumstances, Hines's impressive educational and professional credentials do not warrant a finding that he did not justifiably rely on Maynard's material misrepresentations and omissions. Even if he had inquired further, there is no basis for finding that he could have discovered the concealed information, since Maynard testified he saw no reason to disclose it and did not know of the appraisal himself.

Regarding Frame's claim that Maynard breached the Agreement, we agree with the trial court's finding that Maynard's interpretation of the Agreement to exclude Frame from any distribution of net proceeds resulting from a sale of the Partnership's property is neither credible nor comprehensible. To accept Maynard's argument would render meaningless the provision requiring distribution of the first 20% of proceeds of a sale or refinancing of the "Project" to Frame, and also would require interpreting the same term differently within the same section of the contract. The court properly accorded the words of the contract their "fair and reasonable meaning" consistent with the parties' "reasonable expectations" (*Sutton v East Riv.*

Sav. Bank, 55 NY2d 550, 555 [1982] [internal quotation marks and citations omitted]).

The general rule is that the measure of damages when a fiduciary has sold property for an inadequate price is the difference between what was received and what should have been received, so that the beneficiary of the fiduciary duty is placed in the same position he or she would have been in absent the breach (3 Scott, Trusts [3d ed], § 208.3, p 1687 [1967]). *Matter of Rothko* (43 NY2d 305 [1977]), however, established an exception to this general rule. In that case, the trustees of the artist Mark Rothko's estate engaged in self-dealing. Specifically, they sold paintings to galleries with which they were affiliated and the galleries promptly resold the paintings for up to 10 times the amounts paid to the estate. The Surrogate awarded damages in the amount of the difference between the sale price and the value of the paintings at the time of the trial. The Court of Appeals upheld the award, holding that this increased measure of damages is appropriate "where the breach of trust consists of a serious conflict of interest -- which is more than merely selling for too little" (*Rothko*, 43 NY2d at 321). The *Rothko* Court specified that the "serious conflict of interest" was the self-dealing of the trustees who sought to profit from the low sales prices to the detriment of the estate. Subsequent cases have upheld the

Rothko rule in both estate and other fiduciary situations, awarding appreciation damages when a fiduciary has engaged in self-dealing (*e.g. Matter of Witherill*, 37 AD3d 879, 881 [2007]; *Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 232 [2003]).

This case cannot be distinguished from *Rothko*. In both cases, the trial court found a breach of fiduciary duty as well as both constructive and actual fraud resulting from self-dealing by the fiduciaries. The *Rothko* Court described the conduct of the estate trustees as "manifestly wrongful and indeed shocking" (*Rothko*, 43 NY2d at 314). Maynard's conduct in the present case is no less improper, especially given that he repeatedly assured the limited partners that the price he was offering was generous while simultaneously negotiating for a mortgage that presupposed a far higher valuation for the Partnership property.

However, the trial court's determination to exclude Maynard's limited partnership share from the calculation of the limited partners' damages was improper. While a faithless servant forfeits his right to compensation, Maynard did not acquire his interest as a result of fraud or breach of duty, and is not receiving any compensation on account of his share. Disregarding his share in calculating damages leads to an unwarranted windfall for the litigating limited partners, who are entitled only to their fair share of net proceeds received from

the sale of partnership property at fair market value (see *Rothko*, 43 NY2d at 321-322). We have previously held that removal of Maynard as general partner is not an appropriate remedy in light of the dissolution of the partnership (39 AD3d 328 [2007]).

The decision and order of this Court entered herein on November 18, 2010 is hereby recalled and vacated (*see* M-6254 [decided simultaneously herewith]).

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

ENTERED: APRIL 28, 2011

CLERK

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

3955 Zalina Mohammed, Index 20429/08
Plaintiff-Appellant,

-against-

Command Security Corp., et al.,
Defendants-Respondents.

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Weitzman Law Offices, L.L.C., New York (Raphael Weitzman of counsel), for appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered April 14, 2010, following a jury verdict in favor of defendants, dismissing the complaint, unanimously affirmed, without costs.

The Supreme Court properly denied plaintiff's eve-of-trial motion to strike the answer, which plaintiff sought, inter alia, as sanction for an alleged spoliation of evidence. Plaintiff failed to make the requisite showing that defendants purposely lost or destroyed evidence, knowing that it was needed in order to establish plaintiff's cause of action (see *Burch v New York City Hous. Auth.*, 72 AD3d 551 [2010]; *Scordo v Costco Wholesale Corp.*, 77 AD3d 725 [2010]).

Plaintiff's claim that the Supreme Court erred by not ruling on a motion for leave to amend the pleadings in order to assert a

claim for punitive damages is unsupported by the record on appeal, which shows that the court held the motion in abeyance. As such, the court's handling of the motion for leave to amend is not appealable as of right (see *Evan S. v Joseph R.*, 70 AD3d 668 [2010]; *Housberg v Curtin*, 209 AD2d 670, 671 [1994]), and we decline to address it. Were we to address the issue, we would find any error associated with the Supreme Court's disposition of plaintiff's request for leave to amend to be harmless, as "it failed to prejudice [plaintiff's] presentation of [her] case at trial" (*Gallagher's Stud v Fishman*, 156 AD2d 50, 55 [1990]). Supreme Court providently exercised its discretion by bifurcating the issues of liability and damages. At trial, plaintiff was able to testify about her state of mind and the nature of the accident, and the extent of her injuries "were neither probative of how the incident occurred nor so intertwined with the damages as to require a unified trial" (*Watanabe v Sherpa*, 44 AD3d 519, 519 [2007]; *see Fetterman v Evans*, 204 AD2d 888 [1994]).

Plaintiff failed to preserve for appellate review her contentions regarding the trial judge's conduct (see *American Prop. Consultants v Zamias Servs.*, 294 AD2d 217 [2002], *lv denied* 99 NY2d 504 [2003]), and we decline to reach them. Were we to review the claims, we would find that, although some of the trial court's comments may have been intemperate, plaintiff was not

deprived of a fair trial.

Supreme Court properly excluded evidence that defendant Command Security Corporation had previously been accused of negligent acts (*see Rosso v Beer Garden, Inc.*, 12 AD3d 152, 154 [2004]). The court also properly excluded from evidence an incident report created by an unknown person who did not witness the alleged accident, and which contained the self-serving hearsay statements of plaintiff's daughter as to the ultimate issue of fact, i.e., whether defendants' negligence proximately cause injury (*see Fay v Vargas*, 67 AD3d 568 [2009]; *Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 396 [2003], *lv dismissed in part, denied in part* 100 NY2d 636 [2003]).

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

ENTERED: APRIL 28, 2011

CLERK

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

4749 The People of the State of New York, Respondent, Ind. 1630/96

-against-

Angelo Zapata, Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about April 27, 2009, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, on the law, to the extent of reducing the adjudication to that of a level one sex offender, and otherwise affirmed, without costs.

The court incorrectly assessed 15 points under the risk factor of history of substance abuse, since the People's proof in relation to this factor did not meet the clear and convincing evidence standard (*see People v Irizzarry,* 36 AD3d 473 [2007]).

Without the improperly assessed points, defendant qualifies as a level one offender.

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

ENTERED: APRIL 28, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4914-
4914A-
4914B In re Ameena C., and Others,

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

Wykisha C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the children.

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Orders of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 7, 2010, which, upon a fact-finding determination that respondent neglected her two older children and derivatively neglected her two younger children, placed the oldest child in the custody of the Commissioner of the Administration for Children's Services (ACS) until the completion of the next permanency hearing, and released the three younger children to respondent with six months' supervision by ACS, unanimously affirmed, without costs.

The agency demonstrated by a preponderance of the evidence that respondent neglected her two older children by inflicting excessive corporal punishment on them (*see Matter of Tammie Z.*, 66 NY2d 1 [1985]; *Matter of Alex R. [Maria R.]*, 81 AD3d 463 [2011]). The caseworker testified that the two children told her that respondent struck them both with a broomstick and prodded one child's ear with it, and punched the other child and rammed her head through a wall. The caseworker testified further that she observed bruises on both children, including a swollen arm and scabbed ear on one child, and a large hole in the wall of the family home. The children's hearsay statements to the case worker were admissible, because they were corroborated by the caseworker's observations (*see Matter of Nicole V.*, 71 NY2d 112, 118 [1987]; *Alex R.*, 81 AD3d at 463).

By establishing that respondent neglected two of the children by using excessive corporal punishment on them, petitioner demonstrated respondent's derivative neglect of the other two

children (Family Court Act § 1046[a][i]; *Matter of Terrell H.*, 197 AD2d 372 [1993]).

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

ENTERED: APRIL 28, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4917 Georgia Rose, as Administratrix of the Estate of William A. Hamilton, et al., Plaintiffs-Appellants,

-against-

Martin J. Frankel, M.D., et al., Defendants-Respondents,

Columbia University College of Physicians and Surgeons, Defendant.

Index 116375/04

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

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for Martin J. Frankel, M.D., respondent.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for Charles Powell, M.D., and New York Presbyterian Hospital, respondents.

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered October 19, 2009, which, pursuant to an order, same court and Justice, entered on or about July 31, 2009, denied plaintiffs' motion to, among other things, substitute estate administratrix Georgia Rose for decedent William A. Hamilton and granted defendants' cross motions to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs may not argue for the first time on appeal that there was defective notice of the cross motions to dismiss for

failure to timely substitute pursuant to CPLR 1021 (*cf. Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]). Even if we were to reach the issue, we would find that, because plaintiffs moved for substitution pursuant to CPLR 1015, Supreme Court had jurisdiction to decide defendants' cross motions (*see Giroux v Dunlop Tire Corp.*, 16 AD3d 1068, 1069 [2005]).

Given that this case will turn mainly on medical records rather than witnesses' memories, defendants were not prejudiced by the delay in moving for substitution (*see Schwartz v Montefiore Hosp. & Med. Ctr.*, 305 AD2d 174, 176 [2003]). However, plaintiffs failed to submit a physician's affirmation of merit and provided no justification, other than law office failure, for the almost five-year delay in making the motion (*cf. Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376, 378-379 [2004]).

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

ENTERED: APRIL 28, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4919-
4920 In re Ronald Anthony G., and Another,

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

Sammantha J.,
Respondent-Appellant,

Ronald G.,
Respondent,

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

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Howard M. Simms, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for NYC ACS, respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Michael D. Scherz of counsel), attorney for the children.

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Order of disposition, Family Court, New York County (Susan J. Knipps, J.), entered on or about August 24, 2009, which, after a fact-finding hearing, determined that respondent mother had neglected the child Ronald Anthony G. and derivatively neglected the child Samron G., and placed the children in foster care, unanimously affirmed, without costs.

Petitioner established by a preponderance of the evidence that the children's physical, mental or emotional condition had been impaired or was in imminent danger of becoming impaired as a

consequence of the mother's untreated mental illness, her failure to follow medical advice regarding the proper feeding of one of the subject children and her decision to live on the street and sleep on the subway (*see Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *Matter of A.G.*, 253 AD2d 318, 326-327 [1999]).

Derivative neglect of the younger child was established by the evidence supporting neglect of his 13-month older brother.

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

ENTERED: APRIL 28, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4921 The People of the State of New York, Respondent, Ind. 2355/07

-against-

Eftim Joco, Defendant-Appellant.

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Justin Levine, Bronx, for appellant.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered November 21, 2008, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 7 years, unanimously affirmed.

Defendant did not preserve his challenge to the sufficiency of the evidence supporting the element of serious physical injury, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. There was ample evidence that the victim sustained permanent or prolonged injuries and disfigurement, including, among other things, the total destruction of an eye socket, which had to be replaced by a permanent metal plate.

The court properly exercised its discretion in allowing a witness to perform a limited demonstration of the manner in which

defendant struck the victim with a bat (*see People v Acevedo*, 40 NY2d 701, 704 [1976]). The demonstration tended to explain and illustrate the witness's testimony, and it was relevant to refute defendant's justification defense.

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

ENTERED: APRIL 28, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4922 Ana Lawson, Index 24970/04
Plaintiff-Respondent-Appellant,

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for appellants-respondents.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Lucy Billings, J.), entered April 5, 2010, which, in this action alleging, inter alia, false arrest, unlawful imprisonment and malicious prosecution, denied plaintiff's motion for partial summary judgment on the issue of liability and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the cross motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendant Police Department arrested plaintiff without a warrant and charged her with criminal possession of a controlled substance in the first and third degrees. Although the lack of a warrant raised a presumption of a lack of probable cause for her

arrest and imprisonment (*see Broughton v State of New York*, 37 NY2d 451, 458 [1975], *cert denied* 423 US 929 [1975]), defendants established that no triable issue of fact exists as to whether there was probable cause to arrest plaintiff, thereby providing a complete defense to plaintiff's claims (*see Arzeno v Mack*, 39 AD3d 341 [2007]; *Marrero v City of New York*, 33 AD3d 556, 557 [2006]). Defendants demonstrated that it was undisputed that the police identified plaintiff based on a reliable confidential informant; the police recovered narcotics and paraphernalia in an apartment bedroom near plaintiff's clothing and other possessions; and plaintiff admitted that she had been storing her belongings and staying in the apartment for days. Plaintiff's argument that she did not actually reside in the apartment does not demonstrate a lack of probable cause (*see People v Mayo*, 59 AD3d 250, 254-255 [2009], *affd* 13 NY3d 767 [2009]).

Furthermore, the subsequent indictment of plaintiff raised a presumption of probable cause for purposes of plaintiff's claims, and plaintiff failed to raise a triable issue of fact to rebut this presumption (*see Colon v New York*, 60 NY2d 78, 82-83 [1983]). The dismissal of the indictment upon the People's motion, based on the conclusion that the evidence against plaintiff was too weak to establish guilt beyond a reasonable doubt in light of her son's confession that he solely possessed and intended to sell the

narcotics recovered by police, does not negate the finding of probable cause (*id.* at 84).

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 28, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4924 Thomas Beatty, Index 18513/06
Plaintiff-Appellant,

-against-

Mo Azher Miah, et al.,
Defendants-Respondents,

Fineman Furniture,
Company, Inc., et al.,
Defendants.

_____

Weiss & Rosenbloom, P.C., New York (Barry D. Weiss of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 16, 2010, which, insofar as appealed from as limited by the briefs, in this action for personal injuries sustained in a motor vehicle accident, granted the motion of defendants Mo Azher Miah and West Cab Corp., Inc., for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law. Defendants submitted, inter alia, the affirmed reports of a neurologist, a radiologist and an orthopedist, who, based upon examinations of plaintiff and his medical records, all concluded that plaintiff did not sustain a serious injury within

the meaning of Insurance Law § 5102(d).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's MRI scan, which evidenced a bulging disc, was taken nearly four years after the accident, and was too remote to be probative of his accident-related claim, especially since neither the radiologist nor plaintiff's doctor who treated him in 2008 offered any non-speculative opinion as to a causal connection between the bulging disc and the accident (*see Pou v E&S Wholesale Meats, Inc.*, 68 AD3d 446 [2009]; *Whisenant v Farazi*, 67 AD3d 535 [2009]).

Plaintiff's claim based on an alleged inability to engage in substantially all of his daily activities for 90 of the first 180 days post-accident was refuted by his own testimony. Plaintiff testified that he missed only one day of work and was only confined to bed after work (*see Pou* at 447).

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

ENTERED: APRIL 28, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4930 Cole Davis, etc., et al., Index 110205/08
Plaintiffs-Respondents,

-against-

Chansi Stuckey,
Defendant-Appellant.

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Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for appellant.

Michael F. Mongelli II, Flushing, for respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered April 23, 2010, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant's motion for summary judgment was properly denied in this action where infant plaintiff pedestrian was injured when he was struck by defendant's car as he was running across the street. The deposition testimony of the parties, as well as the testimony of a non-party witness, was conflicting and raises triable issues of fact with respect to the details of the accident, thereby precluding summary judgment based upon the

applicability of the emergency doctrine (*see Rhodes v United Parcel Serv.*, 33 AD3d 455 [2006]; *compare Brown v Muniz*, 61 AD3d 526, 526-527 [2009], *lv denied* 13 NY3d 715 [2010]).

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

ENTERED: APRIL 28, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4933 Sonia Sanchez, Index 301366/07
Plaintiff-Appellant,

-against-

Angel Irun, et al.,
Defendants-Respondents.

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Law Offices of Annette G. Hasapidis, South Salem (Annette G. Hasapidis of counsel), for appellant.

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for respondents.

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Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered March 29, 2010, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

Defendants failed to demonstrate their prima facie entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) with regard to the asserted defense that they are out-of-possession landlords with no right of re-entry or duty to repair (*see generally Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565-566 [1987]; *Chapman v Silber*, 97 NY2d 9, 19 [2001]). Defendants assert only that the

tenant of the basement apartment controlled the interior stairway by reason of an oral lease. However, defendants offer no testimony or other evidence of whether this oral agreement included a right to re-enter and a duty to repair.

In any event, the primary issue in this case is whether plaintiff's injuries were proximately caused by the absence of any handrails on the subject interior stairway leading out of the basement apartment, in purported violation of New York City Building Code § 27-375(f). It is uncontested that defendant owners caused the stairway and basement apartment to be built, and there is no assertion that the stairway ever had any handrails. Thus, defendants undisputedly created the alleged dangerous condition. Defendants have failed to prove, as a matter of law, that § 27-375(f) does not apply to this interior stairway (*see Pappalardo v New York Health and Racquet Club*, 279 AD2d 134, 139-140 [2000]; *Hotzoglou v Hotzoglou*, 221 AD2d 594 [2004]). Additionally, plaintiff testified that, as she fell, she reached for a handrail, which was not there. Thus, issues of fact exist as to whether the absence of the handrail was a proximate cause of

plaintiff's injuries (*see Alvia v Mutual Redevelopment Houses, Inc.*, 56 AD3d 311 [2008]; *Kanarvogel v Tops Appliance City*, 271 AD2d 409, 411 [2000], *lv dismissed* 95 NY2d 902 [2000]; *Hotzoglou*, 221 AD2d at 594; *Lattimore v Falcone*, 35 AD2d 1069 [1970]).

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

ENTERED: APRIL 28, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4934 Ap X-Power Media, Inc., Index 603869/08
Plaintiff-Respondent,

-against-

Ocean Bridge, Inc., et al.,
Defendants,

Lev Paukman, M.D.,
Defendant-Appellant.

_____

Samuel A. Ehrenfeld, New York, for appellant.

Khenkin & Sauchik, P.C., Brooklyn (Alec Sauchik of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 3, 2010, which denied defendants Ocean Bridge, Inc. and Lev Paukman, M.D.'s motion to vacate a default judgment awarding plaintiff damages, unanimously affirmed, without costs.

In this action alleging breach of contract, the motion to vacate the default judgment was properly denied because no reasonable excuse was offered for defendants' failure to answer the complaint (*Benson Park Assoc., LLC v Herman*, 73 AD3d 464, 465 [2010]; *Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455 [2010], *lv dismissed* 15 NY3d 863 [2010]; *Tandy Computer Leasing v Video X Home Lib.*, 124 AD2d 530, 531 [1986]). Defense counsel's

generalized assertion of unpreparedness is insufficient proof of law office failure (*see Perez v New York City Hous. Auth.*, 47 AD3d 505-506 [2008]; *Youni Gems*, 70 AD3d at 455).

In addition, defendants failed to offer a meritorious defense to the breach of contract claim (*see Peacock v Kalikow*, 239 AD2d 188, 190 [1997]; *Facsimile Communications Indus., Inc. v NYU Hosp. Ctr.*, 28 AD3d 391, 392 [2006]). The individual defendant's assertion that he never personally signed a contract with plaintiff is insufficient to show a defense to the claims being asserted (*see Peacock*, 239 AD2d at 190), where, as here, the assertion is that the contract was with the company and that there is no substantive difference between the individual and corporate defendants. Defendant's additional statement that the corporate defendant maintains its own bank accounts is equally unavailing as the maintenance of separate bank accounts, alone, is insufficient evidence that defendant did not dominate and control the corporation (*see Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511, 512 [2009]); defendants do not attempt to make any factual allegations as to the remaining alter ego factors or

plaintiff's remaining causes of action.

Defendants' remaining contentions are improperly raised on this appeal.

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

ENTERED: APRIL 28, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4935N Ripka Rotter & King, LLP, Index 601796/08
Plaintiff-Appellant,

-against-

Kahn Gordon Timko & Rodriguez, P.C., et al.,
Defendants,

Edward A. Lemmo, et al.,
Defendants-Respondents.

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Clausen Miller P.C., New York (Jeffrey W. Varcadipane of counsel), for appellant.

Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for respondents.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered January 12, 2011, which, insofar as appealed from as limited by the briefs, held that plaintiff waived its right to certain discovery and issued a conditional order of preclusion against plaintiff, unanimously reversed, on the law and the facts, without costs and the order vacated.

The court's imposition of discovery sanctions pursuant to CPLR 3126 against plaintiff was improper, since plaintiff had not been afforded notice that such sanctions could result (*see Cherokee Owners Corp. v DNA Contr., LLC*, 74 AD3d 411, 411-412 [2010]; *Warner v Houghton*, 43 AD3d 376 [2007], *affd* 10 NY3d 913 [2008]; *see also Allstate Ins. Co. v Buziashvili*, 71 AD3d 571

[2010]). Plaintiff's conduct was not willful, contumacious or undertaken in bad faith (*see Campione v New Hampshire Ins. Co.*, 76 AD3d 484 [2010]), and there was no pattern of willful noncompliance with discovery obligations (*cf. Bryant v New York City Hous. Auth.*, 69 AD3d 488, 489 [2010]).

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

ENTERED: APRIL 28, 2011

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3753-
3753A The People of the State of New York, Ind. 5010/06
Respondent, 2238/07

-against-

Akinlowo Omowale,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered May 13, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and sentencing him as a second violent felony offender, to a term of 7 years with 5 years postrelease supervision, affirmed. Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at hearing; Bonnie Wittner, J. at plea and sentencing), rendered May 13, 2008, convicting defendant of criminal possession of a controlled substance in the first degree and criminal possession of a weapon in the second degree and sentencing him, as a second felony drug offender whose prior felony drug conviction was a violent felony, to concurrent terms of 15 years and 7 years, respectively, with 5 years postrelease supervision, reversed, on

the law, the motion to suppress physical evidence granted, and the indictment dismissed.

Defendant appeals from Supreme Court's denial of two motions to suppress physical evidence seized in the course of automobile stops that occurred on September 17, 2006 and May 5, 2007.

The 2006 Encounter

At the time of the 2006 encounter, New York City Police Sergeant Siani and Officers Lugo and Thorn were riding in an unmarked patrol car wearing civilian clothes. At West 135th Street, the patrol car was stopped at a red light in the right lane and slightly behind a Cadillac Escalade being operated by defendant and stopped in the left lane. The Escalade's front-seat passenger, later identified as Devon Greene, looked toward the officers making eye contact with Siani in a way that gave Siani the impression that Greene recognized him and his colleagues to be police officers. Greene then turned his shoulder as if placing something in the Escalade's center console. When the light turned green, defendant made a right turn from the left lane, cutting in front of the patrol car without signaling. The officers activated the patrol car's emergency lights and siren but the Escalade did not immediately stop moving. Using the patrol car's loudspeaker, Siani directed defendant to pull the Escalade over several times. Defendant finally did so between West 133rd and 134th Streets.

As the officers approached the Escalade on foot, Thorn, who was on the passenger's side, saw Greene leaning over the Escalade's center console. Siani had Greene step out of the Escalade, frisked him and found no weapon. Siani was nevertheless concerned that a weapon or weapons might be in the car because it appeared to him that Greene had put something in the center console. Accordingly, defendant, Greene and the three other occupants of the Escalade were directed to the back of the vehicle. Siani then went to the front to see what, if anything, had been placed in the center console before allowing the occupants to reenter the Escalade. Siani opened the console and found a pistol inside of it. Defendant and the other vehicle occupants were then arrested. After driving the Escalade to the precinct, the police officers found two more guns, a box of ammunition and a quantity of cocaine in the console. The police also recovered a bullet-resistant vest upon conducting an inventory search of the vehicle.

The 2007 Encounter

The second automobile stop occurred eight months later while defendant was out on bail on the indictment stemming from the first incident. At the time of the 2007 encounter, Siani, Thorne and two other officers stopped a Nissan Maxima moments after seeing defendant sitting in the vehicle while it was double-

parked. As the officers approached, defendant asked Thorne if he remembered him. Thorne directed defendant to step out of the car and immediately handcuffed him at Siani's direction. Once defendant was handcuffed, Siani recovered another person's driver's license which defendant was holding along with a stack of cards and his own driver's license. Siani asked defendant to explain his possession of the other person's license. In response, defendant stated that it belonged to a friend who had left it at his house. During this encounter, defendant never assumed anyone else's identity or offered the other person's driver's license as his own. In fact, defendant was never even asked or directed to produce a driver's license at all. Nevertheless, Siani testified that defendant was arrested at the scene for "false impersonation" and taken to the precinct. Upon a post-arrest search of defendant's person, the police recovered approximately $3,000 and some cocaine. Siani then decided to search the Maxima for more drugs. During that search of the car, the officers found a hidden compartment from which they recovered a pistol, $14,000 in currency and approximately a pound of cocaine.

Discussion of the 2006 Encounter

In denying the first motion to suppress physical evidence, the court found that at the time of the 2006 arrest the officers

were justified in removing defendant from the Escalade and searching the vehicle's center console because they were acting under a reasonable fear for their safety. The motion court further concluded that the seizure of the additional contraband found in the Escalade after defendant's arrest was lawful. We agree. Defendant does not argue on this appeal that the Escalade was unlawfully stopped. He asserts that the search of the vehicle's center console was unlawful.

In *People v Carvey* (89 NY2d 707 [1997]), the Court of Appeals reiterated its holding in *People v Torres* (74 NY2d 224 [1989]) that "absent probable cause, it is unlawful for a police officer to invade the interior of a stopped car once the suspects have been removed and patted down without incident and any immediate threat to safety thereby eliminated" (*People v Carvey* at 710).[1] The *Torres* Court acknowledged an exception to the requirement of probable cause in that

> "[i]ndeed, there may well be circumstances where, following a lawful stop, facts revealed during a proper inquiry or other information gathered during the course

[1]Citing NY Constitution, article I, § 12, the *Torres* Court rendered its decision on state constitutional grounds and declined to adopt the federal standard by which an intrusion into the passenger compartment of a suspect's vehicle may be justified "solely on the theory that 'if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and will then have access to any weapons inside'" (*People v Torres*, 74 NY2d at 226, quoting *Michigan v Long*, 463 US 1032, 1052 [1983]).

> of the encounter lead to the conclusion that a weapon located within the vehicle presents an actual and specific danger to the officers' safety sufficient to justify a further intrusion, notwithstanding the suspect's inability to gain immediate access to that weapon (*People v Torres*, 74 NY2d at 231 n 4)."

"Any inquiry into the propriety of police conduct must weigh the degree of intrusion against the precipitating and attending circumstances" out of which the encounter arose (*People v Salaman*, 71 NY2d 869, 870 [1988]; *People v DeBour*, 40 NY2d 210, 223 [1976]). The Court of Appeals applied the *Torres* exception to the requirement of probable cause in *People v Mundo* (99 NY2d 55 [2002]) after considering the precipitating and attending circumstances of a police-civilian encounter. Under the similar facts of *Mundo*, the police officers' attempt to stop the defendant's vehicle was thwarted when the defendant and his cohorts twice disobeyed the officers' lawful commands and the defendant was seen trying to stash something within the vehicle (*id.* at 59).

The combination of factors in this case are analogous to those in *Mundo* because they led to the justifiable conclusion that a weapon which could have been used to harm the officers was in the Escalade. The first factor is the eye contact that gave Siani the impression that Greene knew Siani and the other people in his

vehicle were police officers.[2] The remaining relevant factors are (a) Greene's body movement that made it appear that he was placing something in the Escalade's center console while defendant was stopped at the red light, (b) the illegal right turn defendant made without signaling once Greene apparently perceived that Siani and his companions were police officers, (c) defendant's failure to timely pull the Escalade over after being directed to do so several times and (d) Greene's leaning over the Escalade's center console as the officers approached the vehicle on foot. Viewed in their totality, these factors gave rise to a sufficient predicate for Siani's very limited check of the Escalade's center console once defendant and his passengers were removed from the car. In *People v Fludd* (20 AD3d 351 [2005], *lv denied* 5 NY3d 852 [2005]), this Court similarly weighed the defendants' noncompliance with the police officers' directives together with an apparent effort to secrete something in the back seat of a car in finding a sufficient predicate for a limited search of the back seat. We do not take issue with the dissent's view that there could have been innocent explanations for defendant's delay in stopping his

[2]Such eye contact may be weighed with other factors to determine whether there is a reasonably objective basis for police officers to fear for their safety (*see e.g. People v Anderson*, 17 AD3d 166 [2005]; *People v Worthy*, 261 AD2d 277 [1999], *lv denied* 93 NY2d 1029 [1999]).

vehicle or Greene's movements therein. We note however that innocent explanations for behavior do not prevent police officers from acting on their well-founded suspicions (*see People v Daye*, 194 AD2d 339, 340 [1993], *lv denied* 82 NY2d 716 [1993]). Because the search of the Escalade's console was lawful, there was probable cause for defendant's arrest and the contraband recovered during the ensuing inventory search was legally obtained.

Discussion of the 2007 Encounter

Defendant's double-parking of the Maxima constituted a traffic infraction which gave the officers a basis for approaching the vehicle and requesting information (*see People v Citron*, 255 AD2d 452 [1998], *lv denied* 92 NY2d 1030 [1998]). This aspect of the appeal however turns on the propriety of defendant's arrest after the officers approached him in the street. In this regard, the motion court denied defendant's motion to suppress on the premise that "[h]e was arrestable for criminal impersonation as soon as the - somebody saw the license that he was about to hand [sic]." This was error. Pursuant to CPL 140.10(1)(a) a police officer is authorized to arrest a person for any offense when he has "reasonable cause to believe that such person has committed such offense in his presence." As used in the statute, "reasonable cause" is equal to "probable cause" (*People v Johnson*, 66 NY2d 398, 403 n 2 [1985]), i.e., "information which would lead

a reasonable person who possesses the same expertise as the officer to conclude, under the circumstances, that a crime is being or was committed" (*People v McRay,* 51 NY2d 594, 602 [1980]).

A person commits criminal impersonation in the second degree when he or she "[i]mpersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another" (Penal Law § 190.25[1]). There was no probable cause for defendant's arrest inasmuch as he did not offer the other person's driver's license as his own and he did not impersonate anyone. In fact, as noted above, the police never even asked defendant to produce a driver's license. The People's alternative argument that there was probable cause to arrest defendant for attempted criminal impersonation is not persuasive. An element of an attempt to commit a crime is "conduct which tends to effect the commission of such crime" (Penal Law § 110). Although it is likely that defendant considered passing the other driver's license off as his own, "[t]he law does not punish evil thoughts, nor does it generally consider mere preparation sufficiently dangerous to require legal intervention" (Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 110, at 93). Defendant's mere act of holding the driver's license in apparent preparation for a criminal impersonation does not constitute a punishable attempt (*see People v Horner,* 300 AD2d

841, 845 [2002]). The People's argument that there was a basis to arrest defendant for criminal possession of stolen property is equally unavailing. We so conclude because it does not appear from the record that the police learned that the driver's license had been reported lost until after defendant's arrest. We therefore find that defendant's arrest on the charge of criminal impersonation was unlawful and all of the physical evidence seized as a result of that arrest should be suppressed.

The People cite *People v Allen* (73 NY2d 378 [1989]) in support of their position that it was reasonable for the police to immediately handcuff defendant upon removing him from the Maxima. In *Allen*, the Court held that poor lighting conditions combined with a "reasonable belief that defendant might be armed, justified the limited use of handcuffs to prevent defendant from reaching for a concealed weapon" (*id.* at 380). This case is distinguishable because the police had no reason to believe that defendant possessed a weapon at the time of the 2007 encounter. To be sure, the People offered no evidence, for example, that defendant acted furtively, appeared to be reaching for a weapon or had any bulge under his clothing characteristic of a weapon (*see e.g. People v Mais*, 71 AD3d 1163, 1165 [2010], *lv denied* 15 NY3d 775 [2010]). Viewed in isolation, defendant's earlier arrest gave rise to a mere hunch, as opposed to a reasonable suspicion, that

he was armed at the time of the 2007 encounter. We therefore find that the police officers' use of handcuffs constituted an unlawful forcible seizure under the circumstances of this case.

We have considered and rejected defendant's remaining arguments, including his claim that the police were required to provide *Miranda* warnings before questioning him about the drivers license (*see Berkemer v McCarty*, 468 US 420, 436-440 [1984]; *People v Bennett*, 70 NY2d 891 [1987]; *People v Huffman*, 41 NY2d 29 [1976]).

All concur except Freedman and Manzanet-Daniels, JJ. who dissent in part by Freedman, J. in a memorandum as follows:

FREEDMAN, J. (dissenting in part)

I agree with the majority that defendant's motion to suppress physical evidence in connection with his 2007 encounter with the police should have been granted, but I believe that the motion to suppress in connection with his 2006 encounter should have been granted as well.

With respect to the 2006 incident, I view the record, which the majority summarizes accurately, as insufficient to support Supreme Court's finding that the police officers were justified in searching the interior of defendant's Escalade after they had stopped the car for a traffic infraction, removed its occupants, frisked them, and isolated them at a distance from the vehicle. The rule in New York is that ordinarily, without probable cause, police officers cannot search the interior of a stopped car once they have removed its occupants and patted them down without incident (*see People v Carvey*, 89 NY2d 707, 710 [1997]). But as the majority notes, a narrow exception has been recognized where

> "following a lawful stop, facts revealed during a proper inquiry or other information gathered during the course of the encounter lead to the conclusion that a weapon located within the vehicle presents an actual and specific danger to the officers' safety sufficient to justify a further intrusion, notwithstanding the suspect's inability to gain immediate access to that weapon."

(*People v Torres*, 74 NY2d 224, 231 n 4 [1989]). In order for

there to be an "actual and specific danger," there must be a "substantial" "likelihood of a weapon in the car" (*Carvey*, 89 NY2d at 711). A "theoretical" fear that a suspect may, following release, re-enter the vehicle and gain access to a weapon inside it does not justify a search (*see Torres*, 74 NY2d at 231 n 4).

On the facts of this case, I conclude that the officers did not have the requisite "knowledge of some fact or circumstance that supports a reasonable suspicion that [defendant was] armed or pose[d] a threat to safety" (*People v Batista*, 88 NY2d 650, 654 [1996]). In fact, Sergeant Siani's testimony that the Escalade's passenger, Devon Greene, acted nervously because he somehow knew that Siani and his companions were police officers, even though they were driving an unmarked car and wearing plainclothes, seems entirely too speculative to be credited. Accordingly, the question whether the search was lawful is dependent on two circumstances: first, the Escalade's continued travel for a little more than one city block after the police had turned on their lights, siren, and loudspeaker; and second, Greene's upper-body movements, both before and after the Escalade stopped, which one officer, who could not see Greene's hands, stated that he thought meant that Greene was manipulating something in the center of the front seat.

I note that the Escalade's failure to stop immediately could

be attributed to the driver's inattentiveness, and that Greene's equivocal movements could be the result of any number of activities besides hiding a weapon. But based on these circumstances, I would have no difficulty with upholding a conclusion by the finder of fact that the police officers had reason to be suspicious of defendant and his companions. However, I cannot agree that these circumstances could reasonably lead the police to suspect that the Escalade's occupants, once removed from the vehicle, were a threat to the officers' safety. I note that, in cases involving similar circumstances, a perceived lack of the reasonable suspicion of danger that is required under *People v Torres* has occasioned vigorous dissenting opinions (*see People v Allen*, 42 AD3d 331, 332-335 [2007, McGuire, J., dissenting], *affd* 9 NY3d 1013 [2008]; *see also People v Mundo*, 99 NY2d 55, 59-63 [2002, Ciparick, J. and Kaye, Ch. J., dissenting]; *People v Mundo*, 286 AD2d 592, 595-596 [2001, Rosenberger, J., dissenting]).

The cases that the majority cites are distinguishable. In *People v Mundo* (99 NY2d 55 [2002], *supra*), the police observed a car make an illegal right turn at a red light and immediately activated their lights. The defendant's car stopped, but when the officers approached it on foot, it pulled away. The officers pursued the car and "the stop and pursuit cycle repeated itself." During the third pursuit, the defendant's car nearly struck a

pedestrian; the officers also observed defendant, seated in the back seat, turn, face them, and "make a movement as if he were hiding something." The Court of Appeals concluded that defendant's "furtive movements," when coupled with the car's "evasive actions," warranted a limited search of the vehicle (*id.* at 57-59). In this case, the Escalade did not evade the police car or otherwise engage in reckless flight from police officers and did not demonstrate a disregard for others' safety. While the circumstances in *Mundo* clearly demonstrated that the defendant sought both to evade apprehension and to conceal something from the police, the same cannot be said here.

In *People v Fludd* (20 AD3d 351 [2005], *lv denied* 5 NY3d 852 [2005]), a police car was cut off by the defendants' Honda driving at "an excessive speed." When the Honda stopped after the police car followed it for two blocks, the occupants twice directly disobeyed the officer's order to keep their hands placed where he could see them, and instead one of the defendants furtively slid a box under a pile of clothing in the back seat. The police officers recovered the box, opened it, and found a loaded firearm. This Court found that the defendants' actions prior to their removal from their car were "not benign" and "were such that the detectives perceived a heightened risk, and reasonably feared for their safety" (*id.* at 353). Here, the actions of the Escalade's

occupants were non-threatening and they cooperated with the police once they were stopped.

For the reasons stated above, I would grant the motion to suppress in connection with the 2006 incident, vacate defendant's relevant guilty plea, and dismiss the relevant charges.

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

ENTERED: APRIL 28, 2011

CLERK

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

4731 Anthony Charnota, Index 101247/07
Plaintiff-Appellant,

-against-

Ver-Tech Elevator Co., Inc.,
Defendant,

Knocklofty Mgmt., LLC, et al.,
Defendants-Respondents.

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

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

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Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered June 16, 2009, dismissing the complaint, upon a jury verdict in defendants' favor, unanimously affirmed, without costs.

Plaintiff was injured exiting a misleveled elevator. He had pressed the emergency button, which stopped the elevator and sounded an alarm, and the building superintendent had responded to the alarm. The superintendent testified that he told plaintiff that he would have him down in a minute, and instructed plaintiff to stay in the elevator car until he, the superintendent, returned to the lobby. Plaintiff testified that, after two or three minutes, the elevator began descending in a normal manner. He said he was so eager to get off the elevator that as soon as the

doors started to open he stepped out, without looking down first, and "literally walked into space and fell." He denied that the superintendent had told him to stay in the car. The jury found that the superintendent was negligent but that his negligence was not a proximate cause of plaintiff's injuries.

Contrary to plaintiff's contention, this is not a case in which the issues of negligence and proximate cause are inextricably interwoven, making a split verdict on the two issues a logical impossibility (*see Fisk v City of New York*, 74 AD3d 658 [2010]); *Ohdan v City of New York*, 268 AD2d 86, 89 [2000], *lv denied* 95 NY2d 769 [2000]. Plaintiff was not endangered by the superintendent's actions (*compare McCollin v New York City Hous. Auth.*, 307 AD2d 875, 876 [2003] [finding plaintiff negligent in failing to use available flashlight in darkened cellar was "irreconcilably inconsistent" with finding his negligence was not a proximate cause of his fall]; *Toyos v City of New York*, 304 AD2d 319 [2003] [finding City negligent in constructing roadway without shoulder was inconsistent with finding negligence not proximate cause of injuries sustained by plaintiff while changing tire in middle of road]). Nor was his act of stepping out of the elevator as the doors opened, without looking down first, foreseeable as a result of the superintendent's negligence, since he was not in any danger in the elevator, he was stuck there, by his own testimony,

no longer than three minutes, and he had been instructed to stay in the elevator car until someone helped him out (*see Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841 [1999]). Even if the jury did not credit the superintendent's testimony that he told plaintiff to stay in the car, it could reasonably find that plaintiff caused his own injuries by exiting the elevator before looking down (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Consistent with the court's charge, the jury was entitled to resolve the issues as it did (*see Pavlou v City of New York*, 21 AD3d 74 [2005], *affd* 8 NY3d 961 [2007]; *Weiss v City of New York*, 306 AD2d 64 [2003]).

Plaintiff failed to demonstrate that the court's conduct deprived him of a fair trial. The court's rulings on admissibility of evidence and its jury charge were proper. In any event, any error was harmless.

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

ENTERED: APRIL 28, 2011

CLERK

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

4797 In re Ramon B.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about July 8, 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 grand larceny in the fourth degree, and placed him on probation for a period of 18 months, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the term of probation to 12 months, and otherwise affirmed, without costs.

Given the underlying offense and favorable aspects of appellant's background, we conclude that a 12-month period of

probation would be the least restrictive alternative consistent with appellant's needs and best interests and the community's need for protection.

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

ENTERED: APRIL 28, 2011

CLERK