SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 13, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3234 The People of the State of New York, SCI. 1504/07
Respondent,

-against-

Demetrius Hill,
Defendant-Appellant.

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Richard M. Greenberg, Office Of The Appellate Defender, New York (Anastasia Heeger of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered May 6, 2008, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 3½ years, unanimously modified, on the law, to the extent of vacating defendant's predicate felony adjudication and remanding for resentencing as a first felony offender, and otherwise affirmed.

Defendant was convicted of violating a Florida statute that penalizes two types of conduct, one of which would not

necessarily be a felony in New York. The Florida accusatory instrument mentioned both theories in the alternative. On defendant's motion to controvert the predicate felony statement, the People submitted the Florida sentencing order in an attempt to establish that defendant was convicted under the theory that would constitute a New York felony. Defendant did not respond to the People's submission. After considering the Florida sentencing order, the amount of time defendant actually served in Florida, and Florida's sentencing statutes, the court drew an inference that defendant must have been convicted under the theory corresponding to a New York felony.

The People did not carry their burden of proving beyond a reasonable doubt that defendant had been convicted of a Florida crime that is the equivalent of a felony in New York (*see* CPL 400.21[7][a]). The accusatory instrument was ambiguous, as acknowledged by the People and the court. The ambiguity as to whether defendant was convicted under the theory corresponding to a New York felony is not resolved by the sentencing order on which the court relied. The sentencing order contains a strong indication that he was convicted under the other theory, although it also contains an indication to the contrary. While defendant did not specifically argue that the sentencing order failed to prove his predicate felon status, the court's express reliance on

that document in so adjudicating him preserves the issue for review as a matter of law (*see* CPL 470.05[2] [issue is preserved for appellate review "if in re(s)ponse to a protest by a party, the court expressly decided the question raised on appeal"]; *People v Prado*, 4 NY3d 725, 726 [2004] [defendant's general objection, "when coupled with the trial judge's specific findings" in denying defendant's application, rendered issue reviewable]).

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

ENTERED: JANUARY 13, 2011

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3236 In re Derrick H.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about August 23, 2005, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts, which, if committed by an adult, would constitute the crimes of attempted robbery in the second and third degrees, attempted grand larceny in the fourth degree and jostling, and imposed a conditional discharge for a period of up to 12 months, affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility. The victim's observations of appellant during the incident, as well as on other occasions,

were sufficient to support the conclusion that the victim was able to make a reliable identification of appellant as the person who attempted to take his cell phone.

The evidence on which the finding is based shows that, on the day of the incident, the victim saw appellant staring at him as the victim took his cell phone out of his pocket in the school lunchroom. The victim then left the school. When he was about a block away from the school, appellant and two other young men approached him from behind and pushed him to the ground. Appellant began searching the victim's pockets, demanding to know where the cell phone was. Appellant and his companions ran off when friends of the victim approached.

Contrary to the dissent, we do not believe that the offense appellant was found to have committed -- an act for which he has expressed no remorse -- was "the sort of minor first offense" for which an ACD would be appropriate. The inference from the record is inescapable that appellant's act involved premeditation, planning and concerted action with confederates. In any event, as the dissent acknowledges, the propriety of an ACD is a point appellant failed to preserve, as no request for such disposition was made before the finding of delinquency. We note that the dissent's quotation of the trial judge's reasoning for rejecting the presentment agency's request for 18 months' probation does

not demonstrate that an ACD was warranted here.

Appellant's remaining contentions are unpreserved and we decline to review them in the interest of justice.

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

MOSKOWITZ, J. (dissenting in part)

While I am not disputing the court's findings concerning credibility, I would reverse and vacate the adjudication of juvenile delinquency and the conditional discharge because the court should have granted an adjournment in contemplation of dismissal (ACD). To the extent defense counsel failed to preserve this issue, I would review it in the interest of justice.

A juvenile delinquency adjudication requires: (1) a determination that the juvenile committed an act, that, if committed by an adult, would constitute a crime and (2) a showing by a preponderance of the evidence that the juvenile needs supervision, treatment or confinement (Family Court Act §§ 345.1. 350.3(2), 352.1). If the court determines that there is no need for supervision, treatment or confinement, it must dismiss the petition (FCA § 352.1[2]). In addition, section 352.2(2)(a) of the Family Court Act states that "the court shall order the least restrictive available alternative enumerated in subdivision one which is consistent with the needs and best interests of the respondent and the need for protection of the community." A juvenile delinquency determination requires more than a delinquent act to avoid branding the child a juvenile delinquent

unnecessarily (*see Matter of Justin Charles H.*, 9 AD3d 316 [2004]).

Here, the juvenile delinquency adjudication and concomitant conditional discharge were an improvident exercise of discretion. First, there was no evidence that appellant was in need of "supervision, treatment or confinement." The court adjudicated appellant a juvenile delinquent and a "person in need of supervision" and conditionally discharged him for a 12-month period. However, in an apparent contradiction, the court then merely ordered appellant to "stay out of trouble for the next 12 months" and did not order any sort of supervision, treatment or confinement. Instead, the court left it up to appellant's school to address any issues he might have. In deciding not to require supervision, the court stated that "there is not any significant or negative information that relates to anything that would be delinquency." Accordingly, because the evidence did not support the finding that appellant was a person in need of supervision, treatment or confinement, the court should not have determined that he was a juvenile delinquent.

Because it was improper to adjudicate appellant a juvenile delinquent, the sentence the court imposed was improper because it was not "the least restrictive available alternative" (*see Matter of Juli P.*, 62 AD3d 588, 589 [2009] [where incident was

isolated outburst, "an ACD, with such counseling as Family Court deems appropriate, would adequately serve the needs of appellant and society in this case"]). Appellant had no prior arrest record. He comes from a stable home. He is not a disciplinary problem at home or at school. The complainant was not hurt and no property was taken from him. The court itself noted the lack of negative information. This is the sort of minor first offense that should result in an ACD, a dispositional alternative that would not stigmatize defendant as a juvenile delinquent *(see Matter of Anthony M*, 47 AD3d 434 [2008] [where defendant had "no record of getting into trouble at home, at school, or in the community," an "ACD would have avoided the stigma of a juvenile delinquency adjudication").

The majority's characterization of the severity of appellant's offense, namely that it was an act that involved premeditation and planning, has no support in the record.

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

ENTERED: JANUARY 13, 2011

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3663 Balla Tounkara, Index 21870/04
Plaintiff-Appellant-Respondent,

-against-

Anthony Fernicola, et al.,
Defendants-Respondents.

- - - -

[And a Third-Party Action]

- - - -

Anthony Fernicola, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

Mt. Moriah, Inc., et al.,
Second Third-Party Defendants-
Respondents-Appellants.

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

Dillon Horowitz & Goldstein LLP, New York (Michael M. Horowitz of counsel), for respondents-appellants.

Shaub, Ahmuty, Citrin & Spratt LLP, New York (Gerard S. Rath of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucy Billings, J.), entered June 30, 2009, which denied plaintiff's motion for summary judgment on his Labor Law § 240(1) and § 241(6) claims and denied the cross motion by second third-party defendants for summary judgment dismissing the claims against them, unanimously modified, on the law, plaintiff's motion granted with respect to his § 240(1) and § 241(6) claims, and otherwise affirmed, without

costs.

Plaintiff made a prima facie showing of defendants' liability under § 240(1) by asserting that defendants failed to provide him with an adequate safety device, and that such failure was a proximate cause of the accident. In opposition, defendants failed to raise a triable issue of fact as to whether the absence of such a device, or plaintiff's own acts or omissions, constituted the sole proximate cause of the accident (*see Campuzano v Board of Educ. of City of N.Y.*, 54 AD3d 268 [2008]). Even if plaintiff knew that appropriate safety devices were "readily available" (albeit not in the immediate vicinity of the accident), there is no evidence that plaintiff "knew he was expected to use" the safety devices for the assigned task. There is no evidence that plaintiff received any instructions on how to perform the task, including directions to use any specified safety devices. Nor is there evidence of any "standing order" conveyed to workers, directing them to use safety devices in performing such a task (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). Accordingly, plaintiff was entitled to summary judgment on his § 240(1) claim.

Additionally, in the absence of any showing by defendant that the safety devices were adequate protection for the task, defendant failed to satisfy its burden to present evidence

sufficient to raise a triable issue of fact as to its comparative negligence defense to plaintiff's § 241(6) claim predicated on the Industrial Code (12 NYCRR) § 23-1.7(b)(1) with regard to "hazardous openings" (*see generally Olshewitz v City of New York*, 59 AD3d 309 [2009]; *Catarino v State of New York*, 55 AD3d 467 [2008]).

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

ENTERED: JANUARY 13, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3703-
3703A Mushlam, Inc., Index 100207/08
Plaintiff-Respondent,

-against-

Marie Nazor, et al.,
Defendants-Appellants.

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Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York (Bruce H. Wiener of counsel), for appellants.

Kucker & Bruh, LLP, New York (Nativ Winiarsky of counsel), for respondent.

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Orders, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 7 and June 3, 2008, which, insofar as appealed from, directed defendants to pay plaintiff pendente lite use and occupancy of $15,000 per month, commencing on May 1, 2008, unanimously reversed, on the law and the facts, without costs, and the matter remanded to the Supreme Court for a hearing to determine the reasonable value of use and occupancy.

Section 220 of the Real Property Law provides that in an action for use and occupancy "[t]he landlord may recover a *reasonable compensation* for the use and occupation of real property, by any person, under an agreement, not made by deed; and a parol lease or other agreement may be used as evidence of the amount to which he is entitled (emphasis added)." The

reasonable value of use and occupancy is the fair market value of the premises after the expiration of the lease (*see e.g. Cooper v Schube*, 101 AD2d 737 [1984]; *see also Beacway Operating Corp. v Concert Arts Socy.*, 123 Misc 2d 452 [Civ Ct NY County 1984]), and it is the landlord, not the tenant, who has the burden of proving reasonable value of use and occupancy (*Beacway* at 453).

In determining the reasonable value of use and occupancy, the rent reserved under the lease, while not necessarily conclusive, is probative (*Beacway* at 453; *see also Eli Haddad Corp. v Redmond Studio*, 102 AD2d 730, 731 [1984]).

The record reflects that plaintiff landlord cross-moved for use and occupancy in the amount of $15,000 per month, relying on nothing more than its unsupported statement as to the rental value of the property. Defendants opposed, contending that the demand for use and occupancy was illegal since the building, which they alleged had at least three residential units, did not have the requisite certificate of occupancy under the Multiple Dwelling Law. Defendants asserted, in any event, that the cross motion was devoid of any evidentiary support for plaintiff's position as to the value of the leasehold. Defendants argued that this defect could not be remedied, since plaintiff was foreclosed from introducing new evidence in reply. In the absence of any competent proof as to value, defendants relied on

the rent set forth in the expired lease, $3,600 per month, as evidence of the fair market value of the leasehold.

In reply on the cross motion, plaintiff landlord submitted as evidence of the rental value of the premises an unsigned lease for the sixth-floor penthouse setting forth a monthly rent of $15,000, and the affidavit of a real estate broker, who opined that based on comparable rentals in the Chelsea area and the lease under negotiation for the sixth floor, the fair market value of the leasehold was no less than $15,000 per month. Plaintiff also contended that the premises was populated solely by commercial tenants.

In surreply, defendants maintained that the comparisons used by plaintiff did not establish a rental value of $15,000. Defendants noted that the second and third floor premises were listed as available for rental on brokerage web sites as of May 19, 2008, at rents of $81,000 annually (approximately $6,750 monthly). Defendants also attached web pages showing that the sixth floor premises was listed as available as of the same date for a monthly rent of $15,000. Defendants argued that the sixth floor premises was not an apt comparison, however, since the landlord had just completed a gut renovation of the sixth floor, including a marble tub. Defendants asserted that the leases relied on by plaintiff as evidence that the building was solely

commercial (i.e., rent for second floor premises of $8,800, rent for one half of the third floor of $5,400, rent for one half of the fifth floor of $5,000) instead demonstrated that the fair market value of the premises was far less than the $15,000 use and occupancy sought by plaintiff. In arriving at its $15,000 figure, plaintiff relied on the affidavit of a real estate broker and an unsigned draft lease for the commercial, sixth-floor penthouse in the building. However, the record reveals that the remainder of plaintiff's signed leases for other units at the building contain far lower rents (e.g., $8,400 rent for 2008 set forth in the 2004 lease for the second floor; $5,400 rent for 2008 set forth in the 2006 lease for half of the third floor, $5,400 rent set forth in the lease for the other half of the third floor; and $5,000 rent for 2008 set forth in the 2005 lease extension for half of the fifth floor). Further, plaintiff failed to address defendants' other arguments in support of a lower use and occupancy, including allegations of residential use, with the landlord's knowledge, in violation of the certificate of occupancy (*see Hart-Zafra v Singh*, 16 AD3d 143 [2005]).

Thus, we find that the record contains insufficient evidence of fair market value. The disparity between the amount sought by plaintiff landlord ($15,000) and the amount set forth in the

lease ($3,600) – a four-fold increase – raised questions sufficient to warrant a hearing as to fair market value, as did the disparity between the alleged value of the premises and the rental value for other units in the building (*see e.g. Trump CPS LLP v Meyer*, 249 AD2d 22 [1998] [ordering a hearing to determine reasonable value of use and occupancy where the parties disputed the appropriate amount]; *South St. Ltd. Partnership v Jade Sea Rest., Inc.*, 187 AD2d 397 [1992]).

Accordingly, we remand the matter to the Supreme Court for a hearing to determine the fair market value of the leasehold.

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

ENTERED: JANUARY 13, 2011

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3882N Ventur Group, LLC, Index 604394/06
Plaintiff-Appellant,

-against-

Diane Finnerty, et al.,
Defendants-Respondents.

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Smith Cambell LLP, New York (Thomas M. Campbell of counsel), for appellant.

Storch Amini & Munves PC, New York (Steven G. Storch of counsel), for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 9, 2010, which granted defendant Finnerty's motion to stay arbitration of plaintiff's counterclaims in the arbitration commenced by Finnerty and to permanently enjoin plaintiff from pursuing its arbitration counterclaims, unanimously affirmed, without costs.

In January 2005, plaintiff entered into a purchase agreement to acquire the assets of two investment advisory firms, which were owned and operated by defendant Diane Finnerty (investment advisory firms). Under the agreement, these assets consisted of management agreements with clients, which could not be assigned without consent. It further provided that "there can be no assurance that Client Consent can or will be obtained with respect to any Management Agreement or any particular number of

Management Agreements," and no adjustment to the purchase price would be made as a result of failure to obtain client consent.

Under the purchase agreement, defendant Finnerty was obligated to become an employee and officer of plaintiff. Thus, she subsequently entered into an employment agreement with plaintiff that made her plaintiff's president and required her to diligently perform all services attendant to that title, including assisting plaintiff with the transfer of the client interest (i.e., obtaining the clients' consent to transfer) and helping plaintiff maintain the new clients.

Ultimately, many of the investment advisory firms' clients declined to transfer to plaintiff. As a result, in December 2006, plaintiff commenced this action against Finnerty and the two investment advisory firms she operated, asserting causes of action for breach of contract and fraudulent inducement. Plaintiff alleged that, during negotiations, Finnerty made knowingly false representations on which plaintiff relied in entering into the agreement, specifically that Finnerty was the person who had the primary relationship with the investment management clients and that she owned those clients. Plaintiff also alleged that Finnerty took no steps to facilitate the transfer of goodwill after the closing, although she had been hired, pursuant to the employment agreement, for the purpose of

assisting in the transition and maintaining the clients.

In August 2008, defendants moved for summary judgment dismissing the complaint. Supreme Court dismissed all causes of action other than the fraudulent inducement and breach of contract claims. On appeal, this Court ordered that the underlying complaint be dismissed in its entirety (68 AD3d 638 [2009]). First, this Court found that the fraud claim failed because plaintiff could not "demonstrate justifiable reliance" where it failed to make any effort to verify Finnerty's alleged misrepresentations concerning the client relationships and the employee's role in the business (*id.* at 639). Second, this Court found that the breach of contract claim failed because the evidence plaintiff submitted was insufficient "to raise an issue of fact as to whether Finnerty breached her obligation to use best efforts to obtain consents from the [former] clients, or that any particular client was lost as a result of such breach" (*id.*).

Prior to this Court's dismissal, Finnerty commenced an arbitration of her claims against plaintiff for nonpayment under the employment agreement. Plaintiff asserted two counterclaims in the arbitration, alleging that Finnerty breached both the employment agreement and her fiduciary duty to plaintiff as an officer and employee thereof. After we dismissed plaintiff's

action, Finnerty moved to stay arbitration and enjoin plaintiff from pursuing its arbitration counterclaims on the ground that collateral estoppel precluded plaintiff from relitigating issues that were necessarily decided in the dismissed lawsuit. Supreme Court granted the motion in its entirety, and plaintiff appealed.

We now hold that plaintiff's counterclaims against Finnerty are barred by collateral estoppel. Collateral estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action are the same" *(Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *see also Burgos v Hopkins*, 14 F3d 787, 792 [2d Cir 1994]). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action (*Ryan* at 500-501; *see also Merrill Lynch, Pierce, Fenner & Smith v Benjamin*, 1 AD3d 39 [2003]).

The dispositive factual issues in plaintiff's counterclaims against Finnerty are identical to the factual allegation of breach of contract asserted against the corporate defendants and decided against plaintiff in the action. In its arbitration counterclaims, plaintiff essentially argues that Finnerty

breached her duties as an employee by failing to "diligently perform" her employment contract duties to facilitate the transfer of the clients' goodwill to plaintiff and to "maintain" such goodwill. On the prior appeal, we explicitly found plaintiff failed to "raise an issue of fact as to whether Finnerty breached her obligation to use best efforts to obtain consents from the [former] clients, or that any particular client was lost as a result of such breach" (68 AD3d at 639). Thus, the essential factual issues dispositive of the counterclaims of breach of employment duties were necessarily decided.

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

ENTERED: JANUARY 13, 2011

CLERK

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

4041 In re Anthony M.W.A.,

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

Micah W.A.,
Respondent-Appellant,

Lutheran Social Services of
Metropolitan New York,
Petitioner-Respondent.

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Elisa Barnes, New York, for appellant.

Satterlee Stephens Burke & Burke LLP, New York (Abigail Snow of counsel), for respondent.

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

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Appeal from order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about March 27, 2009, which, inter alia, upon respondent mother's default, terminated her parental rights to the subject child due to her mental illness, and committed custody and guardianship of the child to the Commissioner of Social Services and petitioner child care agency, unanimously dismissed, without costs, as taken from a nonappealable order.

No appeal lies from the order, as it was entered upon appellant's default in appearing at the fact-finding and dispositional hearings (*see* CPLR 5511; *Matter of Jessenia Shanelle R. [Wanda Y.A.]*, 68 AD3d 558 [2009]).

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

ENTERED: JANUARY 13, 2011

CLERK

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

4042-
4042A Newmark & Company Real Estate Inc., Index 602950/09
Plaintiff-Appellant,

-against-

2615 East 17 Realty LLC,
Defendant-Respondent,

Wilk Real Estate I, LLC, et al.,
Defendants-Intervenors-Respondents.

_____

Law Office of Lionel A. Barasch, New York (Lionel A. Barasch of counsel), for appellant.

Sol Mermelstein, Brooklyn for 2615 East 17 Realty LLC, respondent.

Arnold J. Ludwig, Brooklyn, for Wilk Real Estate I, LLC and Albert Wilk, respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 16, 2010, which, insofar as appealed from, in this action alleging a breach of contract, denied plaintiff's motion for summary judgment, unanimously reversed, on the law, with costs, and the motion granted in the principal amount of $124,415, plus interest from June 25, 2009. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered April 15, 2010, which granted the motion of Wilk Real Estate I, LLC and Albert Wilk to intervene, unanimously dismissed, without costs, as academic.

In the lease between defendant, as the landlord, and nonparty tenant, which was brought into the transaction by plaintiff broker, the subscribing parties represented that plaintiff was the exclusive broker for the transaction and that defendant would pay its commission. This clear representation, which was supported by additional documentary evidence, entitled plaintiff to its commission as a matter of law (*Morris Cohon & Co. v Russell*, 23 NY2d 569, 574-575 [1969]; *Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64 [1999]). We reject defendant's claim that the relevant provision does not mean what it says, but resulted from a scrivener's error (*see Edward S. Gordon Co. v Blodnick, Schultz & Abramowitz*, 150 AD2d 212 [1989], *lv denied* 74 NY2d 613 [1989]).

Although defendant did not sign the separate brokerage agreement proffered by plaintiff setting forth the details of its commission, that fact is not fatal either under the statute of frauds or as to enforceability. Several e-mail communications, supported by other documentary evidence, reflected that plaintiff and defendant were in regular contact negotiating the lease and, when the parties appeared close to agreeing to the lease terms, plaintiff e-mailed defendant a draft brokerage agreement, setting forth, inter alia, the particular commission that had been discussed. Plaintiff invited defendant's revisions and defendant

sent back, also by e-mail, handwritten revisions, which did not modify the commission, but only provided that it would be paid in specified increments. Plaintiff incorporated those revisions and sent the final copy back to defendant's agent, and the record contains no evidence that defendant objected to, protested, or rejected any of the provisions in the last version of the agreement.

An e-mail sent by a party, under which the sending party's name is typed, can constitute a writing for purposes of the statute of frauds (*see* General Obligations Law § 5-701[b][4]; *Stevens v Publicis S.A.*, 50 AD3d 253, 255-256 [2008], *lv dismissed* 10 NY3d 930 [2008]). Defendant does not dispute its authorship of the e-mails, nor that they were sent by its agent, and contrary to defendant's claims, there is no evidence that it rejected the final e-mail sent by plaintiff, which incorporated defendant's revisions. The e-mail agreement set forth all relevant terms of the agreement, including the particular commission charged by plaintiff, and thus, constituted a meeting

of the minds (*cf. Naldi v Grunberg*, __ AD3d __, 2010 NY Slip Op 7079, *12 [2010]).

In view of the foregoing, plaintiff's challenges to the order granting the motion to intervene are academic.

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

ENTERED: JANUARY 13, 2011

CLERK

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

4046 The People of the State of New York, Ind. 2661/06
Respondent,

-against-

Curtis Crayton,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel) and Weil Gotshal & Manges LLP, New York (Jenny C. Wu of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered May 22, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to an aggregate term of 3½ 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, including its resolution of inconsistencies in testimony.

The evidence at a *Hinton* hearing established an overriding

interest that warranted a limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]). The officer testified, among other things, that he continued his undercover work in the specific area of defendant's alleged sales, that he had open investigations, cases involving lost subjects and other cases pending in the courthouse, that he had often been threatened, and that he took precautions to protect his identity. This demonstrated that his safety and effectiveness would be jeopardized by testifying in an open courtroom, and it satisfied the requirement of a particularized showing. Furthermore, the closure was no broader than necessary.

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

ENTERED: JANUARY 13, 2011

CLERK

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

4047 Herbert W. Kleckner, Index 107967/07
Plaintiff-Respondent,

-against-

Meushar 34th Street, LLC,
Defendant-Respondent-Appellant,

Verizon New York Inc.,
Defendant-Appellant-Respondent,

The City of New York,
Defendant-Respondent.

_____

Conway, Farrell, Curtin & Kelly P.C., New York (Darrell John of counsel), for appellant-respondent.

Rafter and Associates PLLC, New York (Howard K. Fishman of counsel), for respondent-appellant.

Fischer and Burnstein, P.C., New York (Steven Herschkowitz of counsel), for Herbert W. Kleckner, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for municipal respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered December 10, 2009, which, insofar as appealed from, in this action for personal injuries allegedly sustained when plaintiff tripped and fell when his foot became caught in a gap between a metal grate in a tree well and the adjacent sidewalk, denied the motions of defendant Meushar 34th Street, LLC (Meushar) and defendant Verizon New York Inc. for summary judgment dismissing the complaint and all counterclaims asserted against

them, unanimously affirmed, without costs.

The motions were properly denied since the record presents triable issues of fact, including which defendant, if any, installed the subject tree well and grate and when, which defendant is responsible for the care, maintenance and repair of the tree well and grate, and which defendant is responsible for the care, maintenance and repair of the relevant area. Although the Court of Appeals has excluded "city-owned tree wells" from the definition of "sidewalk" as the term is used in Administrative Code of City of NY § 7-210 (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]), "a property owner may still owe a duty relating to a tree well if it creates a defective condition on it or uses it for a special purpose, such as when it installs an object on it, or varies its construction" (*Skinner v City of New York*, 2010 NY Slip Op 31068[U], *4 [Sup Ct, NY County 2010]).

Here, neither Verizon nor Meushar has produced any evidence that the tree well is owned by defendant City, or that the City is otherwise responsible for its maintenance and repair. Nor have these defendants produced evidence that they, themselves, do not own, or are otherwise responsible for, the tree well. They allege only that they failed to find proof of ownership of the tree well, and contrary to Meushar's contention, the holding in

Vucetovic does not compel a finding against the City in such circumstances. Furthermore, even if the City were deemed owner of the tree well, Verizon and Meushar have failed to provide evidence showing that they did not create, negligently repair or otherwise cause the allegedly defective condition that resulted in plaintiff's fall (*see Kaminer v Dan's Supreme Supermarket/Key Food*, 253 AD2d 657 [1998]).

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

ENTERED: JANUARY 13, 2011

CLERK

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

4048 Schneider, Kleinick, Weitz & Damashek, etc., Plaintiff-Respondent, Index 114518/09

-against-

Howard A. Suckle, Esq., Defendant-Appellant,

Shaub, Ahmuty, Citrin & Spratt, LLP, Defendant.

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Suckle Schlesinger PLLC, New York (Howard A. Suckle of counsel), for appellant.

David W. Druker, P.C., New York (David W. Druker of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 9, 2010, which, to the extent appealed from as limited by the briefs, denied defendant-appellant's motion to dismiss the complaint and granted plaintiff's cross motion for summary judgment to enforce an attorney's lien under Judiciary Law § 475, unanimously affirmed, with costs.

The plaintiff law firm, which was attorney of record for the prevailing plaintiff in an underlying wrongful death action from the litigation's inception through the jury verdict, possessed a charging lien under Judiciary Law § 475, pursuant to which it

could collect its fees and disbursements (*see Klein v Eubank*, 87 NY2d 459, 462 [1996]; *Chadbourne & Parke, LLP v AB Recur Finans*, 18 AD3d 222, 223 [2005]; *Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, 219 [1997]). Contrary to defendant-appellant's argument, it is undisputed that following the jury's verdict, the firm terminated its representation for just cause, based on a conflict of interest which compromised its ability to provide adequate representation. That termination decision was fully communicated through discussions with, and written notice to, the client's personal attorney. We reject defendant-appellant's contention that the firm waived its entitlement to a charging lien. The firm expressly stated that it would not waive payment of fees and disbursements even before counsel was substituted as a matter of record, and gave notice of its charging lien less than two weeks after the entry of judgment in the underlying action (*see Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 192 [2002]).

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

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

ENTERED: JANUARY 13, 2011

CLERK

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

4049 In re Teng K. Inc., etc., Index 109128/10
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

_____

Estrin, Benn & Lane, LLC, New York (Patrick Benn of counsel), for petitioner.

Jean Marie Cho, New York (Donald T. Martin of counsel), for respondent.

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Determination of respondent New York State Liquor Authority, dated July 7, 2010, which cancelled petitioner's liquor license and imposed a $1,000 bond claim, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Lucy Billings, J.], entered on or about July 12, 2010), dismissed, without costs.

The determination was supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Petitioner conceded at the hearing and in a letter from its counsel that it violated the charge alleging that it used a trade name in connection with the licensed business without first obtaining respondent's permission (*see* 9 NYCRR 53.1[p]).

The evidence further supports the finding that petitioner violated Alcoholic Beverage Control Law § 111 in "ma[king] its license available to a person not specified in the license" (*see Matter of Hacker v State Liq. Auth. of State of N.Y.*, 19 NY2d 177, 184 [1967]). Such evidence included an agreement entered into by petitioner and a management company providing that petitioner would not interfere in any way with the operation and management of the business; a statement signed by petitioner's sole shareholder indicating that he had nothing to do with the restaurant's day-to-day operations and that the management company had full authority to operate the business; and the testimony of the management company's principal that petitioner could not overrule his decisions. There is no basis to disturb the credibility determinations of the Administrative Law Judge, including his decision not to credit the testimony of petitioner's shareholder regarding his role in the monitoring of the restaurant (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

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

ENTERED: JANUARY 13, 2011

CLERK

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

4052 Lee Yuen, Index 113456/07
Plaintiff-Respondent,

-against-

Arka Memory Cab Corp., et al.,
Defendants-Appellants.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Steven N. Feinman of counsel), for appellants.

Ateshoglou & Aiello, P.C., New York (Steven D. Ateshoglou of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered April 29, 2010, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiff's claim that he sustained a serious injury as defined by Insurance Law § 5102(d) to include a significant limitation of use of a body function or system and/or a permanent consequential limitation of use of a body organ or member, unanimously affirmed, without costs.

Contrary to defendants' contention, plaintiff submitted medical evidence in admissible form, including medical affirmations of two doctors who submitted underlying reports, MRI films, notes and records (*see Thompson v Abbasi*, 15 AD3d 95, 97 [2005]; *Gonzalez v Vasquez*, 301 AD2d 438 [2003]). Moreover, plaintiff's treating physician and medical expert, Andrew Brown,

MD, averred that he personally reviewed the MRI films and reports, rendering them admissible (*see Thompson,* 15 AD3d at 97; *see Dioguardi v Weiner,* 288 AD2d 253 [2001]). Plaintiff also presented evidence that his injuries, consisting of a rotator cuff tear in the left shoulder and cervicial disc herniations, with objective, quantified range of motion limitations and continuing pain years after the accident, constitute serious, permanent injuries (*see Toure v Avis Rent A Car Sys.,* 98 NY2d 345, 350 [2002]). Plaintiff adequately explained a ten-month gap in treatment during which time he was being treated for an unrelated condition (*see Jacobs v Rolon*, 76 AD3d 905 [2010]).

Defendant presented the expert opinions of a radiologist who found degenerative changes in the spine and of an orthopedist, Gregory Montalbano, MD, who opined that the alleged injuries to plaintiff's cervical spine were degenerative in origin and that the injury to the left shoulder rotator cuff was degenerative and congenital in origin, and could be related to his work as a bus driver and to his obesity.

In opposition, plaintiff presented the expert medical report and opinion of Dr. Brown, who opined that plaintiff's injuries were causally related to the accident, because he was asymptomatic before the accident and the accident involved sufficient force to cause the types of injuries sustained. The

record also contains the unsworn post-operative report of the surgeon who operated on plaintiff's shoulder, who confirmed that plaintiff had a rotator cuff tear which was consistent with the accident. Although plaintiff's expert did not expressly address Dr. Montalbano's non-conclusory opinion that the injuries were degenerative and/or congenital in origin, "by attributing the injuries to a different, yet altogether equally plausible, cause, that is, the accident," he rejected the defense expert's opinion and his opinion was entitled to equal weight (*Linton v Nawaz*, 62 AD3d 434 [2009], *affd* 14 NY3d 821, 822 [2010]; *see also Peluso v Janice Taxi Co., Inc.*, 77 AD3d 491 [2010]; *Jacobs*, 76 AD3d 905; *Torain v Bah*, _ AD3d _, 2010 NY Slip Op 8779 [2010]; *Feaster v Boulabat*, 77 AD3d 440 [2010]; *contra Farrington v Go On Time Car Serv.*, 76 AD3d 818 [2010]; *Lopez v American United Transp., Inc.*, 66 AD3d 407 [2009]).

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

ENTERED: JANUARY 13, 2011

CLERK

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

4053 The People of the State of New York, Ind. 5710/08
Respondent,

-against-

Jorge Rodriguez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Craig A. Ascher of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (John Cataldo, J.), rendered on or about November 12, 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: JANUARY 13, 2011

CLERK

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

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

4054N Benjamin L. Anderson, etc.
Plaintiff-Appellant,

-against-

Carl P. Belke, et al.,
Defendants-Respondents.

- - - -

Benjamin L. Anderson, etc.,
Plaintiff-Appellant,

-against-

Eugene H. Blabey, II, et al.,
Defendants-Respondents.

Index 600126/09
602210/08

_____

Benjamin L. Andersen, New York appellant pro se.

Harter Secrest & Emery LLP, Rochester (A. Paul Britton of counsel), for respondents.

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Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 14, 2009, which denied plaintiff's motions to renew defendants' motions to change venue to Livingston County, unanimously affirmed, without costs.

The fact that defendants' counsel contributed to the re-election campaign of Justice Kenneth A. Fisher, the Livingston County Justice likely to preside over these actions upon their transfer, is not a fact that would have influenced the determination to change venue (*see* CPLR 2221[e]). As defendants note, this argument is more appropriately advanced in support of

a motion for recusal.

In any event, plaintiff failed to demonstrate that there is a serious risk of actual bias on Justice Fisher's part. The record shows that hundreds of lawyers and law firms that appear before him contributed to his campaign. We agree with the J.H.O. that, while the contribution of defendants' counsel may have been greater than the average contribution of other law firms, it was only a small percentage of the total contributions to the campaign and therefore not so great as to suggest a risk of bias. "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," and this is no "exceptional case" (*see Caperton v A.T. Massey Coal Co., Inc.*, ___ US ___, ___, 129 S Ct 2252, 2263 [2009]).

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

ENTERED: JANUARY 13, 2011

CLERK

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

4109N Broadway 500 West Monroe Mezz II LLC, et al., Plaintiffs-Appellants, Index 651420/10

-against-

Transwestern Mezzanine Realty Partners II, LLC, et al., Defendants-Respondents.

_____

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

Molo Lamken LLP, Washington, D.C. (Robert K. Kry of counsel), for Transwestern respondents.

Allen & Overy LLP, New York (Jacob S. Pultman of counsel), for 500 W Monroe Mezz II, LLC c/o Piedmont Office Realty Trust, Inc., respondent.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered September 8, 2010, which denied plaintiffs' motion for a preliminary injunction to enjoin defendants Transwestern Mezzanine Realty Partners II, LLC and 500 West Monroe Mezz II, LLC c/o Piedmont Office Realty Trust, Inc. from foreclosing on plaintiffs' equity interest in property located at 500 West Monroe Street in Chicago and to require defendants to deposit into escrow certain funds derived from the property, unanimously affirmed, without costs.

Plaintiffs' principal claim that Transwestern breached its contract by not paying the senior loan extension costs is

foreclosed by the plain language of the Forbearance Agreement and its amending documents, including the 2010 letter agreement, which restored to plaintiffs the right to extend the senior loans without Transwestern's consent and, in exchange, provided that neither the borrower nor the lender was obligated "to make any payment or incur any expense on account of the Second Senior Extension Costs." Transwestern's construction of the letter agreement as commercially reasonable is supported by the record evidence, which demonstrates that Transwestern had serious doubts about whether further extensions made economic sense and accordingly drafted the letter agreement so that either party could extend the loan but could not compel the other to pay the costs of the extension. Plaintiffs' remaining claims against Transwestern and 500 West Monroe lack sufficient evidentiary support. Moreover, Transwestern's discussions about the loan with 500 West Monroe were consistent with the terms of the Forbearance Agreement and the loan documents.

Since "[plaintiffs'] interest in the real estate is commercial, and the harm [they] fear[] is the loss of [their] investment, as opposed to loss of [their] home or a unique piece of property in which [they have] an unquantifiable interest," they can be compensated by damages and therefore cannot

demonstrate irreparable harm (*see SK Greenwich LLC v W-D Group [2006] LP*, 2010 WL 4140445, *3, 2010 US Dist LEXIS 112655, *8-9 [2010]). Plaintiffs maintain that it would be impossible "to quantify the future value of the revenue stream and waterfall from the Property." However, even lost profits that are difficult to ascertain can be compensated by money damages (*Sterling Fifth Assoc. v Carpentille Corp.*, 5 AD3d 328, 329 [2004]). Plaintiffs have offered no evidence in support of their claim of injury to reputation (*see Jacob H Rottkamp & Son, Inc. v Wulforst Farms, LLC*, 17 Misc 3d 382, 388 [2007]).

The balance of equities weighs in defendants' favor since 500 West Monroe has expended significant funds in connection with the foreclosure sale, in addition to payments of approximately $1,131,954 to extend the mortgage and Mezzanine A loans on behalf of plaintiffs, and plaintiffs have not paid the loan or the extension fees.

Given the unlikelihood of plaintiffs' succeeding on the merits and the availability of money damages, we see no need for defendants to place funds in escrow.

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

ENTERED: JANUARY 13, 2011

CLERK