SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 1, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3984 Lisa J. Weksler, etc., Index 603288/07
Plaintiff-Respondent,

-against-

Joseph Weksler, etc., et al.,
Defendants,

Kane Kessler, P.C.,
Defendant-Appellant.

- - - -

3985N Lisa J. Weksler, etc.,
Plaintiff-Appellant,

-against-

Joseph Weksler, etc., et al.,
Defendants-Respondents,

Mitchell D. Hollander, Esq., et al.,
Defendants.

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Callan, Koster, Brady & Brennan, LLP, New York (Paul F. Callan of counsel), for Kane Kessler, P.C., appellant.

Jonathan P. Harvey Law Firm, PLLC, Albany (Jonathan P. Harvey and Trudy L. Boulia of counsel), for Lisa J. Weksler, appellant/respondent.

Putney, Twombly, Hall & Hirson LLP, New York (Thomas A. Martin of counsel), for Joseph Weksler, Bruce Weksler, Bruce Supply Corp., 315 East 14th Street Manhattan Corp., P & J Realty LLC, 1839 Cropsey Avenue Associates Inc., 300 Smith Street Associates LLC, 6015 16th Avenue Realty LLC, L.B.J., LLC, Shanghai Global Trading LLC, BPM Metals, Inc. and Blue Print Metals, Inc., respondents.

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

J.), entered April 23, 2009, which, insofar as appealed from, granted plaintiff's motion for renewal of a prior motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7) and reinstated her ninth and tenth causes of action, unanimously affirmed, with costs. Order, same court and Justice, entered June 10, 2009, which disqualified Michael D. Schimek, Esq. from acting as plaintiff's attorney, unanimously reversed, on the law and the facts, without costs, and the motion of defendants Joseph Weksler, Bruce Weksler, Bruce Supply Corp. (Bruce Supply), 315 East 14th Manhattan Corp., P&J Realty, 1839 Crospey Avenue Associates, Inc., 300 Smith Street Associates LLC, 6015 16th Avenue Realty LLC, L.B.J. LLC, Shanghai Global Trading, BPM Metals, Inc., and Blue Print Metals, Inc. (the Weksler defendants) insofar as they seek to disqualify Schimek, denied.

Renewal of the CPLR 3211 motion by defendant Kane Kessler P.C. for a dismissal of the ninth and tenth causes of action was properly granted. Kane Kessler is a law firm that represented plaintiff and her brothers, defendants Joseph Weksler and Bruce Weksler. As evidenced by one of its invoices, Kane Kessler apparently also represented Bruce Supply, the siblings' entity. Under the ninth cause of action, it is alleged that Kane Kessler breached its fiduciary duty by billing Bruce Supply for legal services that were actually performed for Joseph, Bruce and other entities they controlled. Plaintiff alleges under the tenth

cause of action that Kane Kessler aided and abetted breaches of fiduciary duty by Joseph and Bruce with respect to the use of Bruce Supply's assets and the usurpation of its corporate opportunities. In granting Kane Kessler's motion to dismiss the ninth cause of action, the court noted a lack of specificity as to the firm's relevant billings and services rendered. As to the tenth cause of action, the court found a similar lack of particularity with respect to how Kane Kessler aided and abetted Joseph and Bruce's alleged breaches of fiduciary duty. The Kane Kessler invoice and copies of corporate filings, all of which were not previously produced in discovery, provided the particularity needed to support the ninth and tenth causes of action. When evidentiary material is considered the criterion on a CPLR 3211(a)(7) motion is whether a plaintiff has a claim, not whether he or she has stated one (*Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]). Granting leave to renew was therefore a provident exercise of the court's discretion.

Contrary to Kane Kessler's argument, the tenth cause of action does not duplicate the previously dismissed legal malpractice claim. The two claims are premised on different facts that support different theories (*see e.g. Kurman v Schnapp,* 73 AD3d 435 [2010]). The legal malpractice cause of action was based on Kane Kessler's drafting of stock purchase agreements and a shareholders' agreement that were unrelated to the alleged

conduct underlying the tenth cause of action.

The ninth and tenth causes of action are subject to CPLR 214's three-year limitations period because plaintiff seeks money damages only under these claims (*see Yatter v Morris Agency*, 256 AD2d 260, 261 [1998]). These claims are not time-barred inasmuch as Kane Kessler's aforementioned invoice recites actionable conduct committed within three years prior to the commencement of this action.

We initially reject the Weksler defendants' argument that the appeal from the June 2009 disqualification order should be dismissed. Unlike *Sholes v Meagher* (100 NY2d 333 [2003]), where the court truly acted sua sponte, the June 2009 order was issued in response to a request for clarification of an October 2008 order. Hence, the June 2009 order is akin to a resettlement of the October 2008 order (*see e.g. Foley v Roche*, 68 AD2d 558, 566-567 [1979]). An application for resettlement is "not required to be brought pursuant to notice of motion or by order to show cause" (*Zelman v Lipsig*, 178 AD2d 298, 299 [1991]). The June 2009 order contains a material change – the October 2008 order merely prohibited Schimek from viewing "Attorneys' Eyes Only" documents, whereas the June 2009 order also disqualified him from acting as plaintiff's attorney in any capacity and prohibited plaintiff's counsel of record from discussing the case with him. Therefore, it was appealable (*see e.g. Gormel v Prudential Ins.*

Co. of Am., 151 AD2d 1048 [1989]; *Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [1978]). Since plaintiff withdrew her appeal from the October 2008 order instead of abandoning it, she may pursue her appeal from the June 2009 order (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 755-756 [1999]).

The court improvidently exercised its discretion in categorically disqualifying Schimek from action as plaintiff's attorney. Schimek's affidavit is not contradicted insofar as he states that he never worked for the firm representing plaintiff and has not ever represented plaintiff in this action. Defendants' reliance on the advocate-witness rule set forth in rule 3.7 of The Rules of Professional Conduct (22 NYCRR 1200.29, former Code of Professional Responsibility DR5-102 [22 NYCRR 1200.21]), is misplaced. The purpose of the advocate-witness rule is to avoid the unseemly situation where an attorney must both testify on behalf of a client and argue the credibility of his or her testimony at trial (*Skiff-Murray v Murray*, 3 AD3d 610, 611 [2004]). The rule is not implicated here because, as stated above, Schimek does not appear for plaintiff in this action.

We similarly reject the Weksler defendants' argument that Schimek should be disqualified because he allegedly violated rule 4.2 (former DR 7-104[A][1] [22 NYCRR 1200.35]). The rule prohibits an attorney who represents a client from communicating about the subject matter of the representation with a party the

attorney knows to be represented by another attorney in the matter without legal authorization or the prior consent of the other lawyer. On this score, Schimek's affidavit is also unchallenged insofar as he swears that he did indeed discuss the subject matter of this action with Joseph and Bruce at the very suggestion of their Kane Kessler attorney.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Saxe, J.P., Friedman, McGuire, Abdus-Salaam, Román, JJ.

4011 The People of the State of New York, Ind. 2548/06
Respondent,

-against-

Michael Howard,
Defendant-Appellant.

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Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Arlene R. Silverman, J. at suppression hearing; John Cataldo, J. at jury trial and sentence), rendered July 31, 2008, as amended August 12, 2008, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court properly denied defendant's motion to suppress cocaine recovered from boxes magnetically attached to the undercarriage of defendant's car. There is no basis for disturbing the court's credibility determinations. When the police saw defendant reach under the driver's side door of his car and make an apparent drug sale to an apprehended buyer, they clearly had probable cause to arrest defendant and search his car under the automobile exception (*see People v Yancy*, 86 NY2d 239,

245 [1995]). The automobile exception applies to closed, and even locked, containers and compartments within a car (*see People v Ellis*, 62 NY2d 393, 398 [1984]). We see no logical reason to give a closed container attached to the outside of a car any greater protection, especially where it is located in an area directly associated with the observed activity giving rise to probable cause. Defendant's procedural objections to our consideration of the automobile exception are unavailing.

The trial court erroneously denied defendant's for-cause challenge to prospective juror Hill, who stated that she would be inclined to give more weight to testimony from a police officer than to testimony from another witness. Although the court immediately gave appropriate instructions on the subject, Ms. Hill never provided an unequivocal assurance that she would follow those instructions rather than her "tendencies" to give extra credence to the testimony of a police officer (*People v Johnson*, 94 NY2d 600, 614 [2000]). Given this conclusion, we need not determine whether the court properly denied defendant's for-cause challenges to prospective jurors Cramer and Bobo.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4032 The People of the State of New York, Respondent, Ind. 3516/07

-against-

Mario Rodriguez, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at hearing; Bonnie G. Wittner, J. at jury trial and sentence), rendered December 16, 2008, convicting defendant, of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him to an aggregate term of 2 years, unanimously affirmed.

The police lawfully stopped a vehicle for traffic infractions (*see People v Robinson*, 97 NY2d 341 [2001]). The officers observed defendant nervously fidgeting with a pack of cigarettes and, along with the driver, who was reclining and sitting back towards the rear seat in an awkward position, repeatedly move around and look back towards the officers. A police officer then permissibly and reasonably asked defendant why he was sitting alone in the rear seat. When the response that the right front door was broken and could not be opened was

determined to be false, a police sergeant permissibly and reasonably asked defendant "basic, nonthreatening questions" about his address and destination that evening, and to see his identification (*see People v Ocasio*, 85 NY2d 982 [1995]; *People v Dewitt*, 295 AD2d 937, 938 [2002], *lv denied* 98 NY2d 709 [2002]).

These circumstances, coupled with the fact that the stop of the vehicle was inherently dangerous for the police officers, also provided the sergeant with the requisite common-law right of inquiry to question defendant as to whether he had "any weapons, anything on you you're not supposed to have," when defendant asked if he could get out of the car to make it easier to get his identification (*see People v Alvarez*, 308 AD2d 184 [2003], *lv dismissed* 1 NY3d 567 [2003], *lv denied* 3 NY3d 657 [2004]; *Matter of William J.,* 274 AD3d 343, 345 [2000] ["Once it became apparent that respondent was giving false and evasive answers (the officer) possessed a founded suspicion that criminal activity was afoot, triggering the common-law right of inquiry"]). Since the sergeant's question was proper, defendant's response — "No, you can check" — constituted a voluntary consent to search, which led to the lawful discovery of contraband on his person.

Based on the totality of the circumstances, we reject the contention of defendant that the police interfered with his

movements for any length of time greater than what would be expected in a routine traffic stop.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4132 The People of the State of New York, Ind. 6108/07
Respondent,

-against-

Carlos Feliciano,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J. at suppression hearing; Arlene D. Goldberg, J. at plea and sentence), rendered January 7, 2009, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 5 years, unanimously affirmed.

Defendant made a valid and enforceable waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]). The court did not conflate the right to appeal with the rights automatically waived by pleading guilty. This valid waiver

forecloses review of defendant's suppression claim. As an alternative holding, we reject that claim on the merits.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4134-
4135 In re Jose Luis T., and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Carmen A., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

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Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Carmen A., appellant.

Kenneth M. Tuccillo, Hastings On Hudson, for Juan A., appellant.

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

Michael S. Bromberg, Sag Harbor, attorney for the children.

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Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about August 13, 2009, which, insofar as appealed from as limited by the briefs, brings up for review a fact-finding determination that the subject children were neglected and derivatively neglected, unanimously reversed, on the law and the facts, without costs, the findings of neglect and derivative neglect vacated, and the petition dismissed.

Petitioner's prima facie evidence showing a single nondisplaced oblique fine-line fracture of the child's femur that would ordinarily not have been sustained except by reason of respondents parents' acts or omissions was sufficiently rebutted

by the evidence, not addressed by Family Court, showing that the injury could have occurred accidentally when respondent mother bent down to pick up some garbage while the child was secured against her chest in a "snuggly," and could have been exacerbated during the Barlow-Ortolani procedure performed the same day by the child's pediatrician at a previously scheduled well-child visit (*see Matter of Philip M.*, 82 NY2d 238, 243-245, 246 [1993]; *Matter of Christopher Anthony M.*, 46 AD3d 896 [2007]). In light of this rebuttal evidence and the lack of evidence of other neglect, the finding of neglect was not supported by a preponderance of the evidence (Family Court Act § 1046 [b][I]).

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4136 Lenora Crandell, Index 17421/05
Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,
Defendants,

Parkchester South Condominium, et al.,
Defendants-Appellants.

_____

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered December 24, 2009, which, in an action for personal injuries allegedly sustained when plaintiff tripped and fell stepping into a hole in the sidewalk as she disembarked from a bus, denied defendants-appellants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The motion court correctly determined that issues of fact exist concerning the precise location of plaintiff's fall, either at or near a bus stop, thereby precluding a determination of whether appellants were responsible for maintaining the area of the sidewalk where the injury occurred (*see* Administrative Code of the City of New York § 7-210).

We have considered appellants' remaining arguments,

including that plaintiff's affidavit in opposition was inconsistent with her deposition testimony, and find them unavailing.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4137 Hudson Insurance Company, Index 116027/08
Plaintiff,

Westchester Surplus Lines Insurance Company, etc.,
Plaintiff-Respondent,

-against-

David Morse & Associates, Inc., etc.,
Defendant-Appellant.

_____

Hitchcock & Cummings LLP, New York (Christopher B. Hitchcock of counsel), for appellant.

London Fischer, LLP, New York (Daniel Zemann, Jr. of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 27, 2010, denying defendant's motion for summary judgment dismissing the claims asserted by plaintiff Westchester, unanimously affirmed, with costs.

Supreme Court correctly denied defendant's motion for summary judgment dismissing Westchester's claims. Triable issues of material fact exist as to whether Westchester has standing as

plaintiff Hudson's contractual or equitable subrogee (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4139 The People of the State of New York, Respondent, Ind. 4154/08

-against-

Malcolm Clemente, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J. at plea; Renee A. White, J. at sentence), rendered on or about January 21, 2009, unanimously affirmed.

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

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

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

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4140 Akiva Tessler, Index 570447/08
Petitioner-Appellant,

-against-

Rina Tessler,
Respondent-Respondent.

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Akiva Tessler, appellant, pro se.

Snow Becker Krauss P.C., New York (Stanley Chinitz of counsel), for respondent.

_____

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on or about July 14, 2009, which, insofar as appealed from, affirmed the judgment of the Civil Court, New York County (Pam B. Jackman Brown, J.), entered on or about February 6, 2008, after a non-jury trial, inter alia, denying petitioner's request for use and occupancy damages, unanimously affirmed, without costs.

Under the circumstances of this case, including respondent's limited financial circumstances, the Civil Court acted within its

discretion in denying an award of an additional amount of use and occupancy permitted by the statute (RPAPL § 753[2]).

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4141 The People of the State of New York, Respondent,

-against-

Arnold Moye, Defendant-Appellant.

Ind. 6074/07

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 14, 2008, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of 5 years, unanimously affirmed.

Defendant's challenge to the legal sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its conclusion that defendant took property from the victim. There was ample evidence to support the physical injury element of second-degree robbery under Penal Law § 160.10(2)(a),

where the victim had a swollen face and lip and required 6 stitches to close the laceration. Moreover, minor injury may satisfy the statutory definition, if it causes "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007][fingernail injury]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]).

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4143 The People of the State of New York, Ind. 4618/08
Respondent,

-against-

Michael McCoy,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman 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 (Charles Solomon, J.), rendered on or about February 17, 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: FEBRUARY 1, 2011

CLERK

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

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4145 In re Roni Jacobson,
Petitioner-Appellant,

-against-

Joseph Randone,
Respondent-Respondent.

_____

Ellyn I. Bank Dugow, New York, for appellant.

David K. Bertan, Bronx, for respondent.

_____

Order, Family Court, Bronx County (Andrea Masley, J.), entered on or about May 20, 2010, which dismissed the petition alleging a violation of a final order of protection with prejudice, unanimously affirmed, without costs.

Petitioner testified by telephone that she was unable to appear in New York for a fact-finding hearing on an alleged violation of a final order of protection because her broken toe was too painful to allow her to travel. However, the record showed that petitioner had recently traveled to New York on business with the broken toe and that, in the days leading up to the hearing, she was able to run errands, walk around and attend dinner out with her husband and friends. Accordingly, the court did not abuse its discretion in denying petitioner's application for an adjournment made on the eve of trial and dismissing the petition for failure to prosecute (*see e.g. Fleetwood Paving v*

Consolidated Edison Co. of N.Y., 187 AD2d 697 [1992]; *compare* *Jun-Yong Kim v A&J Produce Corp.*, 15 AD3d 251 [2005]).

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4146 The People of the State of New York, Ind. 1761/08
Respondent,

-against-

Kevin Fortune,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered April 7, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. We do not find the police testimony to be implausible or materially inconsistent.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The convictions at issue were highly probative of defendant's credibility, and their probative value outweighed any prejudicial effect, which the court minimized by precluding

inquiry into prejudicial underlying facts.

Defendant's generalized objections failed to preserve his challenges to the prosecutor's summation (*see e.g. People v Harris*, 98 NY2d 452, 492 [2002]) 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]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4147 In re Soho 54 LLC, etc., Index 100704/09
Petitioner-Appellant,

-against-

Peter S. Bergman, etc., et al.,
Respondents-Respondents.

_____

Composto & Composto, Brooklyn (John L. Fendt of counsel), for appellant.

Paul A. Shneyer PC, New York (Paul A. Shneyer of counsel) for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered December 4, 2009, which denied the petition, declared that petitioner may not use its easement through the alley between 56 and 58 Watts Street (the Alley) as long as the easement also benefits 52 Watts Street and enjoined petitioner from using the easement, unanimously affirmed, without costs.

"It has long been the rule that the owner of the dominant tenement may not subject the servient tenement to servitude or use in connection with other premises to which the easement is not appurtenant" (*Mancini v Bard*, 42 NY2d 28, 31 [1977] [internal quotation marks and citations omitted]). While two of petitioner's properties (56 and 54 Watts Street) have the right to use the Alley, the third property (52 Watts Street) does not. The reference to an alley in the 1816 deed for 52 Watts Street is to an alley running from 52 Watts Street to Sixth Avenue, not the

Alley at issue in this case. The 1918 document on which petitioner relies is not dead, but rather is a lease that expired, at the latest, in 1939.

Since petitioner has built a hotel on all three properties (52-56 Watts Street), the court properly enjoined petitioner from using its easement to the Alley "until such time as the building shall be so changed, altered or arranged as to permit the enjoyment of the easement for the advantage of [54-56 Watts Street] only" (*McCullough v Broad Exch. Co.*, 101 App Div 566, 574 [1905], *affd* 184 NY 592 [1906]).

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4149 Robert Whitaker, Index 110457/07
Plaintiff-Appellant,

-against-

Sambaly Soumano, et al.,
Defendants-Respondents.

_____

Bruce A. Newborough, Brooklyn, for appellant.

Baker McEvoy Morrissey & Moskovits, P.C., New York (Stacey R. Seldin of counsel), for Sambaly Soumano and Beech Trans Corp., respondents.

Law Offices of Frank J. Laurino, Bethpage (Calvin Weintraub of counsel), for Prince Yates, respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered September 24, 2009, which granted defendants' motion for summary judgment dismissing the complaint for lack of serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendants established prima facie that plaintiff did not sustain a serious injury as a result of the accident by submitting the reports of doctors who concluded, based on independent medical examinations, that plaintiff's range of motion was normal (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). However, plaintiff submitted sufficient objective medical evidence to raise factual issues as to the "significant limitation" or "permanent consequential limitation" categories of serious injury (Insurance Law § 5102[d]). The doctor who treated

him commencing on the day after the accident affirmed that he noted pain and limited range of motion in plaintiff's right shoulder and lumbar spine on his initial examination, 83% limitation in range of motion three months after the accident, and 52% nearly two years after the accident. In addition, the doctor concluded that plaintiff was unlikely to recover fully, thus providing both quantitative and qualitative assessments of plaintiff's condition sufficient to create triable issues of fact (*see id.*).

Plaintiff failed to raise an issue of fact as to his claim of a 90/180-day injury.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4150 Kevin Gilmartin, Index 15268/07
Plaintiff-Respondent,

-against-

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

John O'Grady, et al.,
Defendants-Appellants.

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

Dinkes & Schwitzer, P.C., New York (Naomi J. Skura of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry L. Schachner, J.), entered April 28, 2010, which, inter alia, denied the O'Grady defendants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established that they are the owners of a single-family residential property and are therefore exempt from statutory liability for personal injury caused by the failure to maintain the sidewalk abutting their property in a reasonably safe condition (*see* Administrative Code of City of NY § 7-210[b]). However, they failed to establish their freedom from common-law liability by showing that they did not affirmatively cause or create the alleged defect in the sidewalk (*see Otero v City of New York*, 213 AD2d 339 [1995]). While defendants denied that they made any repairs to a raised portion of the sidewalk

adjacent to a tree bench (which the parties agree is the site of plaintiff's fall), there is photographic evidence in the record that indicates a "patched" area on that portion of the sidewalk. In addition, while defendants claim to have observed that the elevation differential in the sidewalk was caused by the roots of the tree, as opposed to the tree bench, they also testified that the differential increased "slightly" after they installed the tree bench. These conflicting facts and credibility issues preclude summary judgment (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]).

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4151 The People of the State of New York, Respondent,

-against-

Eddy Pena, Defendant-Appellant.

Ind. 6127/06

Jorge Guttlein, New York, for appellant.

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered March 12, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree, and sentencing him to a term of 4 years, unanimously affirmed.

Defendant was not deprived of his right to conflict-free counsel when his attorney represented a codefendant at a joint guilty plea proceeding, in the temporary absence of the codefendant's own attorney. Defendant has not established that any conflict of interest operated to his detriment or bore a substantial relation to the conduct of the defense (*see People v Recupero*, 73 NY2d 877, 879 [1988]; *see also Cuyler v Sullivan*, 446 US 335, 348-350 [1980]). The record, including the transcript of the sentencing proceeding at which the codefendant's attorney appeared, establishes that defendant's attorney's brief representation of the codefendant was

essentially ministerial. We also note that defendant and the codefendant received identical dispositions.

The plea minutes also establish that defendant was expressly informed of the deportation consequences of his guilty plea, and his arguments to the contrary are without merit.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4152N Destinee Holloman, etc., et al., Index 17964/05
Plaintiffs-Respondents,

-against-

Manginelli Realty Co., Inc., et al.,
Defendants-Respondents.
- - - - - -
Garbarini & Scher, P.C.,
Non-Party Appellant.

_____

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

Levy, Phillips & Konigsberg, LLP, New York (Philip Monier, III of counsel), for Destinee Holloman and Tonisha Mimms, respondents.

Yoeli & Gottlieb LLP, New York (Michael Yoeli of counsel), for Manginelli Realty Co., Inc., Appula Management Corp. and Vito Manginelli, respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered September 24, 2010, which denied the motion of nonparty law firm retained by the New York Liquidation Bureau, as ancillary receiver for the insurance carrier, to withdraw as counsel for defendants, unanimously affirmed, without costs.

Defendants are the owner and managing agent of an apartment building in which the infant plaintiff was allegedly exposed to lead-based paint between May 2002 and September 2004. The ancillary receiver retained the law firm to represent defendants in the matter in October 2005. Five years later, when the matter was ready for trial, the entity handling covered claims of the carrier in liquidation notified the law firm and defendants that

it was disclaiming coverage, asserting that the alleged exposure did not occur within the policy period.

The motion court properly denied the law firm's motion without reaching the merits of the coverage dispute, since it is settled that a motion for withdrawal by counsel under such circumstances is an improper attempt to test an insurer's disclaimer of coverage (*see Brothers v Burt*, 27 NY2d 905 [1970]). "[T]he right of an insurer to deny coverage, can only be resolved by a declaratory judgment action in which the defendant[s] would be able to adequately litigate the facts of [the insurance company's] disclaimer" (*Sojka v 43 Wooster LLC*, 19 AD3d 266, 267 [2005] [internal quotation marks and citations omitted]). Furthermore, the law firm did not demonstrate any conflict of interest arising from its clients' conduct or inconsistency between their interests, which would warrant granting the motion to withdraw (*compare Dillon v Otis El. Co.*, 22 AD3d 1 [2005]; *Carbonetti v Carver Concrete Corp.*, 43 AD2d 522 [1973]).

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4153 The People of the State of New York, Ind. 1948/06
Respondent,

-against-

Bledar Haxhia,
Defendant-Appellant.

_____

Law Offices of Samuel Braverman, Bronx (Samuel Braverman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered February 23, 2009, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, to a determinate term of 20 years, unanimously affirmed.

After considering the notes it received alleging belligerent conduct and extreme tension during jury deliberations, the court properly exercised its discretion in denying defendant's application for individual inquiries of the jurors and in determining that supplemental instructions, as well as a break from deliberations, would be sufficient (*see e.g. People v Gathers*, 10 AD3d 537 [2004], *lv denied* 3 NY3d 740 [2004]; *People v Cabrera*, 305 AD2d 263 [2003], *lv denied* 100 NY2d 560 [2003]; *People v Sampson*, 201 AD2d 314 [1994], *lv denied* 83 NY2d 971 [1994]; *compare People v Lavender*, 117 AD2d 253 [1986], *appeal dismissed* 68 NY2d 995 [1986] [court obligated to inquire into

threats of physical violence]). Although the notes contained language from particular jurors asserting their inability to deliberate fairly or continue serving, it was clear from the notes and their context that the jury's actual difficulty was heated, verbally abusive and exhaustive deliberations. Accordingly, the notes did not provide any indication that any juror had become grossly unqualified or had engaged in substantial misconduct within the meaning of CPL 270.35(1). Following the court's actions, the problems appeared to resolve themselves, and there is no reason to believe that the ultimate unanimous verdict, confirmed by polling, was the result of coercion.

The evidentiary rulings challenged by defendant were proper exercises of the court's discretion over the admissibility of evidence (*see generally People v Aska*, 91 NY2d 979, 981 [1998]), and over the sanctions, if any, to be imposed for belated disclosure (*see* CPL 240.70[1]; *People v Jenkins*, 98 NY2d 280 [2002]). In any event, any error in these rulings was harmless in light of the overwhelming eyewitness and forensic evidence that disproved defendant's justification defense.

With regard to these evidentiary rulings, as well as the court's handling of the jury notes, defendant only raised state law issues, and he did not alert the court to his present constitutional arguments. Accordingly, the constitutional aspect

of each of these claims is unpreserved (*see e.g. People v Lane*, 7 NY3d 888, 889 [2006]; *People v Angelo*, 88 NY2d 217, 222 [1996]; *People v Gonzalez*, 54 NY2d 729 [1981]), and we decline to review those arguments in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4155 In re Dan McL.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Elina Druker of counsel), for respondent.

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about January 14, 2010, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he had committed an act that, if committed by an adult, would constitute the crime of petit larceny, and placed him with the Office of Children and Family Services for a period of 12 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]). The evidence warranted the inference that appellant shared his companion's intent in all respects (*see e.g. Matter of Justice G.*, 22 AD3d 368 [2005]), including the intent to deprive a store of property by exercising dominion and control wholly inconsistent with the continued rights of the owner (*see People v Olivo*, 52 NY2d 309, 318

[1981]). Although appellant only handled the stolen item briefly, his entire course of conduct demonstrates that he did so as part of a plan to hide the item in his companion's backpack and remove it from the store. We have considered and rejected appellant's remaining arguments.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, J.J.

4156 In re Joseph Benjamin P.,

A Child Under Eighteen Years of Age, etc.,

Allen P.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Gloria Sosa-Litner, J.), entered on or about May 1, 2009, which, upon a factual determination dated February 18, 2009 finding that respondent father neglected the subject child, placed the child in the custody of the Commissioner for Social Services until the completion of the next permanency hearing, unanimously affirmed, without costs.

Although the Court has been informed that a subsequent order of the Family Court, entered on or about January 19, 2010, vacated the order of disposition and released the child to the mother and father with ACS supervision and subject to conditions, such vacatur does not render the instant appeal academic, as the adjudication of neglect stands as a permanent stigma that may

impact respondent's standing in future proceedings (*see Matter of Joshua Hezekiah B.*, 77 AD3d 441, 442 [2010], *lv denied* 2010 NY Slip Op 91354 [2010])

A preponderance of the evidence clearly showed respondent to have neglected the child because he should have known of the mother's substance abuse and failed to protect the child (*see e.g. Matter of Albert G., Jr.*, 67 AD3d 608 [2009]). The fact that respondent father elected to turn a blind eye, or failed to inquire more fully into whatever suspicions he may have had, is no defense to the charge of neglect (*see Matter of Miyani M.*, 4 AD3d 430 [2004]).

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

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4158 The People of the State of New York, Ind. 6112/08
Respondent,

-against-

Francisco Hernandez,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about August 11, 2009, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4159 Ableco Finance LLC, Index 650618/09
Plaintiff-Respondent,

-against-

John F. Hilson, et al.,
Defendants-Appellants.

_____

Davis Polk & Wardwell LLP, New York (Paul Spagnoletti of counsel), for appellants.

Shapiro Forman Allen & Sava LLP, New York (Stuart L. Shapiro of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 12, 2010, which denied defendants' motion to dismiss the complaint, unanimously modified, on the law, to grant the motion as to the claim that defendants failed to structure the demand loan so as to protect plaintiff's security interest in the borrower's primary bank accounts, thereby placing a loan repayment at risk of being set aside as a "voidable preference," and otherwise affirmed, without costs.

The documentary evidence does not conclusively establish a defense to plaintiff's allegations that defendants failed to adequately advise it that it was not getting a first priority security interest in all the borrower's existing and future assets, which included the inventory purchased from the bankrupt retail clothing chain, as well as the borrower's interest in proceeds derived from acting as the retailer's agent for

liquidated assets that could not be purchased because of lease transfer issues with certain stores (*see Campbell v Rogers & Wells*, 218 AD2d 576, 580 [1995]; *Camarda v Danziger, Bangser & Weiss*, 167 AD2d 152 [1990]). Any negligence on plaintiff's part in reviewing the documents is merely a factor to be assessed in the mitigation of damages (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 305 n 2 [2001]).

The allegations that defendants failed to advise plaintiff that the acquisition documents permitted the borrower to have credit card sales proceeds deposited into bank accounts over which the retailer retained control and that there was a significant risk that the retailer would use these deposits to set off its own expenses rather than to repay the loan are sufficient to allege that defendants "failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession" (*Arnav Indus.*, 96 NY2d at 303-304; *Camarda*, 167 AD2d at 152). Defendants' contention that the alleged "improper conduct" of the retailer was an unforeseen intervening cause of plaintiff's loss is unavailing at this juncture (*see Garten v Shearman & Sterling LLP*, 52 AD3d 207 [2008]).

However, documentary evidence establishes a conclusive defense to the allegation that defendants' failure to include in the original security agreement an express obligation that the

borrower sign control account agreements raised the "specter" of a preferential transfer challenge to a $28.5 million loan repayment the borrower made within 90 days of filing for bankruptcy. The documents show that on August 26, 2008, the borrower granted plaintiff a security interest in all its deposit accounts and cash, and that on September 12, 2008, plaintiff executed an agreement that required the bank to honor all instructions it received from plaintiff, but not from the borrower, concerning that account. Thus, a security interest in the account was transferred to plaintiff on August 26, 2008 and was perfected on September 12, 2008 – within 30 days of the transfer. Pursuant to bankruptcy law, if the security interest is perfected within 30 days of the transfer, then the transfer is deemed to have been made when the security interest was created (*see* 11 USC § 547[e][2][A]). Since the transfer is deemed to have been made on August 26, 2008, it was not "for or on account of an antecedent debt owed by the debtor before such transfer was made" – one element required to establish a voidable preference (*see id.* § 547[b][2]). Thus, no voidable preference was established (*id.* § 547[b]).

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

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4161 The People of the State of New York, Ind. 1485/03
Respondent,

-against-

Roberto Marti,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Debevoise & Plimpton, LLP, New York (William C. Weeks of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

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Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about July 27, 2006, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The 2009 Drug Law Reform Act (L 2009, ch 56), like its predecessors, provides that an eligible inmate's application for resentencing "shall" be granted, unless "substantial justice" dictates that it be denied (CPL 440.46[3] [incorporating by reference provisions of 2004 DLRA (L 2004, ch 738, § 23)]). The determination is discretionary (*see People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]) and is made on an individualized assessment of all the relevant facts and circumstances, including, among other things, a defendant's recidivism (*see e.g. People v Ciriaco*, 46 AD3d 374 [2007]) or misconduct while incarcerated (*id.*). In light of the facts presented here, the court properly denied the application. While

the court misspoke in reciting the applicable standards for resentencing, the decision and order makes clear that the court did, in fact, apply the correct standards in determining defendant's application.

We have considered and rejected defendant's remaining contentions.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4163 MBIA Insurance Corporation, et al., Index 601324/09
Plaintiffs-Appellants-Respondents,

-against-

Merrill Lynch, et al.,
Defendants,

Merrill Lynch International,
Defendant-Respondent-Appellant.

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Philippe Z. Selendy of counsel), for appellants-respondents.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Scott D. Musoff of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 9, 2010, which, to the extent appealed from, granted defendant Merrill Lynch International's motion to dismiss the complaint except as to the fourth cause of action, unanimously modified, on the law, to dismiss the fourth cause of action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint in its entirety.

Plaintiffs' fraud-related claims failed to state a cause of action in light of the specific disclaimers in the contracts, executed following negotiations between the parties, all sophisticated business entities, providing that plaintiff Lacrosse would not rely on defendants' advice, that it had the

capacity to evaluate the transactions, and that it understood and accepted the risks (*see Capital Z Fin. Servs. Fund II, L.P. v Health Net, Inc.*, 43 AD3d 100, 111 [2007]; *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87 [2001]). Given their level of sophistication and the undisputed fact that the information was not exclusively in defendants' possession, plaintiffs' contention that it would have been impractical to conduct the investigation necessary to discern the truth of defendants' allegedly fraudulent representations does not satisfy the requirements of the peculiar knowledge exception (*see Steinhardt Group v Citicorp*, 272 AD2d 255, 257 [2000]).

The cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained because it is premised on the same conduct that underlies the breach of contract cause of action and is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (*see Hawthorne Group v RRE Ventures*, 7 A.D.3d 320, 323 [2004] [internal quotation marks and citation omitted]).

The breach of contract cause of action fails to state a cause of action for breach of the promise to provide subordination protection since there is no such promise in the relevant agreements. Nor does it state a cause of action for breach of the promise to provide AAA-rated securities since it is undisputed that defendants in fact provided securities with AAA

ratings. Nowhere in the plain language of the documents does there appear a promise of credit quality.

The court correctly found that plaintiffs could not seek rescission since they failed to demonstrate that they could not be compensated by damages.

Contrary to plaintiffs' argument, the waivers in the financial guaranties agreed to by plaintiff MBIA waived MBIA's defense to payment (*see Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-210 [2007], *lv denied* 10 NY3d 741 [2008]; *Gannett Co. v Tesler*, 177 AD2d 353, 353 [1991]).

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4164 In re Kriss Hawthorne, Index 402781/09
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Kriss Hawthorne, appellant pro se.

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 14, 2010, which granted the cross motion of respondent New York City Housing Authority pursuant to CPLR 3211(a)(7) and dismissed the petition challenging respondent's determination that petitioner was not entitled to a "remaining family member" grievance hearing, unanimously affirmed, without costs.

Since respondent Housing Authority's rule (New York City Housing Authority Housing Management Manual, ch VII, § E [1][c][2]) requires continued payment of use and occupancy as a condition precedent to commencement of a grievance on entitlement to status as a remaining family member, petitioner's acknowledgment that he had failed to pay use and occupancy charges provided grounds for respondent's determination (*see Garcia v Franco*, 248 AD2d 263, 264-265 [1998], *lv denied* 92 NY2d 813 [1998]).

Additionally, petitioner's relationship, as godson to the deceased tenant, is not within the Housing Authority's category of immediate relatives who are able to obtain permanent permission to occupy an apartment and succeed to a deceased tenant's lease (*see* New York City Housing Authority Housing Management Manual, IV [B]). There is no provision for permitting a tenant's godson to succeed to a lease; thus, the denial of petitioner's grievance without a hearing was not arbitrary and capricious (*see Goldman v New York City Hous. Auth.*, 63 AD3d 532 [2009], *lv denied* 14 NY3d 701 [2010]).

Finally, Housing Authority policy requires a tenant to make a written request to the manager to have a relative or other family member become either a legally authorized permanent household member or a co-tenant, a policy consistently enforced by this Court (*see e.g. Edwards v New York City Hous. Auth.*, 67 AD3d 441 [2009]). Here, the deceased tenant did not obtain written permission to add petitioner to the household, and he was not listed on the affidavits of income or the tenant data

summary. Accordingly, the court properly dismissed the petition, as any hearing would have been futile.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4165 The People of the State of New York, Ind. 3859/06
Respondent,

-against-

Kin Wong,
Defendant-Appellant.

_____

Dan Savatta, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 15, 2007, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 10 years, unanimously affirmed.

Defendant did not request a charge on the defense of justification, and the court was under no obligation to deliver one sua sponte. It was clear that defense counsel was pursuing a theory that the complainant was stabbed with his own knife during a struggle over the knife, as opposed to a theory that defendant stabbed the complainant in self-defense. Regardless of whether the evidence might have supported multiple defenses, an unrequested justification charge would have improperly interfered with defendant's strategy (*see People v Johnson*, 75 AD3d 426 [2010]).

Defendant's claim that his trial counsel rendered ineffective assistance by failing to request a justification

charge is unreviewable on direct appeal because it involves matters outside the record concerning counsel's strategic choices (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]).

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4166 The People of the State of New York, Ind. 4868/08
Respondent,

-against-

Steven Letsche,
Defendant-Appellant.

_____

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

Cyrus R. Vance, District Attorney, New York (Matthew C. Williams 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 (Carol Berkman, J.), rendered on or about February 4, 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: FEBRUARY 1, 2011

CLERK

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

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4167 Laurence L. Leff, Ph.D., etc., et al., Index 115952/08
Plaintiffs-Appellants,

-against-

TIAA-CREF Life Insurance Company,
Defendant-Respondent.

_____

Laurence L. Leff, appellant pro se.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Daniel G. Ecker of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered November 24, 2009, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing the cause of action for a declaration that it must pay, transfer or roll over the proceeds of the decedent's personal annuity contract into an individual retirement account in the individual plaintiff's name, unanimously modified, on the law, to deny the motion and to declare that defendant is not obligated to pay, transfer or roll over the proceeds of the decedent's personal annuity contract into an IRA in plaintiff's name, and otherwise affirmed, without costs.

The annuity contract at issue here is not ambiguous; plaintiff's interpretation of the contract, according to which he, who is not a party to it, is permitted to make changes to it, is not reasonable (*see RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 436 [2009]; *Fiske v Fiske*, 95 AD2d 929, 931 [1983], *affd* 62

NY2d 828 [1984]). Nor was it reasonable for plaintiff to rely on the alleged promises of defendant's employees to roll over the death benefit into an IRA account, since this promise clearly was in violation of the annuity contract, a copy of which plaintiff possessed at the time he alleges he relied on defendant's promises. Thus the claim for promissory estoppel fails (*see New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 490 [2004]). The detrimental reliance claim fails for the same reason (*see Rosenberg v Home Box Off., Inc.*, 33 AD3d 550, 550 [2006], *lv denied* 8 NY3d 804 [2007]).

Plaintiff's argument based on the Electronic Records and Signatures in Global and National Commerce Act (*see* 15 USC 7001) is unavailing, since, even assuming that his conversations with defendant's employees formed a contract, that contract could not be used to alter the terms of the annuity contract between defendant and decedent (*see Fiske*, 95 AD2d at 931).

Plaintiff's claim that he and defendant entered into a contract requiring defendant to roll over the death benefit into an IRA is without merit. The record is devoid of the manifestation of mutual assent required to create a contract (*see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). Defendant never intended that plaintiff interpret its provision of customer service as an offer to enter into a contract, and, at the time of the alleged

promise, neither plaintiff nor defendant's employees were certain that the death benefit could legally be rolled over. Defendant investigated the matter in an effort to help plaintiff, and ultimately notified him that any action other than a lump sum payment to the estate was unambiguously prohibited by the annuity contract.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4168 Elizabeth Baynes, Index 102392/05
Plaintiff-Appellant,

-against-

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

_____

Kahn Gordon Timko & Rodriques, New York (Nicholas I. Timko of counsel), for appellant.

Gallo Vitucci & Klar LLP, New York (Daniel P. Mevorach of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered October 14, 2009, which, in an action for personal injuries allegedly sustained when plaintiff fell on gravel as she crossed the street, granted defendants' motions for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff alleges that at the time of her accident, she was crossing the street with the assistance of a walker/shopping cart which became stuck in the subject gravel, causing her to fall. In preparation for repaving, the street had recently been milled by defendant Columbus Construction Corp., leaving an irregular, striated surface. Columbus had been hired by defendant City of New York to perform the milling work.

Dismissal of the complaint as against Columbus was

appropriate. The record establishes that the presence of the gravel was open and obvious and not inherently dangerous (*see Schulman v Old Navy/Gap, Inc.*, 45 AD3d 475, 476 [2007]). Indeed, plaintiff testified at her deposition that she was looking down and observed the gravel prior to proceeding across the street.

Summary judgment was also properly granted to the City inasmuch as plaintiff admittedly failed to meet the written notice requirement pursuant to Administrative Code of the City of New York § 7-201(c)(2). It is undisputed that Columbus milled the street where plaintiff fell, and thus, her claim against the City is not exempted from the written notice requirement (*see Oboler v City of New York*, 8 NY3d 888 [2007]; *Walker v City of New York*, 34 AD3d 226 [2006]).

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: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4169 Eduard Rakhman, et al., Index 400937/09
Plaintiffs,

Angel Rivas,
Plaintiff-Respondent,

-against-

Alco Realty I, L.P., et al.,
Defendants,

One More Time Realty Corp.,
Defendant-Appellant.

_____

Jacob Rabinowitz, New York, for appellant.

Steven Banks, The Legal Aid Society, New York (Scott A. Rosenberg of counsel), and Patterson Kelknap Webb & Tyler LLP, New York (Claude S. Platton of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered April 5, 2010, which, to the extent appealed from, granted plaintiff Angel Rivas's motion for summary judgment on his causes of action for declaratory and injunctive relief, inter alia, enjoining defendant One More Time Realty Corp. to accept plaintiff's Section 8 subsidy and execute all necessary documents, including a lead paint disclosure form, declaring that plaintiff's rent is reduced to his rent contribution under the Section 8 program until defendant starts receiving plaintiff's Section 8 subsidies, and enjoining defendant to refund all moneys collected in excess of plaintiff's contribution under the Section 8 subsidy as of December 2008, unanimously affirmed, with costs.

Defendant's refusal to complete the lead paint disclosure form required by the New York City Housing Authority to process plaintiff's Section 8 voucher constitutes a refusal to accept plaintiff's Section 8 benefits and, therefore, a violation of the anti-discrimination provisions of the J-51 tax abatement law (Administrative Code of the City of New York § 11-243[k]) and the New York City Human Rights Law (Administrative Code § 8-107[5][1]-[2]) (*see Tapia v Successful Mgt. Corp.*, __ AD3d __, 2010 NY Slip Op 08860 [2010]; *Kosoglyadov v 3130 Brighton Seventh, LLC*, 54 AD3d 822 [2008]). Defendant's explanation that it satisfied its one-time obligation to submit a lead paint disclosure certification when plaintiff first moved into the building in 1997, pursuant to 24 CFR 35.88 and 35.92, is unavailing, since satisfaction of federal requirements does not except defendant from state law requirements (*see Rosario v Diagonal Realty, LLC*, 8 NY3d 755, 764 n 5 [2007], *cert denied* 552 US 1141 [2008]; *Tapia*, __ AD3d at __, 2010 NY Slip Op 08860 at *3; *Kosoglyadov*, 54 AD3d at 824). We find defendant's explanation to be a pretextual excuse for its unwillingness to accept plaintiff's Section 8 benefits (*see Jones v Park Front Apts., LLC*, 73 AD3d 612, 612-613 [2010]). The court correctly found that plaintiff would have been eligible for the benefits but for the missing lead paint disclosure form, and properly granted the relief sought (*see Kosoglyadov*, 54 AD3d at 824).

Defendant's remaining contentions are unpreserved and in any event without merit.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4170 The People of the State of New York, Ind. 4232/00
Respondent,

-against-

Michael Cagle,
Defendant-Appellant.

_____

Zoe Dolan, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about September 16, 2008, which denied defendant's motion to be resentenced under the Drug Law Reform Act of 2005 (L 2005, ch 643), unanimously affirmed.

In denying defendant's application made under the 2005 DRLA, the court correctly found that he was ineligible for resentencing on his second-degree conspiracy conviction because, regardless of the drug-related nature of the underlying conduct, he was not convicted of an offense defined in article 220 of the Penal Law (*see People v Caba*, 49 AD3d 380 [2008], *lv denied* 10 NY3d 957 [2008]; *People v Anonymous*, 43 AD3d 806 [2007]). After the court denied the motion, the Legislature enacted the 2009 DRLA (L 2009, ch 56). Defendant did not move for resentencing under the 2009 DRLA, and the issue of his eligibility under that statute is not properly before us on this appeal. In any event, since the 2009 statute contains the same language as its 2004 and 2005

predecessors restricting its application to persons convicted of Penal Law article 220 offenses, defendant is plainly ineligible for resentencing, and his arguments to the contrary are without merit.

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

ENTERED: FEBRUARY 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4171N Teresa Chiaramonte, etc., Index 6233/03
Plaintiff-Respondent,

-against-

Paolo T. Coppola, M.D.
Defendant-Appellant.

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Silverson, Pareres & Lombardi, LLP, New York (Rachel H. Poritz of counsel), for appellant.

Weinberg & Gerontianos, P.C., New York (Melissa A. Weinberg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered January 28, 2009, which, in an action alleging medical malpractice and wrongful death, granted plaintiff's motion to vacate the default judgment entered against her and reinstated the complaint, unanimously reversed, on the law, without costs, the motion denied and the default judgment reinstated. The Clerk is directed to enter judgment accordingly.

The motion to vacate the default judgment, which was entered based upon plaintiff's failure to appear at a scheduled status conference (*see* 22 NYCRR 202.27[b]), was improperly granted since plaintiff failed to show a meritorious cause of action. The affidavit of plaintiff's purported expert, whose identity cannot be discerned from the affidavit, was insufficient since the expert failed to make factual allegations, describe the extent of his or her knowledge of the matter, or state with specificity the

observations as to the procedures or treatments performed and defendant's alleged deviations from the acceptable standards of medical care. Nor does the expert explain how the alleged departures from those standards contributed to the decedent's death (*see DeRosario v New York City Health & Hosps. Corp.*, 22 AD3d 270 [2005]; *compare Kaufman v Bauer*, 36 AD3d 481, 482-483 [2007]).

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

ENTERED: FEBRUARY 1, 2011

CLERK