SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 3, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Sweeny, Freedman, Richter, Abdus-Salaam, JJ.

4037 The People of the State of New York, Respondent, Ind. 1754/04

-against-

Paul Marino,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered June 7, 2005, convicting defendant, upon his plea of guilty, of attempted criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the second felony offender adjudication and remanding for resentencing in accordance with the decision herein, and otherwise affirmed.

Defendant claims his plea was involuntary, and the product of ineffective assistance of counsel, in that at the time of the plea he believed his federal conviction was the equivalent of a

New York felony and that he had to be sentenced as a predicate felon under Penal Law § 70.06(1)(b). He asserts that this misinformation affected plea negotiations and his decision to plead guilty. He requests vacatur of the plea.

The record establishes that the plea was voluntary, and that defendant did not preserve the issue of his predicate status at sentencing (*People v Kelly*, 65 AD3d 886 [2009], *lv denied* 13 NY3d 860 [2009]; *People v Samms*, 95 NY2d 52, 57 [2000]).

However, the People do not dispute that defendant's federal conviction on May 17, 2002 for mail fraud (violation of 18 USC 1431), which served as the predicate in this matter, has no felony equivalent in state law. Thus, it cannot be the basis for adjudicating defendant a second felony offender (*see Matter of Hochberg*, 259 AD2d 94 [1999] [holding that "the New York State Penal Law contains no felony . . . equivalent to the federal felon[y] of . . . mail fraud"]). Because defendant's predicate sentence was based on a mistake of law, we find that this case presents a proper basis for exercising our interest of justice jurisdiction and remanding for resentencing, but we find no basis to vacate the plea (*see People v Marrero*, 2 AD3d 107 [2003], *affd* 3 NY3d 762 [2004]; *People v Assadourian*, 19 AD3d 207 [2005], *lv denied* 5 NY3d 785 [2005]; *People v Wallace*, 188 AD2d 499 [1992]; *People v Candelario*, 183 AD2d 440 [1992], *appeal denied* 80 NY2d 894 [1992]). Of course, on remand, the People may allege

a different prior felony conviction, if there is one, as the basis for predicate felony adjudication.

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Richter, Manzanet-Daniels, Román, JJ.

4104 Hudson Insurance Company, et al., Index 604411/05
Plaintiffs-Respondents,

-against-

M.J. Oppenheim, in his quality as
Attorney in Fact in Canada for
Lloyd's Underwriters, etc.,
Defendant-Appellant.

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Lazare Potter & Giacovas LLP, New York (David E. Potter of counsel), for appellant.

Katten Muchin Rosenman LLP, New York (Philip A. Nemecek of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 26, 2009, which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendant demonstrated as a matter of law that plaintiffs' notice of the claimed loss was untimely. The subject policy required the insured to provide notice of a loss "[a]t the earliest practicable moment after discovery of [the] loss by the Corporate Risk Manager," and provided that "[d]iscovery occurs when the Corporate Risk Manager first becomes aware of facts which would cause a reasonable person to assume that a loss ... has been or will be incurred." This language notwithstanding,

there was no designated "Corporate Risk Manager" at either plaintiff. Rather, plaintiffs assert that Fairfax's chief actuary, Jean Cloutier, functioned as their "de facto corporate risk manager." They argue that Cloutier learned of the loss in June or July 2003 and that therefore the notice transmitted to the Underwriters on May 30, 2003 was timely. However, Hudson's general counsel and assistant general counsel, among other executives, learned of the subject loss on July 23, 2002. The assistant general counsel only later informed Cloutier of it. Indeed, Cloutier testified that he merely "remind[ed]" subsidiaries to report claims to insurers and that he merely "requested" that Fairfax subsidiaries (among them Hudson) copy him on claims. There is no evidence that subsidiaries were required to report assumable losses, as opposed to filed claims, to Cloutier.

Thus, crediting their assertion that Cloutier functioned as their "Corporate Risk Manager," we find that plaintiffs breached their duty to "exercise reasonable diligence . . . to acquire knowledge" of covered losses "with reasonable celerity" (*see Bauer v Whispering Hills Assoc.*, 210 AD2d 569, 571 [1994], *lv denied* 86 NY2d 701 [1995] [internal quotation marks and citation omitted]). Moreover, to the extent that Cloutier delegated the risk management role to Hudson's legal department (by directing subsidiaries to report losses directly to the insurer), Hudson's

general counsel's and assistant general counsel's knowledge of the claimed loss — and the corresponding duty to notify the Underwriters — would be imputed to Cloutier (*see Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 240 [2002]; *Bauer*, 210 AD2d at 571).

In addition, since plaintiffs "discovered" the loss on July 23, 2002, given the 24-month limitations period contained in the policy, this action was untimely commenced on July 28, 2004, the date of a Standstill Agreement entered into by the parties (*see e.g. Lichter Real Estate No. Three, L.L.C. v Greater N.Y. Ins. Co.*, 43 AD3d 366, 366-367 [2007]; *815 Park Ave. Owners v Fireman's Ins. Co. of Washington, D.C.*, 225 AD2d 350, 354 [1996], *lv denied* 88 NY2d 808 [1996]).

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4172 The People of the State of New York, Ind. 1485/06
Respondent,

-against-

Melvin Orange,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Jalina J. Hudson of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John W. Carter, J.), rendered on or about August 3, 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 3, 2011

CLERK

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

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4174 In re Lizzette F.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio 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 (Nancy M. Bannon, J.), entered on or about April 6, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed an act that, if committed by an adult, would constitute the crime of obstructing governmental administration in the second degree, and placed her on enhanced supervised probation for 12 months, unanimously affirmed, without costs.

In light of appellant's history of running away and drug use, and her troubled relationship with her mother, the court properly exercised its discretion in placing appellant on probation under the enhanced supervision program. This was the least restrictive dispositional alternative consistent with

appellant's needs and the need for protection of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4175 Stanley J. Kogan, et al., Index 108255/06
Plaintiffs-Respondents,

-against-

North Street Community, LLC, et al.,
Defendants-Respondents,

Grubb & Ellis Management
Services, Inc., et al.,
Defendants.
- - - - -
North Street Community, LLC, et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

Nino Tripicchio & Son Landscaping, et al.,
Third-Party Defendants-Appellants.

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Baxter, Smith & Shapiro, P.C., Hicksville (Margot L. Ludlam of counsel), for Nino Tripicchio & Son Landscaping, appellant.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Sarah M. Ziolkowski of counsel), for Merchants Mutual Insurance Company, appellant.

Russo, Keane & Toner, LLP, New York (Alan Russo of counsel), for North Street Community, LLC, 311 North Street, LLC, Bettina Equities Company, LLC, respondents/respondents-appellants.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for Stanley J. Kogan and Penny Sniffen-Kogan, respondents.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered May 19, 2010, which, insofar as appealed from, denied the motion by North Street Community, LLC, 311 North Street, LLC, and Bettina Equities Company, LLC (collectively, North Street) for summary judgment dismissing the complaint as

against them, denied Tripicchio's motion for summary judgment dismissing the third-party complaint as against it, and implicitly denied third-party defendant Merchants Mutual Insurance Company's motion for summary judgment declaring that it has no obligation to provide insurance coverage for North Street in connection with the first-party action and dismissing the third-party complaint and all cross claims against it, unanimously modified, on the law, to grant Tripicchio's motion and to grant Merchants' motion and declare that it has no obligation to provide insurance coverage for North Street in connection with the first-party action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of Tripicchio dismissing the third-party complaint as against it and judgment in favor of Merchants dismissing the third-party complaint and all cross claims against it.

North Street submitted certified weather records and an expert meteorologist's affidavit showing that temperatures on the day before the accident rose to 61° or 62° and that any ice that might have formed overnight would have melted by the time of plaintiff's accident. Thus, North Street established prima facie that it neither created nor had notice of an icy condition in its parking lot (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500-501 [2008]; *Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [2007]). Plaintiff's testimony that he slipped on a 2½-foot-by-1½-foot

patch of ice, coupled with his expert's affidavit stating that ice had formed by 3:00 A.M. and would not have melted by the time of plaintiff's fall, raised issues of fact as to North Street's notice of the alleged icy condition (*see Garcia v Mack-Cali Realty Corp.*, 52 AD3d 420 [2008]).

Pursuant to its "Contract for Maintenance & Snow Plowing" with North Street Community, LLC, Tripicchio was required only to "snow plow if needed" for three winter months (including, without dispute, January 2006, the month of plaintiff's accident). On its face, the contract called for salt to be applied only after plowing had been performed. North Street's on-site property manager testified that Tripicchio was required to inspect for refreezing only in the event of snowfall. It is undisputed that, on January 18, the day before the accident, the temperature reached at least 61°, and there was rain but no snow. There is no evidence in the record of any snowfall after January 15, when about one-half inch of mixed snow and sleet fell, with only "trace" accumulation, and it is undisputed that the temperature would have caused any snow remnants to melt by midnight on January 18. In sum, there is no record of any snowfall event that could have triggered Tripicchio's duty to either plow or inspect the premises for refreezing on the morning of the accident. Accordingly, plaintiff's fall did not arise from Tripicchio's performance of its work. Therefore, North Street is

not entitled to contractual indemnification against Tripicchio. Because Tripicchio had no liability for plaintiff's accident, North Street is also not entitled to contribution or common-law indemnification against it (*see Mas v Two Bridges Assoc.*, 75 NY2d 680, 689-690 [1990]).

Finally, even were we to find Tripicchio liable, recovery would not lie against Merchants. North Street learned of the accident approximately two weeks after it occurred, but failed to notify Merchants until four months later. This delay rendered the notice untimely under a provision in Tripicchio's policy requiring that Merchants be notified of an occurrence "as soon as practicable." Thus, Merchants had no obligation to North Street under the policy (*see Republic N.Y. Corp. v American Home Assur. Co.*, 125 AD2d 247 [1986]). In view of the foregoing, we do not reach Merchants' remaining insurance-related issues.

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4177 Francisca Montan, Index 7944/05
Plaintiff-Appellant,

-against-

Saint Vincent's Catholic Medical Center, et al.,
Defendants,

St. Vincent's Midtown Hospital, et al.,
Defendants-Respondents.

_____

Koehler & Isaacs, LLP, New York (Raymond J. Aab of counsel), for appellant.

Garfunkel Wild, P.C., Great Neck (Wilhelmina A. de Harder of counsel), for St. Vincent's Midtown Hospital, respondent.

Martin Clearwater & Bell LLP, New York (Stewart G. Milch of counsel), for Dr. Ramon Tallaj, respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered May 29, 2009, which, insofar as appealed from as limited by the brief, granted plaintiff's motion to renew her prior application to certify a class and defendants-respondents' respective motions to dismiss the RICO causes of action, and, upon renewal, adhered to the original determinations, unanimously affirmed, without costs.

The motion court correctly found that the new facts presented by plaintiff are "not very different" from those previously alleged, and do not warrant a change in the prior determination (CPLR 2221[e][2]). Plaintiff does not allege any injury recoverable under RICO (18 USC § 1964[c]) (*see Laborers*

Local 17 Health and Benefit Fund v Philip Morris, Inc., 191 F3d 229, 241 [2d Cir 1999], *cert denied* 528 US 1080 [2000]), and New York does not recognize an independent tort cause of action for civil conspiracy (*see Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424, 425 [2006]). Plaintiff failed to satisfy the statutory prerequisites for class certification (*see* CPLR 901; 902).

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4178 The People of the State of New York, SCI 2562/08
Respondent,

-against-

Angel M. Rodriguez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert Seewald, J.), rendered on or about November 24, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: FEBRUARY 3, 2011

CLERK

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

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4179 Bajraktari Management Corp., et al., Index 302737/09
Plaintiffs-Appellants,

-against-

American International Group, Inc., et al.,
Defendants,

American International Speciality
Lines Insurance Company,
Defendant-Respondent.

_____

Jeffrey F. Cohen, Bronx, for appellants.

Saiber LLC, Florham Park, NJ (Lisa C. Wood of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered October 9, 2009, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The insurance policy clearly and unambiguously defines "Continuity Date" as December 29, 2004. The motion court correctly declined to consider parol evidence to ascertain the parties' intention as to that date (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). "[A] contract is not rendered ambiguous just because one of the parties attaches a different, subjective meaning to one of its terms" (*Moore v Kopel*, 237 AD2d 124, 125 [1997]).

Plaintiffs' remaining arguments based upon their contention that the policy is ambiguous are unavailing. Their argument that

the policy should be construed in a manner that would be consistent with "the reasonable expectations of a New York City property owner" is also unavailing (*see Slayko v Security Mut. Ins. Co.*, 98 NY2d 289, 296-297 [2002]).

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4180 The People of the State of New York, Ind. 5383/04
Respondent,

-against-

Quinton Dais,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Eduardo Padro, J.), rendered February 25, 2010, resentencing defendant, as a second felony drug offender whose prior conviction was for a violent felony, to a term of 6 years, with 3 years' postrelease supervision, unanimously affirmed.

In granting defendant's CPL 440.46 motion for a reduced sentence, the court properly adjudicated him a second felony drug offender with a predicate violent felony conviction under Penal Law § 70.70(4), even though he was only adjudicated an ordinary second felony offender at his original sentencing.

Defendant's lengthy record includes, among other things, convictions for a violent felony in 1984 and a nonviolent felony in 1994. At the time of the underlying drug sale in 2004 that resulted in the present conviction, the classification of drug felon with a prior violent felony conviction under the 2009 Drug

Law Reform Act did not yet exist. Therefore, for purposes of the original sentence, it was immaterial whether defendant was a prior nonviolent or violent felon. The People selected the 1994 nonviolent felony conviction as the predicate felony conviction for sentencing purposes. The court adjudicated defendant a second felony offender and sentenced him to a term of 7 to 14 years.

In 2010, defendant successfully moved for resentencing under CPL 440.46. This time, the People filed a new predicate felony statement using the 1984 violent felony conviction. The court adjudicated defendant a second felony drug offender whose prior conviction was for a violent felony, and sentenced him accordingly.

Defendant argues that the People could not "relitigate" his predicate felony status at the resentencing. However, defendant's request for resentencing placed the case in a procedural posture that made it material, for the first time, that he was not only a predicate felon, but a predicate violent felon as well (*see People v Ramirez*, 49 AD3d 475 [2008], *lv dismissed* 10 NY3d 868 [2008]; *People v Alcequier*, 43 AD3d 699 [2007]; *see also People v Singleton*, 8 Misc 3d 1026[A], 2005 NY Slip Op 51295[U] [Sup Ct, NY County 2005], *affd* 40 AD3d 502 [2007], *lv denied* 9 NY3d 881 [2007]). Defendant is essentially seeking the benefits of resentencing under the Drug Law Reform

Act without any adverse consequences attendant thereto.

Furthermore, the original sentencing proceeding only determined that defendant was a predicate felon, based on the 1994 conviction. The question of whether he was also a predicate violent felon, based on his 1984 conviction, was neither litigated nor determined. Accordingly, defendant's arguments based on collateral estoppel, law of the case and CPL 400.21(8) are all without merit.

Defendant also argues that determining his predicate felon status on the basis of Penal Law § 70.70(4), a statute that took effect after the underlying drug sale, violated the Ex Post Facto Clause. That argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find the argument unavailing. The Ex Post Facto Clause "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred" (*Weaver v Graham*, 450 US 24, 30 [1981]). Here, defendant's new sentence of six years and three years' postrelease supervision was no greater than what he could have received under the law existing at the time of the crime, and it was actually less than what he originally received. Indeed, a reduced sentence was the whole point of his DRLA application.

Finally, we perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4181 In re Leah M. and Another,

Children Under the Age of
Eighteen Years, etc.,

Anthony M.,
Respondent-Appellant,

Beatrice S.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

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

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

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about March 3, 2010, which, inter alia, found that respondent father neglected the subject children, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding of neglect as the evidence established that respondent created an imminent danger that the physical, mental and emotional health of the children would be harmed (*see* Family Court Act § 1012[f][i]; § 1046[b][i]). The hearing testimony showed that the detectives who executed a search warrant of respondent's residence found guns and ammunition that were within the reach of the children

(*see Matter of Tajani B.*, 49 AD3d 874 [2008], *lv denied* 10 NY3d 717 [2008]).

Since proceedings under article 10 of the Family Court Act are civil rather than criminal in nature, the negative inference drawn from respondent's failure to testify did not violate his Fifth Amendment rights in the criminal case that was pending against him at the time of the hearing (*see Matter of Nicole H.*, 12 AD3d 182, 183 [2004]).

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4183 In re Metropolitan Transportation Authority, etc., Index 401164/08

- - - - -

192 Broadway Jewelers, Inc.
doing business as Renaissance Jewelers, etc.,
Claimant-Appellant,

-against-

Metropolitan Transportation Authority,
Condemnor-Respondent.

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Goldstein, Rikon & Rikon, P.C., New York (Michael Rikon of counsel), for appellant.

Berger & Webb, LLP, New York (Charles S. Webb, III of counsel), for respondent.

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Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered September 21, 2009, against claimant in favor of condemnor in the amount of $113,444.03, unanimously affirmed, without costs.

The trial court appropriately ordered claimant to produce its tax returns (*see e.g. Berger v Fete Cab Corp.*, 57 AD2d 784 [1977]), especially since the only item admitted in evidence was a depreciation schedule (*see Kornblatt v Jaguar Cars*, 172 AD2d 590 [1991]). Claimant had failed to produce any receipts or other documents indicating the original cost of the trade fixtures for which it sought compensation (*see Berger*, 57 AD2d at 784), and the original cost of the trade fixtures was relevant to their value (*see Matter of Village of Port Chester*, 42 AD3d 465,

467 [2007]). Additionally, the depreciation schedule was relevant to the issue of ownership of the fixtures in question. If claimant had wished to show that the "equipment" on the depreciation schedule differed from the "trade fixtures" at issue in this case, it should have elicited testimony below; it may not introduce evidence for the first time on appeal (*see e.g. Becker v City of New York*, 249 AD2d 96, 98 [1998]).

It was an appropriate exercise of the trial court's discretion to credit the testimony of condemnor's expert over that of claimant's expert (*see Matter of Adirondack Hydro Dev. Corp. [Warrensburg Bd. & Paper Corp.]*, 205 AD2d 925, 926 [1994]). We decline to consider claimant's purported evidence of alleged perjury on the part of condemnor's expert, since it was not presented to the trial court (*see Becker*, 249 AD2d at 98).

Claimant failed to preserve its objection to the trial court's procedure of limiting the direct testimony of the parties' appraisers to correcting their reports. Claimant also failed to preserve its contention that the court unduly limited its cross-examination of condemnor's witness, and, in any event, it was within the court's discretion to limit the scope of cross-examination (*see Matter of Friedel v Board of Regents of Univ. of State of N.Y.*, 296 NY 347, 352-353 [1947]) and rebuttal (*see Coopersmith v Gold*, 223 AD2d 572, 574 [1996], *affd* 89 NY2d 957 [1997]). In sum, claimant received due process and a fair trial.

The trial court properly excluded the storefront, walls and panels, fascia/soffit, doors, flooring, air conditioning system, partitions, trim, toilets, wall paneling, and wall tile from the fixture award, since these items had become an integral part of the real property (*see e.g. Marraro v State of New York*, 12 NY2d 285, 291-292 [1963]; *Matter of New York State Urban Dev. Corp. v Nawam Entertainment, Inc.*, 57 AD3d 249 [2008], *lv denied* 13 NY3d 701 [2009]). Even if, arguendo, the electrical wiring and plumbing installed by claimant were compensable under *Marraro* (*see* 12 NY2d at 296-297), they were properly excluded because, pursuant to claimant's lease, they became the landlord's property upon installation (*see Matter of City of New York [G & C Amusements]*, 55 NY2d 353, 361 [1982]; *Nawam*, 57 AD3d at 250-251).

The trial court properly excluded such items as an entry mat and a fan as personalty (*see Nawam*, 57 AD3d at 250). The court's valuation of claimant's chandelier and track lighting was within the range of expert testimony (*see Matter of City of New York [Reiss]*, 55 NY2d 885 [1982]).

The court erred in granting condemnor's motion for leave to file an amended appraisal (*see Salesian Socy. v Village of Ellenville*, 98 AD2d 927 [1983]). Condemnor argued that it showed good cause for the amendment because our holding in *Nawam* had clarified the law of fixtures (*see id.;* 22 NYCRR 202.61[a][3]). However, our reliance in *Nawam* on the provisions in a lease to

find that certain items were not compensable was not new law (*see G & C Amusements*, 55 NY2d at 361); condemnor failed to show that this issue had been unsettled before our holding in *Nawam* (*see Matter of Brooklyn Union Gas Co. v State Bd. of Equalization & Assessment*, 125 AD2d 803, 805 [1986], *lv dismissed* 70 NY2d 722 [1987]). However, the grant of condemnor's motion does not warrant vacating the judgment. The amended appraisal did not change the valuation of any item; it merely moved certain items from the compensable section to the noncompensable section. Whether an item is compensable (*i.e.* whether it constitutes a trade fixture) is a decision for the court, not for an appraiser. Even if condemnor had not been permitted to amend its appraisal, it would not have been bound by its placement of certain items in the compensable section (*see Nawam*, 57 AD3d at 251).

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

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4184 The People of the State of New York, Ind. 39301C/05
Respondent,

-against-

Lenny Emiliano,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Friedman Kaplan Seiler & Adelman LLP, New York (John C. Lin of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Kayonia Whetstone of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Michael A. Gross, J. at hearings; Elizabeth Foley, J. at jury trial and sentence), rendered November 30, 2007, convicting defendant of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 21 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress the fruits of an allegedly unlawful seizure. We find the police had, at least, reasonable suspicion to warrant a forcible detention and frisk.

A taxi pulled up alongside a police car, and a passenger pointed to a nearby building and told the officers that someone was being robbed. She also pointed out defendant and his codefendant, who were walking away from the building. An officer specifically testified that the woman pointed at the two men and

identified them as the robbers, and defendant's assertions to the contrary are not supported by the hearing record.

Although the woman was never identified, the reliability of her statement was enhanced by the fact that it was made in a face-to-face encounter with the police (*see e.g. People v Appice*, 1 AD3d 244 [2003], *lv denied* 1 NY3d 594 [2004]). Moreover, her information was corroborated by defendant's suspicious actions (*see e.g. People v Briggs*, 286 AD2d 270 [2001], *lv denied* 97 NY2d 639 [2001]). At first, defendant and the codefendant walked rapidly together. They slowed down when they left the immediate vicinity of the alleged robbery. Then, when they looked at the marked police car, they looked at each other and separated, running in opposite directions. The record establishes that defendant did not simply exercise his "right to be let alone," but "actively fled from the police" (*People v Moore*, 6 NY3d 496, 500-501 [2006]). Based on all these circumstances, the police justifiably detained defendant at gunpoint (*see People v Martinez*, 80 NY2d 444, 448 [1992]).

At trial, the court properly denied defendant's motion to preclude a 911 tape as a sanction for the People's allegedly belated disclosure of the anonymous caller's phone number. Long before trial, the People disclosed the Sprint report as well as a tape recording of a 911 call describing the robbery. The caller's phone number was redacted from the report. During

trial, the People, who had been unsuccessful in obtaining the caller's cooperation, sought to introduce the tape under the excited utterance and present sense impression exceptions to the hearsay rule. Defendant then requested the caller's phone number, and, at the court's direction, the People disclosed it. Defendant was unable to locate the caller, and complained, as he does on appeal, that the belated disclosure prevented him from making contact.

Initially, we note that the People do not have a duty to disclose contact information for potential witnesses, except to the extent that may be required by their obligation under *Brady v Maryland* (373 US 83 [1963]) to disclose exculpatory information (*see People v Izquierdo*, 292 AD2d 247 [2002], *lv denied* 98 NY2d 698 [2002]; *compare People v Andre W.*, 44 NY2d 179, 184 [1978]).

However, defendant claims he is not raising a *Brady* issue, but a Confrontation Clause issue, arising from his inability to "cross-examine" the 911 caller. That argument is misplaced. Regardless of whether defendant may have wanted to interview the caller or call her as a defense witness, the 911 tape was admissible as an exception to the hearsay rule, irrespective of the absence of cross-examination. It qualified, inter alia, as a present sense impression (*see People v Brown*, 80 NY2d 729 [1993]), and it was not testimonial for Confrontation Clause purposes (*see Davis v Washington*, 547 US 813, 822 [2006]).

In any event, defendant was aware from the inception of the case that the report contained a redacted number. The People disclosed the number when defendant finally asked for it. Thus, the People cannot be faulted for defendant's inability to contact the caller, and defendant was not entitled to any sanction.

Moreover, defendant has not shown that he was prejudiced by the timing of the disclosure. There is no indication that earlier disclosure of the phone number would have enabled defendant to locate the caller, or that she would have provided any information helpful to the defense (*see e.g. People v Buie*, 289 AD2d 140 [2001], *lv denied* 98 NY2d 695 [2002].

Defendant's remaining arguments are unavailing. The court properly exercised its discretion in denying defendant's mistrial motion, made after an officer revealed inadmissible hearsay. The court's prompt curative instruction, which the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]), was adequate to prevent any prejudice. Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative

holding, we also reject them on the merits (*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]).

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4185 The People of the State of New York, Ind. 4389/07
Respondent,

-against-

Barry Lineberger,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

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Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about September 18, 2009, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing sufficient total points to support a level three sex offender adjudication. The court properly assessed 15 points for the risk factor of history of drug or alcohol abuse, based on defendant's extensive history of drug use (*see People v Warren*, 42 AD3d 593, 594 [2007], *lv denied* 9 NY3d 810 [2007]).

Defendant's challenge to an assessment of 10 points under another risk factor is unavailing. In any event, even without that assessment he would remain a level three offender, and we

find no basis for a discretionary downward departure (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]), particularly in light of the seriousness of the underlying sex crime. The mitigating circumstances cited by defendant were adequately taken into account by the risk assessment instrument.

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4188 In re Denise Santangelo, Index 114924/08
Petitioner-Appellant,

-against-

Raymond Kelly, as the Police Commissioner
of the City of New York, etc., et al.,
Respondents-Respondents.

_____

Law Offices of Chet Lukaszewski, P.C., Lake Success (Chet Lukaszewski of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (David R. Priddy of counsel), for respondents.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered on or about July 17, 2009, which denied the petition to annul respondents' determination denying petitioner's application for accident disability retirement (ADR) pension benefits, unanimously affirmed, without costs.

A reviewing court may not set aside a denial of ADR due to a tie vote on the issue of whether the petitioner's disability is causally related to the service-related injuries "unless 'it can be determined as a matter of law on the record that the disability was the natural and proximate result of a

service-related accident'" (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997], quoting *Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 352 [1983]). "[A]s long as there was any credible evidence of lack of causation before the Board of Trustees, its determination must stand" (*Meyer*, 90 NY2d at 145, citing *Canfora*, 60 NY2d at 351). Here, the Medical Board's determination that petitioner's disability was caused by the natural progression of her pre-existing isthmic spondylolisthesis and not by a line of duty event is supported by ample credible evidence.

Contrary to petitioner's contention, the Board of Trustees did not abrogate its duty to independently evaluate causation when it relied on the sound recommendation of the Medical Board (*see Matter of Alexander v New York City Employees' Retirement Sys.*, 36 NY2d 671 [1975], *Pamlanye v McGuire*, 111 AD2d 721, 723 [1985]). The record establishes that all of the available evidence was considered – including the multiple letters submitted by petitioner's personal physician, which were the basis of the Trustees' decision to remand petitioner's case to

the Medical Board -- twice. Thus, the Trustees are entitled to rely on the medical board's opinion, which has ample support in the record (*Meyer*, 90 NY2d at 145; *Matter of Lloyd v Kelly*, 73 AD3d 490, 491 [2010]).

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4190 Benjamin Cunningham, Index 401014/09
Plaintiff-Appellant,

-against-

David Newman, M.D., et al.,
Defendants-Respondents.

_____

Benjamin Cunningham, appellant pro se.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Anna R. Mercado of counsel), for respondents.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered December 30, 2009, which, in this medical malpractice action, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

There was no basis to strike the affirmation of defendants' expert, which, in conjunction with other evidence, established defendants' prima facie entitlement to summary judgment dismissal. In opposition, plaintiff failed to offer evidence sufficient to raise a triable issue regarding malpractice (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court also properly dismissed plaintiff's claims against defendants for alleged violations of the so-called "patient bill of rights" (*see* Public Health Law §§ 2801-d, 2803-c).

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

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

ENTERED: FEBRUARY 3, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4191N Francisco Garcia, Index 301213/08
Plaintiff-Appellant, 83971/08

-against-

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

1515 Bruckner Blvd. LLC,
Defendant-Respondent.

[And A Third-Party Action]

_____

Michael A. Cervini, P.C., Jackson Heights (Robin Mary Heaney of counsel), for appellant.

Jeffrey M. Schwartz, New Rochelle, for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered December 24, 2009, which granted plaintiff's motion pursuant to CPLR 3126 to strike the answers of defendants City of New York, 1515 Bruckner Blvd. LLC, Citywide Contractors LLC and Kaila Construction Corporation unless they appear for their respective examinations before trial within 60 days of service of a copy of the order, unanimously affirmed, without costs.

Defendants failed to comply with a preliminary conference order and two compliance conference orders issued over a period of 14 months to produce witnesses for examinations before trial. However, given counsel's failure to file an affirmation in compliance with 22 NYCRR 202.7(a)(2), it was a provident exercise

of discretion to provide defendants with a final opportunity to produce witnesses for examinations before trial (*see Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [2004]).

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

ENTERED: FEBRUARY 3, 2011

CLERK