SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 7, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Andrias, Moskowitz, Freedman, JJ.

5047 The People of the State of New York, Respondent, Ind. 714/00

-against-

Bobby Perez,
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 (Bari L. Kamlet of counsel), for respondent.

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Judgment of resentence, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered April 23, 2010, resentencing defendant to an aggregate term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was not barred by double jeopardy since defendant was still serving his prison term at that time and had no reasonable expectation of finality in his illegal sentence (*People v Lingle*, __ NY3d __, 2011 NY Slip Op 03308 [Apr 28, 2011]).

We have considered and rejected defendant's due process argument. Defendant's remaining challenges to his resentencing are similar to arguments that were rejected in *People v Williams* (14 NY3d 198 [2010], *cert denied* __ US __, 131 SCt 125 [2010]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 7, 2011

CLERK

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3937 The Goldman Sachs Group, Inc., Index 602060/09
Plaintiff-Appellant,

Goldman, Sachs & Co.,
Plaintiff,

-against-

Almah LLC,
Defendant-Respondent.

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Morrison Cohen LLP, New York (Mary E. Flynn of counsel), for appellant.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for respondent.

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Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered April 29, 2010, which, insofar as appealed from, in an action for breach of contract, inter alia, denied plaintiff's motion to dismiss as to the first counterclaim, based on documentary evidence, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of plaintiff-appellant dismissing the counterclaims.

Plaintiff The Goldman Sachs Group, Inc. (GS) is the tenant and defendant, Almah LLC, is the landlord under a 1998 lease for premises at 180 Maiden Lane entered into by their predecessors in

interest. The lease was for an initial 15 year term, to expire in 2014. It had an "early termination option" which permitted the tenant to terminate in 2009 by giving notice in 2008. The tenant also had an option to extend the lease for two 5 year terms if the early termination option was not exercised.

By side letter agreement executed at the same time between plaintiff Goldman, Sachs & Co. (GS & Co.) and the prior landlord, the landlord was required to pay GS & Co. a "commission" if GS & Co. waived the early termination option. GS & Co. is GS's wholly-owned subsidiary. The rationale was that a brokerage commission would be paid so the landlord would avoid the expenses of an empty premises and needing to seek a new tenant in a tough real estate market. The side letter agreement was incorporated by reference in the lease.

The lease also permits assignment or sublease with the landlord's prior written consent, which cannot be unreasonably withheld. Before the proposed effective date of the assignment or sublease, the tenant is required to deliver executed copies of the assignment or sublease documents and, if not fully disclosed thereby, a "statement of all consideration to be received by Tenant for or in connection with the assignment or sublease and the terms of payment therefor."

Art. 12.6(a) requires that the tenant share with the landlord any profit received from an assignment:

> "in the case of an assignment, an amount equal to fifty percent (50%) of all sums . . . and other consideration payable to Tenant by the assignee for or by reason of the assignment (including but not limited to, sums paid for the sale or rental of Tenant's fixtures, leasehold improvements . . .) reduced . . . by (i) the actual expenses incurred in good faith by Tenant in connection with such assignment . . . payable if, as and when Tenant receives such sums. . ."

A similar profit sharing clause in Art. 12.6(b) governs subleases.

Art. 12.8 provides, in relevant part:

> "The first sentence of Section 12.1 and Sections 12.2, 12.3, 12.4, 12.5 and 12.6 of this Article [i.e., those relating to assignment, subletting, consent and profit sharing] shall not apply to . . . any assignment or sublease by Tenant to any Related Party. . . . For the purposes of this Section, a "Related Party" shall mean (x) any corporation, partnership or other entity which, at the time of the making of such assignment or sublease or the commencement of such occupancy, is controlled by, controls or is under common control with, Tenant. . ."

Foregoing its early termination option, by letter dated April 17, 2008, GS requested the landlord's consent to a sublease and assignment. GS proposed to sublease the premises to GS & Co. for a portion of the remaining lease term, with GS & Co. then surrendering portions of the premises in phases. GS also proposed a subsequent assignment whereby it would assign all its rights as tenant under the lease (and sublessor under the

sublease) to nonparty AIG Employee Services, Inc (AIG). AIG would thus become sublessor to GS & Co., receiving the rent, which would be paid over to the landlord until GS & Co. surrendered the premises pursuant to the sublease.

After formally informing the landlord of the terms of the proposed sublease and assignment, by letter dated May 5, 2008, GS provided drafts of the transactional documents, stating that "there is no consideration to be received by Tenant in connection with the Assignment." By a June 13, 2008 letter accompanying the executed transactional documents, GS reiterated that no consideration has been or will be paid in connection with the transaction except as set forth in the documents.

On May 19, 2008, the landlord consented to the proposed sublease and assignment. The consent letters requested a statement of all consideration to be received by GS. GS then sublet the premises to GS & Co. for the remainder of the lease term and assigned its rights and obligations under the lease and sublease to AIG; GS thereafter became AIG's subtenant at the same rent as under the lease until it surrendered such space.

Since GS did not exercise its early termination option, by letter dated July 23, 2008 GS & Co. claimed a $3.1 million commission under the side letter agreement. When the landlord

denied payment, the tenant commenced this action for the commission. The landlord counterclaimed against GS for its 50% share of the value received by the tenant for the assignment and sublease transaction, claiming it was a detailed "sweetheart" sublease "customized" to fit GS's complex needs and that its inherent economic value constituted "other consideration" under Art. 12.6 of the lease. The landlord asserted that the entire transaction was worth $150 million (so its share was $75 million) because it facilitated GS's move in stages from the premises into its new world headquarters at Battery Park City. The landlord sought damages for, inter alia, breach of contract.

Before any discovery was conducted, GS moved to dismiss the counterclaims pursuant to CPLR 3211(a)(1) and (7)(21).[1] GS argued that it was entitled to dismissal of the first counterclaim (breach of contract) because all the transaction documents submitted established that it "received" no "payment" of any kind as a result of the assignment and sublease. Preliminarily, the motion court acknowledged that, because Art. 12.6(a) of the lease speaks in terms of actual payment, GS's

[1]The court granted the motion as to two of the three counterclaims. The dismissal of these counterclaims is not at issue on appeal.

interpretation limiting the profit-sharing obligation to money received was reasonable. Nevertheless, the court denied the motion to dismiss as to the first counterclaim, finding that the term "other consideration" was ambiguous and should be interpreted with the aid of extrinsic evidence, reasoning that, since "sum" means money, if "other consideration" is to have any non-redundant meaning, it must mean more than just money, in accordance with the broad legal concept that consideration may be many forms of value.

Whether a contract is ambiguous is a question of law for the court and is to be determined by looking "within the four corners of the document" (*Kass v Kass*, 91 NY2d 554, 566 [1998], citing *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]). A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning" (*Greenfield v Philles Records*, 98 NY2d 562, 570 [2002]; *see also Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Conversely, "[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings" *(Feldman v National Westminster Bank*, 303 AD2d 271, 271 [2003], *lv denied* 100 NY2d 505 [2003] [internal quotation marks and citations omitted]).

The existence of ambiguity is determined by examining the "entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed," with the wording to be considered "in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Kass* at 566 [internal quotations marks and citation omitted]). The "'intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations'" (*Del Vecchio v Cohen*, 288 AD2d 426, 427 [2001], quoting *Slamow v Del Col*, 174 AD2d 725, 726 [1991], *affd* 79 NY2d 1016 [1992]).

Applying these principles, we find that the language of Article 12.6, when considered as an integrated whole and not in isolation, conveys the parties' intent that only actual "payment" made by the assignee and "receipt" by the assignor as consideration would trigger the profit-sharing clause. Indeed, Article 12.6 lists several types of "consideration" and all of the examples consist of amounts payable, for one reason or another, to the Tenant. The examples of "other consideration" include "sums paid for the sale or rental of Tenant's fixtures, leasehold improvements, equipment, furnishings or other personal property . . . " Additionally, Article 12.6 indicates that any

"consideration" would consist of "sums" that a Tenant "receives" and against which the Tenant's expenses can be netted. This language in Article 12.6 conveys the parties' clear intent that only tangible consideration such as cash or notes payable to the tenant could trigger the profit-sharing clause, and that any intangible benefits inuring to the tenant from the assignment and sublease, as the owner posits, in the form of inherent "value" does not suffice. Even though the word "consideration" might seem to suggest a broader meaning in general, the word should be limited to the particular object that the parties intended here. Accordingly, because it is undisputed that no "payment" was "received" as consideration for the assignment of the lease, tenant GS was entitled to a dismissal of the counterclaim in its entirety.

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

ENTERED: JUNE 7, 2011

CLERK

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

4844- 4844A
Kent M. Swig,
Petitioner-Appellant,

Index 602942/09
114519/09

-against-

Properties Asset Management Services, LLC,
Respondent-Respondent.

- - - - -

Square Mile Structured Debt (One) LLC, et al.,
Petitioners-Respondents,

-against-

Kent M. Swig,
Respondent-Appellant,

Properties Asset Management Services, LLC, et al.,
Respondents.

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Thompson Hine LLP, New York (Richard De Palma of counsel), for appellant.

Greenberg Traurig, LLP, New York (James W. Perkins of counsel), for Square Mile Structured Debt (One) LLC and Square Mile Structured Debt (Three) LLC, respondents.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 1, 2010, which denied the petition of judgment debtor Kent M. Swig for a declaration that respondent Properties Asset Management Services, LLC (PAMS) is not restrained from making payments to him for sums due under an asset management

agreement and for an order requiring PAMS to make 90% of such payments, and granted Square Mile's petition for an order directing Swig, PAMS and respondent Terra Holdings, LLC to turn over all distributions under the agreement payable to Swig, unanimously affirmed, without costs. Order, same court and Justice, entered May 14, 2010, which, insofar as appealed from, denied Swig's motion to renew, unanimously affirmed, without costs.

Swig, the judgment debtor, bore the burden of proving that the funds at issue were exempt as earnings for personal services under CPLR 5205(d)(2) (*see Matter of Balanoff v Niosi*, 16 AD3d 53, 56 [2005]). His submissions failed to satisfy that burden.

The asset management agreement he submitted essentially contradicted his assertion that his income thereunder should be treated as earnings for his personal services. Under the asset management agreement he received three types of compensation: base salary, incentive compensation, and additional incentive compensation; his petition, as well as Square Mile's turnover petition, referenced all three of these forms of income. The agreement states that the base salary is to compensate *PAMS* and that to earn base salary PAMS is required to provide the active involvement of only two of its four managers, which did not

necessarily require the performance of any services by Swig himself. His incentive compensation is based on the operating cash flow of Terra Holdings, and his additional incentive compensation is based on Terra's available cash from operations, and nothing in the record indicates that Swig's personal services were the chief factor in Terra's profits. Consequently, the terms of the agreement establish that no portion of Swig's compensation is necessarily identifiable as exempt under CPLR 5205(d)(2), and nothing in Swig's petition supports a contrary conclusion beyond his conclusory assertion.

Nor do the submissions on Swig's renewal motion entitle him to relief. His submissions on the initial petition and cross petition could have made analytical distinctions among the three kinds of compensation due him under the asset management agreement, but they did not. His belated submission of W-2's on renewal, and his effort to claim an exemption for at least the portion of his compensation reported in that manner, were properly rejected.

Under more straightforward employment circumstances, the showing that an employee received a W-2 reporting his wages could be sufficient to shift the initial burden to the judgment creditor to show why those funds were not exempt. Here, however,

when the complex terms of the compensation provisions of the asset management agreement are considered, the fact that the structure of Swig's compensation includes a component called base salary that was reported in the context of W-2's is insufficient to deem those funds "easily identifiable as exempt" (*Matter of Balanoff*, 16 AD3d at 56). Nor does Swig's bare assertion in his affidavit that the salary was for his personal services establish those funds as exempt. Indeed, the assertion that his base salary had not been treated as covered by the restraining notices because it was actually paid by PAMS "through Brown Harris Stevens Residential Management, LLC" tends only to establish that the portion of Swig's compensation called his base salary was not a typical payment of wages.

As the motion court correctly reasoned, we need not reach the question of whether Swig's submissions established a need for a hearing as to whether he needed 90% of his salary to meet his basic financial obligations to his family. We note, however, that the initial petition did not even assert that the sums sought were necessary for the reasonable requirements of himself and his dependents; it merely asserted that he needed the funds to pay his legal counsel and his restructuring advisors and that the withholding of funds was interfering with his ability to

manage his business. Only after this failure was pointed out in Square Mile's responsive turnover petition did Swig make the requisite assertion that the funds were needed for the support of himself and his dependents; even then, however, he offered nothing to substantiate the assertion. Therefore, no hearing on the issue would have been warranted in any event.

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

ENTERED: JUNE 7, 2011

CLERK

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

4845 New York State Assemblyman Adam Clayton Powell, IV, et al., Plaintiffs-Appellants, Index 108220/06

-against-

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

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Schulte Roth & Zabel LLP, New York (Howard Epstein of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered January 27, 2010, which granted defendants' motions for summary judgment, denied plaintiffs' cross motion for summary judgment, and declared that neither Asphalt Green nor Bobby Wagner Walk is subject to the public trust doctrine, and therefore, the City of New York is not required to obtain legislative approval before commencing demolition, construction or operation of an access ramp and marine waste transfer station located at East 91st Street in Manhattan, unanimously affirmed, without costs.

In October 2004, the City of New York announced a proposed Comprehensive Solid Waste Management Plan (SWMP), which would

include the building of a new solid waste marine transfer station (MTS) on City-owned property at East 91st Street and the East River in Manhattan, the site of a former MTS that was last operated in 1999. The goal of the SWMP is to convert the City's existing MTSs to enable waste to be containerized on site, thereby making the waste suitable for out-of-City barge and rail export.

In this action, plaintiffs seek a judgment declaring that defendants cannot proceed with the construction and operation of the East 91st Street MTS without authorization from the New York State Legislature.[1] Plaintiffs maintain that because the project will encroach upon alleged parkland for non-park purposes, the public trust doctrine requires prior legislative approval of the plan. In particular, plaintiffs contend that the demolition and reconstruction of the MTS, including an access ramp leading to it, will constitute alienation of the Asphalt Green sports center and Bobby Wagner Walk, a pedestrian thoroughfare along the East

[1] This Court previously affirmed a judgment dismissing a separate CPLR article 78 proceeding brought by a community group challenging the City's plan to build the East 91st Street MTS (*Association for Community Reform Now ["ACORN"] v Bloomberg*, 52 AD3d 426 [2008], *lv denied* 11 NY3d 707 [2008]). We rejected various challenges to the project and found that the proposed MTS would not cause any significant changes to the existing land uses or overall character of the neighborhood (*id.* at 427).

River. According to plaintiffs, Asphalt Green will lose storage area beneath the current access ramp during the construction period, and the construction and operation of the MTS will diminish the public's use and enjoyment of both areas.

Both sides sought summary judgment, and in an order entered January 27, 2010, the motion court granted defendants' motions and denied plaintiffs' cross motion. The court concluded that neither Asphalt Green nor Bobby Wagner Walk is a dedicated parkland subject to the public trust doctrine. Alternatively, the court found that even if the areas were parklands, the City's plan would not result in a substantial intrusion on the lands so as to implicate the public trust doctrine. Accordingly, the court declared that the City was not required to obtain legislative approval before commencing demolition, construction or operation of the MTS and access ramp. We now affirm.

Under the public trust doctrine, State legislative approval is required before parkland can be alienated or used for an extended period for non-park purposes (*Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 630 [2001]). A parcel of land may constitute a park either expressly, such as by deed or legislative enactment, or by implication, such as by a continuous

use of the parcel as a public park (*Matter of Angiolillo v Town of Greenburgh*, 290 AD2d 1, 10-11 [2001], *lv denied* 98 NY2d 602 [2002]; *Matter of Lazore v Board of Trustees of Vil. of Massena*, 191 AD2d 764, 765 [1993]). Such an implied dedication may exist "when a municipality's acts and declarations manifest a present, fixed, and unequivocal intent to dedicate" (*Riverview Partners v City of Peekskill*, 273 AD2d 455, 455 [2000]).

The motion court properly concluded that Asphalt Green and Bobby Wagner Walk do not constitute parkland subject to the public trust doctrine. Neither area has ever been mapped or expressly dedicated as a public park. Nor are these properties parks dedicated by implication. Asphalt Green was not acquired by the City for park purposes. Indeed, a 1989 assignment of a part of Asphalt Green to the Department of Parks includes a condition that the land not be formally "mapped" as parkland, which shows an unambiguous intent that the site not be dedicated as a public park. Moreover, Asphalt Green is operated by a non-City entity and the public's access is restricted 70 percent of the time to those who pay substantial membership fees. As for Bobby Wagner Walk, the Department of Transportation owns the property, and it functions primarily as a thoroughfare, which distinguishes it from a park. Thus, plaintiffs cannot establish

an unequivocal intent to dedicate these areas as public parkland.

Even if the subject properties could be considered parks, the reconstruction of the access ramp and MTS would not result in a "substantial intrusion on parkland for non-park purposes" (*Friends of Van Cortlandt Park*, 95 NY2d at 630). Neither the temporary loss of some storage space under the existing access ramp nor the minimal encroachment onto the subject properties will substantially interfere with access to or use of the facilities. Furthermore, the construction is scheduled to mostly occur at night and last only 22 to 24 months overall, with only 11 months needed for demolition and reconstruction of the access ramp.

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

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

ENTERED: JUNE 7, 2011

CLERK

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

4888 The People of the State of New York, Ind. 2070/09
Respondent,

-against-

Louis Riley,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura Ward, J.), rendered December 10, 2009, convicting defendant, after a jury trial, of grand larceny in the second degree, criminal possession of stolen property (CPSP) in the second degree, burglary in the third degree, and six counts of possession of burglar's tools, and sentencing him, as a second felony offender, to an aggregate term of 4½ to 9 years, unanimously modified, on the facts, to the extent of reducing the convictions of grand larceny in the second degree and criminal possession of stolen property in the second degree to petit larceny and criminal possession of stolen property in the fifth degree, respectively, and imposing a sentence of time served on each of the reduced convictions, and otherwise affirmed.

The bulk of the stolen property that is the subject of the second-degree grand larceny and second-degree CPSP counts consists of approximately 2,500 linear feet of copper piping that was ripped from behind the walls of four connected buildings. The elements of each of these crimes include proof that the value of the stolen property exceeds $50,000 (*see* Penal Law §§ 155.40 and 165.52). Upon a review of the evidence in light of the elements of these two crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]) we find that the verdict was against the weight of the evidence due to a failure of proof of the value of the stolen property (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Pursuant to Penal Law § 155.20(1), the People introduced evidence of "the cost of replacement of the property within a reasonable time after the crime" as proof of the value of the copper piping. The People's only evidence of value included labor costs associated with installing new piping in the buildings. Defendant argues that the People have not established the element of value because such labor costs cannot be included as part of the cost of replacement. No New York case addresses this point. However, we are persuaded by the opinions of appellate courts of other jurisdictions that defendant is

correct.

In interpreting Texas Penal Code § 31.08(a)(2), an analog of Penal Law § 155.20(1), the Texas Court of Appeals found that the value of a compact disc player stolen from an automobile "is not the same as the cost of replacing it where the replacement cost includes installation" (*Drost v State,* 47 SW 3d 41, 46 [Tex Ct App 2001]). In *Spencer v State* (217 So 2d 331 [Fla Dist Ct App 1968], *cert denied* 225 So 2d 528 [Fla 1969]), a case involving electrical wire severed from a power pole, the Court of Appeal of Florida aptly observed:

> "The thing stolen was not the installed wire, but was the wire after it had been severed and dropped to the ground. The wire after severance is what must be shown to have had a value of $100.00 or more, if its taking is to constitute grand larceny. It is our conclusion that the cost of the wire in place is not the criterion of value authorized by the statute" (*id.* at 332; *see also Chase v State,* 46 Ark App 261, 263, 879 SW 2d 455, 455-456 [Ark Ct App 1994]).

Inasmuch as its value was not otherwise established, the value of the property stolen by defendant must be deemed to be less than $250 (*see* Penal Law § 155.20[4]). We therefore reduce the grand larceny and CPSP convictions as set forth above.

We also find that the court properly declined to impose any sanction for noncompliance with the procedures for disposal of stolen property set forth in Penal Law § 450.10. The return of

the property to its rightful owners was neither intentional nor in bad faith, and it did not cause defendant any prejudice (*see People v Graham*, 186 AD2d 47 [1992], *lv denied* 80 NY2d 975 [1992]).

We have considered defendant's remaining contentions and find them without merit.

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

ENTERED: JUNE 7, 2011

CLERK

Andrias, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

4961-	In re JT Tai & Co., Inc.,	Index 117410/09
4962-	Petitioner-Appellant,	117689/09
4963-		117411/09
4964	-against-	117293/09

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

- - - - -

In re Manoco LP.,
Petitioner-Appellant,

-against-

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

- - - - -

In re Stacy Maou,
Petitioner-Appellant,

-against-

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

- - - - -

In re Robinson Callen, Trustee,
Petitioner-Appellant,

-against-

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

_____

Davidoff Malito & Hutcher LLP, New York (Mark D. Geraghty of counsel), for JT Tai & Co. Inc., Manoco LP and Stacy Maou, appellants.

Cohen, Hochman & Allen, New York (Bradley J. Green of counsel), for Robinson Callen, Trustee, appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A.

Brenner of counsel), for respondents.

Judgments, Supreme Court, New York County (Paul Wooten, J.), entered October 7, 2010, denying the petitions to, among other things, annul the determinations of the New York City Environmental Control Board (ECB) which found that petitioners were outdoor advertising companies subject to the higher penalties set forth in former section 26-262 of the Administrative Code of the City of New York, and dismissing the proceedings brought pursuant to CPLR article 78, unanimously affirmed, without costs.

All four above-captioned appeals are determined by our construction of the same statute. Because the factual differences between the four petitions are not germane to our determination of the issue, we combine the appeals and consider them together.

The four petitioners are similarly situated property owners. They challenge the determinations of the ECB that they are outdoor advertising companies (OACs) as that term is defined in former Administrative Code § 26-259(b) and (c), and hence, subject to enhanced sanctions for illegal signage. They argue that the definition of an OAC does not apply to property owners

who lease space on their properties to registered OACs for advertising purposes.

Petitioner Callen is a property owner that leases space on its premises at 30 Gansevoort Street directly to OACs which display advertising signs on the premises' exterior. The New York City Department of Buildings (DOB) issued notices of violation against petitioner for failing to register as an OAC, failing to obtain a permit for the outdoor advertising signs, and for violating various zoning regulations.

Petitioner Maou owns premises in New Hyde Park, Queens County. In July 2004, petitioner entered into an agreement with Vista Media Group Inc. to lease space for a wall sign for outdoor advertising purposes. In July 2007, DOB issued this petitioner three notices of violation.

Petitioner Manoco LP is the owner of premises at 150 East 58th Street. In 1994, petitioner entered into a long-term lease with the predecessor in interest of Signal Outdoor Advertising LLC, an OAC registered with the City of New York. On May 2007, DOB issued petitioner three notices of violation relating to the installed signage.

Petitioner JT Tai & Co. Inc. is the owner of premises at 591 Third Avenue. In 1998, petitioner entered into a five-year lease

with Allied Outdoor Advertising allowing Allied to erect outdoor advertising signage on an exterior wall of the building, and subsequently the lease was extended by successors in interest until 2012. In March 2007 the DOB issued petitioner five notices of violation for, inter alia, failing to register as an OAC, and for displaying advertising signs without a DOB permit and in excess of the size permitted.

We find that the ECB's determinations that petitioners are OACs within the meaning of former Administrative Code § 26-259(b) (as amended by Local Law No. 31 [2005] of City of NY) are rational and not arbitrary and capricious. At the time of issuance of the notice of violations to petitioners, former Administrative Code § 26-259(b) defined an OAC as an entity involved in "the outdoor advertising business," and former Administrative Code § 26-259(c) defined "the outdoor advertising business" as, in pertinent part, "the business of . . . leasing . . . or otherwise either directly or indirectly making space on signs situated on buildings and premises within the City of New York available to others for advertising purposes." When construing these statutory provisions by their plain terms, as one must when statutory interpretation does not involve specialized knowledge (*see Matter of Belmonte v Snashall*, 2 NY3d

560, 565-566 [2004]), it is clear that the conduct of the petitioners falls within the statutory definition of an OAC.

Petitioner Callen's contention that the ECB exceeded its authority under the New York City Charter by fining it in excess of $25,000 is unpreserved since petitioner failed to raise it at the administrative level (*see Matter of Robinson v Martinez*, 308 AD2d 355, 355 [2003]), and we decline to review it in the interest of justice. Were we to review it, we would find it unavailing. Although New York City Charter § 1049-a(d)(1)(g) provides that the ECB may enforce civil penalty orders of up to $25,000 by entering the order as a judgment "in the civil court of the city of New York or any other place provided for the entry of civil judgments within the state," § 1049-a(d)(3) provides that the ECB may apply to a court of competent jurisdiction for enforcement of any of its other orders. Accordingly, ECB has the

authority to apply to a court of competent jurisdiction to enforce orders of greater than $25,000.

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

ENTERED: JUNE 7, 2011

CLERK

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

5092 Randall S. Newman, et al., Index 100878/09
Plaintiffs-Appellants,

-against-

Wells Fargo Bank, N.A., et al.,
Defendants-Respondents.

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Randall S. Newman, P.C., New York (Randall S. Newman of counsel), for appellants.

Hogan Lovells US LLP, Washington, DC (Jessica L. Ellsworth of the bars of the State of Virginia and the District of Columbia, admitted pro hac vice, of counsel), for Wells Fargo Bank, N.A., respondent.

Zeichner Ellman & Krause LLP, New York (Steven S. Rand of counsel), for Countrywide Home Loans, Inc., respondent.

Winget, Spadafora & Schwartzberg, LLP, New York (Scott B. Tenenbaum of counsel), for Quality Real Estate Appraisals, Inc. and Richard S. Marra, respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about February 5, 2010, which granted defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, without costs.

Plaintiffs allege that defendant Wells Fargo Bank, N.A. fraudulently misrepresented that their home would be classified as a two-family instead of a one-family home for mortgage purposes. That claim is refuted by the terms set forth in a

mortgage commitment letter signed by plaintiff Randall S. Newman on the date of plaintiffs' closing. Plaintiffs' remaining claims are not viable because they are based on the premise that plaintiffs detrimentally relied upon fraudulently inflated appraisals of the home. Appraisals are not actionable because they are matters of opinion (*see Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 450 [2009], *affd* 16 NY3d 173 [2011]; *Stuart v Tomasino*, 148 AD2d 370, 372 [1989]).

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5254 The People of the State of New York, Ind. 3570/07
Respondent,

-against-

Thanh Do,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered June 24, 2008, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree, and sentencing him to a term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The court conducted the suppression proceedings in two stages. First, the court conducted a conventional adversarial hearing. The court then conducted ex parte, in camera proceedings relating to a confidential informant.

The arresting officer testified at the adversarial hearing that he received confidential information that a group of men were about to commit a home invasion robbery at a specified

location. At that location, the officer saw three men, including defendant, who met the descriptions of the suspects. The officer saw an L-shaped bulge resembling a firearm in defendant's waistband. After a protective frisk failed to rule out the possibility that the object was a weapon, the officer handcuffed defendant and removed the object from defendant's person.

The hearing court credited this testimony, and we find no basis for disturbing that determination. Therefore, the evidence presented at the adversarial hearing was sufficient to deny suppression (*see People v Prochilo*, 41 NY2d 759, 762 [1977]). Since the confidential information was confirmed by the officer's observation of a bulge with the specific shape of a handgun, it established reasonable suspicion, justifying the police actions.

Accordingly, it was unnecessary for the People to establish the informant's reliability and basis of knowledge. In any event, based on our in camera review of the sealed minutes of the ex parte portion of the suppression proceedings, we find that the informant was reliable, and that he was speaking from personal knowledge. We also conclude that the court properly employed the procedures set forth in *People v Castillo* (80 NY2d 578 [1992], *cert denied* 507 US 1033 [1993]), and we reject defendant's procedural arguments.

We decline to revisit our prior decision (M-886, 2010 NY Slip Op 67604[U]) that denied disclosure of the sealed materials.

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5256 Maria Sabalza, Index 6901/06
Plaintiff-Respondent,

-against-

William H. Salgado,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

William Pager Esq., et al.,
Third-Party Defendants-Respondents.

_____

Andrew Lavoott Bluestone, New York, for appellant.

William Pager, Brooklyn, for Maria Sabalza, respondent.

Steinberg & Cavaliere, LLP, White Plains (Steven A. Coploff of counsel), for William Pager Esq. and Law Offices of William Pager, respondents.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered June 30, 2010, which denied defendant/third-party plaintiff's motion for summary judgment dismissing the complaint, and granted third-party defendants' motion to dismiss the third-party complaint pursuant to CPLR 3211 (a)(1) and (7), unanimously affirmed, with costs.

Plaintiff alleges that, while grocery shopping at a local supermarket in 1997, she slipped and fell on water and a grape at a soda display, near the produce section. She retained the

services of defendant attorney, and he commenced an action for personal injuries in 1998. On May 26, 2003, the action was dismissed based upon the failure of defendant to appear at a compliance conference. On or about May 5, 2004, defendant filed a motion to restore the case to the calendar, but that motion was denied, based upon defendant's failure to appear in support of the motion. On or about March 14, 2005, defendant filed a motion to renew his prior motion to restore plaintiff's action to the court calendar, and that motion was denied on the merits.

Plaintiff alleges that defendant misled her as to the status of her case, screened his calls to avoid speaking with her, and failed to appear for previously scheduled appointments. In August of 2005, plaintiff engaged the services of third-party defendants who, after executing a consent to change attorney in the underlying action, commenced this action for malpractice.

A plaintiff's burden of proof in a legal malpractice action is a heavy one (*Lindenman v Kreitzer*, 7 AD3d 30 [2004]). The plaintiff must first prove the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation (*id.* at 34; *Nazario v Fortunato & Fortunato, PLLC*, 32 AD3d 692 [2006]).

However, a defendant seeking dismissal of a malpractice case

against him has the movant's burden of making a prima facie showing of entitlement to summary judgment (*see Suppiah v Kalish*, 76 AD3d 829 [2010]). Where the motion is premised on an argument that the plaintiff could not succeed on her claim below, it is defendant's burden to demonstrate that the plaintiff would be unable to prove one of the essential elements of her claim (*see Velie v Ellis Law, P.C.*, 48 AD3d 674 [2008]).

A defendant seeking summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition, nor had actual or constructive notice of its existence (*see Castillo v New York City Tr. Auth.*, 69 AD3d 487 [2010). A defendant cannot satisfy its burden merely by pointing out gaps in the plaintiff's case, and instead must submit evidence concerning when the area was last cleaned and inspected prior to the accident (*see Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [2007]; *Porco v Marshalls Dept. Stores*, 30 AD3d 284 [2006]; *compare with Smith v Costco Wholesale Corp.*, 50 AD3d 499 [2008]).

Defendant attorney failed to make a prima facie showing (*see Suppiah*, 76 AD3d at 832; *Velie*, 48 AD3d at 675). He did not submit any evidence, documentary, testimonial or otherwise, concerning C-Town’s maintenance procedures, whether or not there

were any complaints concerning the conditions, or when C-Town last inspected the area. Since defendant failed to meet his initial burden of establishing a lack of constructive notice as a matter of law, the burden never shifted to plaintiff to establish how long the condition had been in existence (*see Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409 [2004]).

The motion court was correct in denying defendant's motion to dismiss plaintiff's claim of a violation of Judiciary Law § 487. A cause of action for violation of the Judiciary Law statute related to attorney misconduct is not duplicative of causes of action alleging legal malpractice, since the statutory claim requires an intent to deceive, whereas a legal malpractice claim is based on negligent conduct (*Burke, Albright, Harter & Rzepka, LLP v Sills*, 83 AD3d 1413 [2011]; *Moormann v Perini & Hoerger*, 65 AD3d 1106 [2009]).

The third-party action for contribution or indemnification was also properly dismissed as not viable, since third-party defendants did not share in defendant's responsibility for plaintiff's alleged loss, not having represented her as

defendant's successor until after the case had been dismissed and two motions to restore had been denied (*see Rivas v Raymond Schwartzberg & Assoc., PLLC*, 52 AD3d 401 [2008]; *Wilson v Quaranta*, 18 AD3d 324 [2005]).

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5257 Paul M. Ellington, Index 650233/09
Plaintiff-Appellant,

-against-

Sony/ATV Music Publishing LLC,
et al.,
Defendants-Respondents.

_____

Scarola Malone & Zubatov LLP, New York (Alexander Zubatov of counsel), for appellant.

Pryor Cashman LLP, New York (Ilene S. Farkas of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 12, 2010, which granted defendants' motion to dismiss the first, second, sixth and eighth causes of action for repudiation, rescission, breach of fiduciary duty and unjust enrichment, respectively, unanimously affirmed, with costs.

Plaintiff failed to set forth a basis for terminating the parties' copyright royalties agreement. Viacom's sale of defendant Famous Music, a party to the agreement, to defendant Sony/ATV did not repudiate the agreement by assigning plaintiff's rights and rendering Famous incapable of performing its obligations. In any event, an assignment is permissible in the

absence of an express prohibition (*see Eisner Computer Solutions v Gluckstern*, 293 AD2d 289 [2002]; *Matter of Stralem*, 303 AD2d 120, 122 [2003]). Plaintiff's conclusory characterization of the agreement as an unassignable personal services contract (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 482 [2006], *cert dismissed* 548 US 940 [2006]) was contradicted by the overall tenor of the agreement, which was cast as a sale of "assets" and did not provide for the management of plaintiff's artistic career or talents. The extraordinary remedy of rescission was unwarranted since, among other reasons, there was an adequate remedy at law (*see Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]).

The fiduciary breach claim was duplicative of the contract claims (*see William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [2000]), plaintiff's artificial separation of the royalty mis-routing allegation from the "negative adjustment" contract claims notwithstanding. The unjust enrichment claim was not

viable in light of the undisputedly valid contract claims (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]).

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

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5258 The People of the State of New York, Ind. 3697/06
Respondent, 4439/06
3221/08

-against-

Phillip Stapleton,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered on or about April 2, 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: JUNE 7, 2011

CLERK

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

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5259 Dr. Tulsa Knox, Index 106696/09
Petitioner-Respondent,

-against-

New York City Department of Education,
Respondent-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for appellant.

Noah A. Kinigstein, New York, for respondent.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered March 2, 2010, denying respondent's motion to dismiss the petition to annul its determination that petitioner is ineligible for re-employment, and granting the petition to the extent of remanding the matter for a name-clearing hearing, unanimously affirmed, without costs.

Petitioner demonstrated "stigma plus," i.e., defamation by the government, coupled with a likelihood of dissemination of the stigmatizing material that could significantly impair her ability to gain employment as a school psychologist in the future (*see Matter of Swinton v Safir*, 93 NY2d 758, 763-765 [1999]). The report of the Special Commissioner of Investigation, which sets forth in detail the findings of dishonesty that led to the

placement of petitioner's name on respondent's "Ineligible/ Inquiry List" and recommends that these findings be considered should petitioner apply for any position in a New York City public school in the future, has already been disseminated not only within the Department of Education, but also to the Bronx County District Attorney's Office and the State Department of Education.

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5260-
5261 Josef Mermelstein, Index 111937/09
Plaintiff-Respondent,

-against-

Renee Singer,
Defendant-Appellant.

_____

Craco & Ellsworth, LLP, Huntington (Andrew C. Ellsworth of counsel), for appellant.

Michael J. Petersen, Brooklyn, for respondent.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 5, 2011, in plaintiff's favor, and bringing up for review, an order, same court and Justice, entered September 21, 2010, unanimously affirmed, without costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The record demonstrates that the IRA account was solely in plaintiff's name and that all the funds and securities in the account came from other IRA accounts solely in his name (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]). In support of her argument that her late father had

some ownership interest in the account, defendant relies solely on hearsay conversations and a hearsay document, which, without more, cannot withstand summary judgment (*see Narvaez v NYRAC*, 290 AD2d 400, 400-401 [2002]).

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5262 Maciej Wasek, Index 108974/06
Plaintiff,

-against-

New York City Health & Hospitals Corporation, et al.,
Defendants.
- - - - -
New York City Health & Hospitals Corporation, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Construction Force Services, Inc., et al.,
Third-Party Defendants,

C Force Systems LLC,
Third-Party Defendant-Appellant.

_____

Quirk and Bakalor, P.C., New York (Debra E. Seidman of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 10, 2010, which, insofar as appealed from, in this action for personal injuries sustained at a construction site, denied the motion of third-party defendant C Force Systems for summary judgment dismissing the third-party complaint as against it, unanimously modified, on the law, to the extent of dismissing

the third-party complaint's common-law and contractual indemnification claims, and otherwise affirmed, without costs.

Given that discovery has not yet taken place regarding third-party plaintiffs' claim to pierce the corporate veil of third-party defendant Construction Force Services, Inc., with which they allegedly had an agreement for provision of insurance coverage, summary judgment is not warranted at this time (*see* CPLR 3212[f]; *see also Berkeley Fed. Bank & Trust v 229 E. 53rd St. Assoc.*, 242 AD2d 489 [1997]).

Since third-party plaintiffs state that they are no longer seeking recovery on their common-law and contractual indemnification claims, those claims are dismissed.

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5263 In re Odalis F.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

_____

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

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

_____

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about March 31, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the fourth degree, reckless endangerment in the second degree and menacing in the second degree, and imposed a conditional discharge for a period of 12 months, unanimously reversed, on the law, without costs, the delinquency finding vacated, and the petition dismissed.

The presentment agency's case rested on a 911 call made by a nontestifying complainant, who was appellant's older brother. We conclude that the call was improperly admitted as an excited

utterance.

An extrajudicial statement is admissible under the excited utterance exception to the hearsay rule when the declarant is "so influenced by the excitement and shock of [a startling] event that it is probable that he or she spoke impulsively and without reflection" (*People v Caviness*, 38 NY2d 227, 231 [1975]). "[T]he time for reflection is not measured in minutes or seconds, but rather is measured by facts" (*People v Vasquez*, 88 NY2d 561, 579 [1996] [internal quotation marks omitted]).

In *People v Robinson* (282 AD2d 75 [2001]) we considered the admissibility of a 911 call under the analogous present sense impression exception to the hearsay rule. We held that a victim's 911 call made several minutes after a robbery was inadmissible where the declarant called her employer to report the robbery before calling the police; it could not be said that she did not have time to reflect on the event before calling 911.

Notwithstanding the different bases for presuming the trustworthiness of statements under the respective hearsay exceptions, a declarant's activities before making the statement at issue are relevant under both. Here, the complainant's conduct prior to calling 911, like that of the declarant in *Robinson*, indicates a capacity for deliberation and reflection.

Although the testimony did not establish how much time passed between the time appellant allegedly threatened the complainant with a knife and the time he placed the 911 call, it is clear that several intervening events occurred. The complainant called his mother on the phone and waited for her to get home. When his mother arrived, the complainant asked her whether he should call the police.

Moreover, other than the recording of the 911 call itself, there is no evidence of the existence of the allegedly startling event that led to the alleged excited utterance.

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5264 The People of the State of New York, Ind. 1765/08
Respondent,

-against-

Christopher Nervil,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered on or about June 30, 2009, unanimously affirmed.

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

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

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5265 Susan Fazio, et al., Index 117080/08
Plaintiffs-Respondents,

-against-

Costco Wholesale Corporation,
Defendant-Appellant.

_____

Thomas M. Bona, P.C., White Plains (James C. Miller of counsel), for appellant.

Worby Groner Edelman LLP, White Plains (Michael G. Del Vecchio of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered October 21, 2010, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

We reject plaintiffs' contention that the appeal is untimely because defendant filed its notice of appeal 32 days after it was served electronically with notice of the entry of the order (*see* CPLR 5513[a]). A New York State Court Electronic Filing (NYSCEF) site confirmation shows the date on which the order with notice of entry was filed electronically and e-mail notifications were sent to counsel for the parties. However, the NYSCEF site's transmission of notification of the entry to e-mail service addresses "shall not constitute service of notice of entry by any

party" (22 NYCRR 202.5b[h][3]). "A party shall serve notice of entry of an order . . . on another party by serving a copy of the notification . . . and an express statement that the transmittal constitutes notice of entry" (*id.*). The only affidavit of service in the record shows that the notice of entry was served on defendant by mail. Thus, defendant had 35 days to notice its appeal (*see* CPLR 2103[b][2]).

The conclusion of defendant's expert that the cracked and eroded area of concrete in defendant's parking lot on which plaintiff Susan Fazio tripped was only 1/16 inch deep and therefore did not create a tripping hazard was reasonably inferable from the photographs; no inspection was required to make a prima facie showing on that issue (*see Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1982]; *see also Gaud v Markham*, 307 AD2d 845 [2003]). However, "a mechanistic disposition of a case based exclusively on the dimension of the . . . defect is unacceptable" (*Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]). Plaintiff's testimony that the concrete in the depressed area was eroded, broken up and uneven, with exposed, protruding stone creates an issue of fact whether the defect was trivial (*see id.* at 977; *see e.g. Tese-Milner v 30 E. 85th St. Co.*, 60 AD3d 458 [2009]; *George v New York City Tr.*

Auth., 306 AD2d 160 [2003]; *Tineo v Parkchester S. Condominium*, 304 AD2d 383, 383-384 [2003]; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [2000]).

Contrary to defendants' contention, plaintiff adequately identified the location of her fall. Indeed, plaintiffs testified that when they tried to describe to defendant's manager exactly where the incident occurred, an employee present in the manager's office said, "You know where that is, it's over by the carts," and the manager testified that the same employee took him to the parking lot to show him the location. Thus, the record also presents an issue of fact as to constructive notice (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Plaintiffs were not required to produce an expert to refute defendant's expert's conclusions (*see e.g. Hendricks v Baksh*, 46 AD3d 259 [2007]).

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5266 The People of the State of New York, Ind. 744/06
Respondent,

-against-

Raul Galvez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Davis Polk & Wardwell LLP, New York (Julia Nestor of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (William A. Wetzel, J. at suppression hearing; Edward J. McLaughlin, J. at jury trial and sentencing), rendered March 24, 2009, convicting defendant of murder in the second degree, and sentencing him to a term of 22 years to life, unanimously affirmed.

The court did not improperly delegate its authority when, after permitting a juror to separate from the other deliberating jurors for a short break, it directed a court officer to instruct the juror as to his responsibilities during the break and to tell the other jurors not to deliberate in the absence of the twelfth juror. These instructions were purely ministerial (*see e.g. People v Nacey*, 78 NY2d 990, 991 [1991]; *People v Bonaparte*, 78

NY2d 26, 30 [1991]; *People v Crespo*, 267 AD2d 36 [1999], *lv denied* 94 NY2d 878 [2000]). Defendant's argument that special circumstances required the court to deliver these instructions personally is based on speculation as to the jury's deliberations, and is unpersuasive.

Earlier on the same day that the juror asked to take a break, the jury sent a note saying it had reached a verdict; 10 minutes later, it sent another note asking the court to disregard the previous note. These notes were not disclosed to counsel, and the record does not indicate whether the court was aware of them. Although the procedure set forth in *People v O'Rama* (78 NY2d 270, 277-278 [1991]) was not followed, this does not warrant reversal. One note simply negated the other, and neither note requested or required a response (*see generally People v Williams*, 38 AD3d 429, 430 [2007], *lv denied* 9 NY3d 965 [2007]). Accordingly, there was no need for any input by counsel.

Defendant did not preserve the argument that his statements should have been suppressed because the detective's translation of the *Miranda* warnings was inadequate. Regardless of what defense counsel may have been alluding to in his colloquy with the hearing court (*see People v Borrello*, 52 NY2d 952 [1981]), this was insufficient to preserve defendant's present claim, and

the court did not "expressly decide[]" the issue "in response to a protest by a party" (CPL 470.05[2]; *see People v Colon*, 46 AD3d 260, 263 [2007]). We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find it unsupported by the hearing record. We have considered and rejected defendant's remaining suppression argument.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5267 Jeanne Marie Lusk, Ind. 102852/09
Plaintiff-Appellant,

-against-

Kenneth J. Weinstein, Esq.,
Defendant,

Suzanne Parker, Esq.,
Defendant-Respondent.

_____

Leanard Zack & Associates, New York (Leonard Zack of counsel), for appellant.

Steinberg & Cavaliere, LLP, White Plains (Steven A. Coploff of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered September 23, 2010, which, insofar as appealed from, granted defendant Parker's motion to dismiss the complaint against her, unanimously affirmed, with costs.

Plaintiff was a party to the underlying matrimonial action in which she retained defendant Parker to represent her.

The court properly found that a charging lien entered in the underlying action against plaintiff barred her from thereafter asserting a claim for legal malpractice (*see* Judiciary Law § 475; *Wallach v Unger & Stutman, LLP*, 48 AD3d 360 [2008]). While it is unclear to what award the charging lien attached, the charging

lien order was never vacated or appealed. Instead, plaintiff entered into a stipulation with Parker to resolve the parties' fee dispute without prejudice to any other claims either party might assert against the other in other actions, e.g., Parker's res judicata defense here.

Plaintiff's causes of action for breach of contract and breach of fiduciary duty were properly dismissed as duplicative of the legal malpractice claim (*see e.g. Garten v Shearman & Sterling LLP*, 52 AD3d 207, 207-208 [2008]), since they arose out of the same facts as the legal malpractice action and did not involve any additional damages, separate and distinct from those generated by the alleged malpractice (*see Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435 [2011]).

Plaintiff's claim under Judiciary Law § 487 was also properly dismissed on res judicata grounds since it was predicated on the same conduct as that alleged in the legal malpractice claim (*see Zito v Fischbein Badillo Wagner Harding*, 80 AD3d 520, 521 [2011].

We have considered plaintiff's remaining contention and find it without merit.

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5268 In re Clinton Campbell, Index 117015/09
Petitioner-Appellant,

-against-

Raymond Kelly, as Police Commissioner
of the City of New York,
Respondent-Respondent.

_____

Lazzaro Law Firm, P.C., Brooklyn (Lance Lazzaro of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered May 6, 2010, which denied the petition brought pursuant to CPLR article 78 seeking, inter alia, to annul respondent's determination denying petitioner's application for a handgun license, unanimously affirmed, without costs.

Possession of a handgun license is a privilege, not a right, and as such, it is subject to the broad discretion of the Police Commissioner (*see Matter of Tolliver v Kelly*, 41 AD3d 156, 158 [2007], *lv denied* 9 NY3d 809 [2007]). Here, respondent's determination was rationally based as it was premised upon petitioner's failure to disclose seven out of eight arrests. Respondent examined the circumstances surrounding those arrests,

which were for driving while intoxicated, criminal possession of a weapon, assault and armed robbery, and resulted in multiple convictions, and determined that petitioner was unfit to carry a weapon (*see Tolliver* at 158; *Matter of Papaioannou v Kelly*, 14 AD3d 459 [2005]).

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

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5269 The People of the State of New York, Ind. 3074/07
Respondent,

-against-

Taurice Moore,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Rither Alabre of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered November 10, 2009, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 25 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The hearing evidence establishes the voluntariness of defendant's statements. To the extent he may have been experiencing symptoms of drug withdrawal at the time of his written and videotaped statements, there is no evidence that this condition affected his ability to understand his rights and make a voluntary waiver (*see People v Dlugos*, 237 AD2d 754, 756 [1997], *lv denied* 89 NY2d 1091 [1997]).

Defendant did not preserve his challenge to the court's charge, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The charge "adequately conveyed the principle that if the jury found that defendant was not guilty of a greater charge on the basis of justification, it was not to consider any lesser counts" (*People v White*, 66 AD3d 585, 586 [2009] *lv denied* 14 NY3d 807 [2009]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5270 Darnell Price, Index 106285/08
Plaintiff-Appellant,

-against-

Staples The Office Superstore East, Inc.,
Defendant-Respondent.

_____

Elovich & Adell, Long Beach (Mitchel Sommer of counsel), for appellant.

Simmons Jannace, LLP, Syosset (Allison C. Leibowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered May 19, 2010, which, in this action for personal injuries sustained when plaintiff tripped over a rolled-up carpet in the aisle of defendant's store and fell to the ground, granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Dismissal of this action was not warranted because even assuming that the evidence demonstrates that the carpet was visible from all directions and compels the conclusion that the hazard was open and obvious (*see Tagle v Jakob*, 97 NY2d 165, 169 [2001]), triable issues exist as to whether defendant breached its duty to maintain the premises in a reasonably safe condition

(*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [2004]). A jury could reasonably conclude that the rolled up carpeting constituted a tripping hazard (*see id.; Sweeney v Riverbay Corp.*, 76 AD3d 847 [2010]).

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

ENTERED: JUNE 7, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5271N-
5272N

Jack Gross,
Plaintiff-Respondent,

-against-

141-30 84th Road Apartment Owners Corp., et al.,
Defendants-Appellants.

Index 600056/08

Nicolini, Paradise, Ferretti & Sabella, Mineola (John J. Nicolini of counsel), for 141-30 84th Road Apartment Owners Corp., appellant.

Kelly, Rode & Kelly, LLP, Mineola (Susan M. Ulrich of counsel), for Jeneryl Management Corp., appellant.

The Chartwell Law Offices, LLP, New York (Jack Gross of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 21, 2011, which granted plaintiff's oral application to strike defendants' answers, affirmative defenses and counterclaims for failure to comply with discovery orders, and set the case down for a trial on damages, unanimously reversed, on the law and the facts, without costs, defendants' pleadings reinstated and the matter remanded for further proceedings.

Although Supreme Court's order was not appealable as of right because it did not decide a motion made on notice (*see* CPLR

5701[a][2]), in the interest of judicial economy, we nostra sponte deem the notice of appeal a motion for leave to appeal and grant the motion (*see* CPLR 5701[c]; *Winn v Tvedt*, 67 AD3d 569 [2009]).

Supreme Court erred in granting plaintiff's application, since plaintiff failed to show that defendants' noncompliance with the court's discovery orders was "willful, contumacious or due to bad faith" (*Weissman v 20 E. 9th St. Corp.*, 48 AD3d 242, 243 [2008]; *Dauria v City of New York*, 127 AD2d 459, 460 [1987]). Indeed, the record shows that defendants provided plaintiff with the discovery owed pursuant to Supreme Court's most recent order. Prior to that order, most of the delays in the discovery schedule were due to plaintiff's actions. Where, as here, delays in discovery were caused by both parties' actions, the unilateral and drastic sanction of striking the pleadings is inappropriate

(*Daimlerchrysler Ins. Co. v Seck*, 82 AD3d 581 [2011]; *Sifonte v Carol Gardens Hous. Co.*, 70 AD2d 563, 564 [1979]).

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

ENTERED: JUNE 7, 2011

CLERK

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

5274 Ying Jing Yan, Index 311607/08
Plaintiff-Respondent,

-against-

Ke-en Wang,
Defendant-Appellant.

_____

Law Offices of Siegel Wang & Associates, LLP, New York (Lee Siegel of counsel), for appellant.

Robert Hiltzik, Jericho, for respondent.

_____

Order, Supreme Court, New York County (Saralee Evans, J.), entered November 18, 2010, which, after a nonjury trial, granted plaintiff's application for a divorce on the ground of cruel and inhuman treatment, unanimously affirmed, without costs.

Plaintiff's testimony that defendant directed her to have an abortion against her wishes and did not visit her during her two-week convalescence; that defendant often worked late into the evening and through the night and would not communicate his plans to plaintiff and ignored her telephone calls; that the parties fought often, both verbally and physically, especially after plaintiff refused to assist defendant in obtaining his green card; that defendant made false claims against plaintiff to the police; and that during an altercation, plaintiff suffered a

serious laceration on her left forearm while attempting to block a knife yielded by defendant, amply established that defendant's conduct endangered plaintiff's physical and mental well-being and constituted cruel and inhuman treatment (*see Campbell v Campbell*, 72 AD3d 556, 556 [2010]).

The court properly declined to grant defendant's counterclaim for divorce on the ground of cruel and inhuman treatment. Even if defendant prosecuted his counterclaim, he did not establish that plaintiff engaged in a course of conduct that rendered it unsafe and improper for him to continue to cohabit with her (*compare Israel v Israel*, 242 AD2d 891 [1997]). The court's credibility determinations are supported by the record (*see Hass & Gottlieb v Sook Hi Lee*, 55 AD3d 433, 433 [2008]).

The record does not support defendant's contention that the court's conduct during trial deprived him of a fair trial or the right to present his case (*see Messinger v Mount Sinai Med. Ctr.*, 15 AD3d 189, 189 [2005], *lv dismissed* 5 NY3d 820 [2005]). Nor

has defendant demonstrated that but for the alleged errors, he would have prevailed on the merits of his claim (*see Messinger*, 15 AD3d at 190).

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

ENTERED: JUNE 7, 2011

CLERK

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

5275 In re Kawon W.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.

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Presentment Agency

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

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

_____

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about July 22, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of nine months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and imposed a term of probation. In light of appellant's violent

acts and behavioral problems, that disposition was the least restrictive alternative consistent with the needs of appellant and 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: JUNE 7, 2011

CLERK

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

5276 Gary Vidor, Index 104212/09
Plaintiff-Appellant,

-against-

6 Jones Street Associates, LLC, et al.,
Defendants-Respondents.

_____

Wingate, Russotti & Shapiro, LLP, New York (Joseph P. Stoduto of counsel), for appellant.

Gannon, Lawrence & Rosenfarb, New York (Lisa L. Gokhulsingh of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about December 10, 2010, which, in this action for personal injuries allegedly sustained when plaintiff slipped and fell on loose, ungrouted tiles in the foyer of defendants' building, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendants established their entitlement to judgment as a matter of law by showing that they lacked constructive notice of any defect in the entryway tiles. Defendants presented the testimony of the building's superintendent who stated that he cleaned and inspected the area of the floor on which plaintiff fell and did not observe any loose tiles, and that he had not

received complaints about such condition (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500-501 [2008]).

In opposition, plaintiff presented his testimony that he observed that the tiles were loose and ungrouted when he arrived at the building the prior afternoon at approximately the same time that the superintendent testified that he last inspected the floor. Furthermore, plaintiff's daughter stated that she observed the subject tiles, that they were unsecured because the tile grout was deteriorated and that she was able lift the tiles off the floor and saw dirt and debris underneath them. Under the circumstances, plaintiff's opposition sufficiently raised a triable issue of fact as to whether the defect was visible and apparent and existed for a sufficient period of time to permit defendants to discover and remedy the condition prior to the accident (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Alexander v New York City Tr. Auth.*, 34 AD3d 312, 313-314 [2006]).

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

ENTERED: JUNE 7, 2011

CLERK

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

5277-
5278 Coventry Real Estate Advisors, L.L.C., et al., Plaintiffs-Appellants,

-against-

Developers Diversified Realty Corp., et al., Defendants-Respondents.

Index 115559/09

_____

Gallagher Harnett & Lagalante LLP, New York (Louis M. Lagalante of counsel), for appellants.

Jones Day, New York (Robert C. Micheletto of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 4, 2011, which denied plaintiffs' motion for the issuance of commissions to take depositions outside the state, unanimously affirmed, without costs. Order (same court, Justice, and date of entry), which denied plaintiffs' motion to use an anonymous document in discovery, unanimously modified, on the facts, to grant the motion as to the last page of the document (for purposes other than uncharged crimes), and otherwise affirmed, without costs.

The motion court providently exercised its discretion in denying plaintiffs' motion for the issuance of commissions pursuant to CPLR 3108, since they failed to demonstrate that

commissions were "necessary or convenient" (CPLR 3108; *Reyes v Riverside Park Community [Stage I], Inc.*, 59 AD3d 219, 219 [2009]). The motion court stated that plaintiffs could submit new papers if they wanted commissions for out-of-state depositions on a topic other than uncharged crimes; hence, the current appeal concerns only uncharged crimes. Although "a witness may be cross-examined [at trial] with respect to specific immoral, vicious or criminal acts which have a bearing on the witness's credibility" (*Badr v Hogan*, 75 NY2d 629, 634 [1990]), here, due to the affidavits plaintiffs obtained, they already have a good-faith basis to cross-examine an executive of one of the defendants about an uncharged crime. If the executive denies the uncharged crime, plaintiffs will not be allowed to use extrinsic evidence solely to impeach his credibility (*see People v Schwartzman*, 24 NY2d 241, 245 [1969], *cert denied* 396 US 846 [1969]).

We reject plaintiffs' argument that they can use evidence of the uncharged crime and a cover-up thereof to show intent for their fraud claim.

Plaintiffs failed to preserve their argument that the motion court should have considered a protective device pursuant to CPLR 3103, rather than deny its motion in its entirety, and we decline

to consider it.

Because the first four pages of the anonymous document concern the uncharged crime, for the reasons stated above, the motion court providently exercised its discretion in denying plaintiff's motion to use those pages in discovery. The pages are also not discoverable because they are privileged (*see* CPLR 3101[b],[c]; 4503). However, the last page is not privileged, and it has relevance beyond the uncharged crime since it alleges that an executive of one of the defendants ordered a "data dump" on his computer. Indeed, plaintiffs may use the last page to discover if the executive deleted from his computer material relevant to this case. Accordingly, plaintiffs are entitled to use the last page in discovery.

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

ENTERED: JUNE 7, 2011

CLERK

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

5279-
5280 Elyaho Malekan, Plaintiff-Appellant, Index 601166/08 401763/09

-against-

Isak Sakai, et al., Defendants-Respondents.

- - - - -

Sakai Antiques, et al., Plaintiffs-Respondents,

-against-

Elyaho Malekan, Defendant-Appellant.

_____

Bradley S. Gross, New York, for appellant.

Cuomo LLC, Mineola (Oscar Michelen of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 3, 2010, dismissing plaintiff Malekan's complaint and bringing up for review orders, same court and Justice, entered June 3, 2010, which, inter alia, granted the Sakai defendants' motion for summary judgment dismissing the complaint, and declared that Sakai Antiques, Inc. (Sakai) is the rightful owner of the subject antique, unanimously affirmed, without costs.

Supreme Court correctly determined that Sakai is the rightful owner of the antique. Plaintiff Malekan's contention

that the agreement in Farsi was an agreement to forbear, akin to a covenant not to sue, lacks support in the record. Furthermore, there is no dispute that Malekan also signed a bill of sale written in English concerning the antique, and under the circumstances, Malekan is bound by what he signed (*see Shklovskiy v Khan*, 273 AD2d 371, 372 [2000]).

We have reviewed Malekan's remaining contentions and find them unavailing.

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

ENTERED: JUNE 7, 2011

CLERK

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

5281 In re Kayvon B.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

_____

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

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

_____

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about August 26, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the second degree and criminal possession of a weapon in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

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

defense beyond a reasonable doubt, notwithstanding the fact that the victim did not testify.

The court properly exercised its discretion in declining to draw an adverse inference from the victim's absence. The presentment agency sufficiently demonstrated that the victim was unavailable (*see generally People v Gonzalez*, 68 NY2d 424, 427-428 [1986]).

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

ENTERED: JUNE 7, 2011

CLERK

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

5282 The People of the State of New York, Ind. 38/09
Respondent,

-against-

Steven Rondos,
Defendant-Appellant.

_____

White & White, New York (Diarmuid White of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about May 4, 2010,

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: JUNE 7, 2011

CLERK

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

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

5283 In re Jamiah Sharang C.,

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

Kamila N.,
Respondent-Appellant,

Leake & Watts Services, Inc.,
Petitioner-Respondent.

_____

Randall S. Carmel, Syosset, for appellant.

Rosin Steinhagen Mendel, New York (Benjamin J. Rosin of counsel), for respondent.

Orrick, Herrington & Sutcliffe, LLP, New York (Bryan D. Kreykes of counsel), attorney for the child.

_____

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about December 24, 2009, which, upon a finding of mental illness, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence, including medical records and uncontroverted expert testimony, supports the finding that respondent is presently and for the foreseeable future unable, by

reason of mental illness, to provide proper and adequate care for her child (*see* Social Services Law § 384-b[4][c], [6][a]; *Matter of Genesis S.* [*Irene Elizabeth S.*], 70 AD3d 570 [2010]). Respondent failed to preserve her claim that the psychiatric evidence was insufficient to support such a finding (*see Matter of Star Leslie W.*, 63 NY2d 136, 145 [1984]; *Matter of Genesis S.*, 70 AD3d at 570). In any event, given the psychiatrist's unrebutted testimony, the lapse in time between the psychiatric evaluation and the fact-finding hearing does not warrant a different result (*see Matter of Robert K.*, 56 AD3d 353 [2008], *lv denied* 12 NY3d 704 [2009]).

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

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

ENTERED: JUNE 7, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, JJ.

5284 Shirley A. Zuri McKie, Index 103038/09
Plaintiff-Appellant,

-against-

LaGuardia Community College/CUNY,
Defendant-Respondent.

_____

Lee Nuwesra, Bronx, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 13, 2009, which, in this employment discrimination action, granted defendant's motion to dismiss plaintiff's complaint, unanimously affirmed, without costs.

The motion court properly dismissed the complaint based on plaintiff's failure to file a notice of claim within 90 days of the events giving rise to her suit (*see* Education Law § 6224[1],[2]; *see also* General Municipal Law § 50-e[1]; *see generally Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 62 [1984]). Contrary to plaintiff's contention, pursuant to the plain language of Education Law § 6224(1), which expressly incorporates the requirements of General Municipal Law §§ 50-e and 50-i, the requirement of filing a notice of claim within 90 days as a

condition precedent to bringing suit against a community college of the City University of New York (CUNY) applies to *all* claims asserted against such community college, not just tort and wrongful death claims (*compare Siegel v LaGuardia Community Coll.*, 2006 WL 1084780, *6 [ED NY 2006], *affd* 2007 WL 2908250 [2d Cir 2007], *with Mills v County of Monroe*, 89 AD2d 776, 776 [82], *affd* 59 NY2d 307 [1983], *cert denied* 464 US 1018 [1983]).

The motion court properly determined that it lacked the discretion to extend the time within which plaintiff could file a notice of claim to the extent of deeming her filing of a federal action to be a notice of claim. A court cannot extend the time to file a notice of claim beyond the statutory time limitation for the asserted claim (*see* General Municipal Law § 50-e[5]; *see Pierson v City of New York*, 56 NY2d 950, 954-956 [1982]; *Gastman v Department of Educ.* of City of N.Y., 60 AD3d 444, 445 [2009], *lv denied* 12 NY3d 711 [2009]). Contrary to plaintiff's contention, the statute of limitations for her employment discrimination claims is one year and ninety days (*see* Education Law § 6224[1]; General Municipal Law § 50-i[1][c]), not three years (*see Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367 [2007]). Because it is undisputed that plaintiff's claims accrued no later than March of 2003 and that

she filed her federal complaint in December of 2004, her claims were time-barred.

We reject plaintiff's contention that she satisfied the requirements of Education Law § 6224(2) by refraining from bringing the federal action until at least 30 days after meeting with defendant's president and demanding that she be reappointed to her position. Even accepting plaintiff's contention that a "demand" pursuant to § 6224(2) need not be a formal, written notice of claim, her demand to defendant's president did not put CUNY on notice of her claim, and thus, it cannot be considered a demand "presented to the city university for adjustment" within the meaning of the statute (*cf. Parochial Bus Sys., Inc. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 547-548 [1983]; *Koren-DiResta Constr. Co. v New York City School Constr. Auth.*, 293 AD2d 189, 193 [2002]).

Lastly, we reject plaintiff's contention that Education Law § 6224 violates the Equal Protection Clause of our State Constitution because it affords less protection to employees of junior colleges than it does to similarly situated employees of senior colleges (*compare* Education Law § 6224[1],[2], *with* § 6224[4]). Similar constitutional challenges have been rejected in prior cases (*see e.g. Guarrera v Lee Mem. Hosp.*, 51 AD2d 867,

867 [1976], *lv dismissed* 39 NY2d 942 [1976]; *Zipser v Pound*, 75 Misc 2d 489, 490 [1972]), and we are not persuaded that the two classes of employees at issue here are similarly situated, or that the distinctions drawn between employees of junior colleges and those of senior colleges are not rationally based (*see OTR Media Group, Inc. v City of New York*, 83 AD3d 451 [1st Dept 2011]; *Tilles Inv. Co. v Gulotta*, 288 AD2d 303, 304-305 [2001], *lv dismissed* 97 NY2d 725 [2002], *lv denied* 98 NY2d 605 [2002]). 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: JUNE 7, 2011

CLERK

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

5285-
5285A Galerie Rienzo Ltd., Index 111701/06
Plaintiff-Respondent,

-against-

Frank M. Lobacz, M.D.,
Defendant-Appellant.

_____

Barry V. Pittman, Bay Shore, for appellant.

Winston & Winston P.C., New York (Arthur Winston of counsel), for respondent.

_____

Amended judgment, Supreme Court, New York County (Donna Mills, J.), entered April 28, 2010, upon a jury verdict in plaintiff's favor, directing defendant to surrender two paintings to plaintiff and bringing up for review an order, same court and Justice, entered March 19, 2010, which denied defendant's motion to set aside the verdict, unanimously affirmed, without costs. Appeal from order, unanimously dismissed, without costs, as subsumed in the appeal from the amended judgment.

The verdict was based on legally sufficient evidence and was

not against the weight of the evidence (*see generally McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). There exists no basis to disturb the jury's credibility determinations (*see e.g. Bykowsky v Eskenazi*, 72 AD3d 590 [2010], *lv denied* 16 NY3d 701 [2011]).

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

ENTERED: JUNE 7, 2011

CLERK

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

5286 The People of the State of New York, Ind. 2021/09
Respondent,

-against-

Umar Abdullah,
Defendant-Appellant.

_____

Scott Brettschneider, Uniondale (Patrick Michael Megaro of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered January 14, 2010, convicting defendant, after a nonjury trial, of assault in the third degree, and sentencing him to a term of 45 days, concurrent with 3 years' probation, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The credible evidence disproved defendant's justification defense beyond a reasonable doubt. Nothing in the record supports defendant's assertion that the court misunderstood the burden of proof on that defense; defendant merely takes out of context an isolated a remark by the

court.

Defendant's remaining arguments, including his challenges to expert medical testimony, are without merit.

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

ENTERED: JUNE 7, 2011

CLERK

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

5287 The People of the State of New York, Ind. 414/02
Respondent,

-against-

David Hargrove,
Defendant-Appellant.

_____

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

_____

Judgment of resentence, Supreme Court, New York County (Renee A. White, J.), rendered March 10, 2009, resentencing defendant to a term of 3 years, with 5 years' postrelease supervision, unanimously reversed, on the law, the resentence vacated and the original sentence without postrelease supervision reinstated.

As the People concede, the imposition of postrelease supervision on resentencing violated defendant's right against double jeopardy (*see People v Williams*, 14 NY3d 198 [2010]).

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

ENTERED: JUNE 7, 2011

CLERK

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

5288 2626 Bway LLC, Index 106287/09
Plaintiff-Appellant,

-against-

Broadway Metro Associates, LP, et al.,
Defendants-Respondents.

_____

Claude Castro & Associates, PLLC, New York (Claude Castro of counsel), for appellant.

Reavis Parent Lehrer LLP, New York (Lawrence Brocchini of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about January 22, 2010, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff purchaser alleges that defendant seller Broadway Metro Associates, LP anticipatorily breached the contract for the purchase of real property by, inter alia, its inability to convey title with certain development rights purportedly provided to the seller in a recorded Zoning Lot Development Agreement (ZLDA) made between the seller and an adjoining property owner. However, neither the contract of sale nor the ZLDA provide for the development rights claimed by plaintiff to exist. These agreements are unambiguous and must be enforced as written (*see*

W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162 [1990]).

The ZLDA and an agreement entered into between the seller and the adjoining property owner specifically conveyed to the adjoining property owner a light and air easement beginning 15' above the parapet wall of the roof of the subject premises. However, the fact that the area covered by the easement does not begin until 15' above the parapet wall does not provide the seller with the right to add to the premises up to that point or create any obligation on the part of the adjoining property owner to protect such right. The ZLDA's only protection of a right to build on the roof is the retention of Broadway Metro's right to use that area "for mechanical equipment . . . or any other devices." Under the rule of construction inclusio unius est exclusio alterius, the expression of a specific guarantee of use implies the exclusion of any other guarantee of use (*see Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 404 [1984]; *Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302 [2007]).

Since the contract of sale was specifically made "SUBJECT TO" the ZLDA and included the ZLDA as a "Permitted Exception" to the conveyance of title, the seller was under no obligation to convey title in the manner claimed by plaintiff and thus,

plaintiff's attempt to hold the seller in breach for this purported defect is unavailing.

Defendant seller's unilateral scheduling of a clear and unequivocal "time of the essence" closing date on three-weeks' written notice was reasonable under the circumstances (*cf. ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006]).

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

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

ENTERED: JUNE 7, 2011

CLERK

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

5289 Patrick J. Hoeffner, Index 602694/05
Plaintiff-Appellant,

-against-

Orrick, Herrington &
Sutcliffe LLP, et al.,
Defendants-Respondents.

_____

Thompson Wigdor & Gilly LLP, New York (Douglas H. Wigdor of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Andrew G. Gordon of counsel), for respondents.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 3, 2011, which, to the extent appealed from, granted defendants' motion for an order striking the demand for punitive damages, and denied plaintiff's cross motion for an order permitting plaintiff to seek full economic damages on his claim of conspiracy to commit fraud, unanimously affirmed, without costs.

Plaintiff was an associate at defendants' firm when two of its partners left to open a intellectual property practice at another firm. This new firm offered plaintiff a "partnership track" position with a salary increase and signing bonus. Plaintiff commenced this action alleging that, from March 2002 to

May 2005, defendants entered into a deceitful scheme to prevent him from leaving the firm at a point in time when he was the key associate on patent infringement litigation for an important client. Plaintiff claims that, while he was promised that he would be voted on for partnership, and assured that he would eventually be made partner, his employment was terminated soon after he successfully concluded the litigation which the firm had been eager to keep.

Punitive damages are not available "in the ordinary fraud and deceit case" (*Walker v Sheldon*, 10 NY2d 401, 405 [1961] [internal quotation marks and citation omitted]), but are permitted only when a "defendant's wrongdoing is not simply intentional but 'evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations'" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007], quoting *Walker* at 405). Mere commission of a tort, even an intentional tort requiring proof of common law malice, is insufficient; there must be circumstances of aggravation or outrage, or a fraudulent or evil motive on the part of the defendant (*Prozeralik v Capital Cities Communications*, 82 NY2d 466, 479 [1993]).

Neither defendants' alleged misrepresentations concerning

their support for plaintiff's partner candidacy, nor the breach of their contractual promise to put him up for a partnership, evidence such a high degree of moral turpitude and wanton dishonesty as to imply criminal indifference. Cases involving mere fraudulent misrepresentations to induce a party to accept an employment agreement, do not warrant imposition of punitive damages (see *Kelly v Defoe Corp.*, 223 AD2d 529 [1996]).

As for plaintiff's cross motion, it is well settled that New York does not recognize an independent civil tort of conspiracy (*Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424, 425 [2006]; *see Algomod Tech. Corp. v Price*, 65 AD3d 974 [2009], *lv denied* 14 NY3d 707 [2010]). While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action (see *MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1995], citing *Brackett v Griswold*, 112 NY 454 [1889]).

Given that civil conspiracy is not an independent tort, it cannot have its own independent measure of damages; any damages attributable to plaintiff's conspiracy claim exists only *within* those damages that may be assessed for fraud. Those damages, as previously determined by this Court, are "the difference between the immediately payable portion of the other firm's offer, such

as the signing bonus, and the sum [plaintiff] received from defendant law firm immediately after agreeing to remain with defendant" (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614, 615 [2009], citing *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421-422 [1996]; *Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). We have previously held that plaintiff's damages may not include any amount based on continued employment with the other firm, since the duration and success of his career with that firm are speculative (*Hoeffner* at 615).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 7, 2011

CLERK

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

5291 Craig J. Goldberg, et al., Index 601076/10
Petitioners-Respondents,

-against-

Michael T. Nugent,
Respondent-Appellant.

_____

Ginsberg & Burgos PLLC, New York (Peter R. Ginsberg of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Arthur H. Aufses III of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 7, 2010, which granted the petition to vacate an arbitration award, denied respondent's cross petition to confirm the award and remanded the matter for a rehearing before a new arbitration panel, unanimously affirmed, with costs.

The court properly determined that the panel exceeded its authority by granting relief on claims not asserted in respondent's statement of claim (*see Matter of Spear, Leeds & Kellogg v Bullseye Sec.*, 291 AD2d 255 [2002]; CPLR 7511[b][iii]). The relief of liquidating respondent's interests in certain undisputed investments, awarding him an amount representing estimated future payments and severing the parties' business relationship was not requested in the statement of

claim. Petitioners were not permitted to put in evidence on those matters, and the award disregarded amounts already paid to respondent. Furthermore, remanding the matter to a different arbitration panel was a provident exercise of the court's discretion (*see East Ramapo Cent. School Dist. v East Ramapo Teachers Assn.*, 108 AD2d 717 [1985]; CPLR 7511 [d]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 7, 2011

CLERK

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

5292 Lisandros Suazo, Index 302705/10
Plaintiff, 84121/10

-against-

Maple Ridge Associates,
L.L.C., et al.,
Defendants.

- - - - -

Maple Ridge Associates,
L.L.C., et al.,
Third-Party Plaintiffs-Respondents,

-against-

84 Lumber Company,
Third-Party Defendant-Appellant.

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Bond, Schoeneck & King, PLLC, Rochester (Gregory J. McDonald of counsel), for appellant.

Goldberg Segalla LLP, White Plains (Yadira Ramos-Herbert of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about December 9, 2010, which denied third-party defendant's motion to dismiss the third-party complaint pursuant to CPLR 3211(a)(1) and (7), unanimously reversed, on the law, without costs, and the motion to dismiss the third-party complaint is granted. The Clerk is directed to enter judgment accordingly.

Plaintiff, an employee of third-party defendant, sustained

injuries to his hand in a work-related accident while delivering doors to a construction site. The construction site was owned by third-party plaintiff Maple Ridge Associates, L.L.C., and third-party plaintiff Cambridge Development & Construction Corp. is alleged to be the developer for the project. Following plaintiff's commencement of a personal injury action against the owner and the developer, they commenced a third-party action against plaintiff's employer seeking contractual indemnification against plaintiff's personal injury claims.

The right of a party to recover indemnification on the basis of a contractual provision depends on the intent of the parties and the manner in which that intent is expressed in the contract (*see Kurek v Port Chester Hous. Auth.*, 18 NY2d 450 [1966]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*see Hooper Assoc., Ltd., v AGS Computers*, 74 NY2d 487 [1989]). A contract that provides for indemnification will be enforced so long as the intent to assume such role is sufficiently clear and unambiguous (*see Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265 [2007]).

The document upon which third-party plaintiffs' base their claim for contractual indemnification is titled "Waiver of Liens

and Indemnity Agreement," which was executed by plaintiff's employer on February 14, 2008. Third-party plaintiffs' claim that the Lien Waiver clearly and unmistakably provides for indemnification for personal injury claims made by third-party defendant's employee is flatly contradicted by the plain language of the document. The title of the agreement itself sets the context for the provisions which follow. Third-party defendant supplied construction materials to third-party plaintiffs and as part of that transaction, third-party defendant provided the Lien Waiver, as permitted by section 34 of the Lien Law. The document provided that first, in exchange for payment, third-party defendant waived any claim or lien on account of labor, services, materials and/or equipment furnished by third-party defendant or its subcontractors and suppliers. Second, third-party defendant warranted that all claims for labor, materials, equipment and services used by third-party defendant had been fully paid and satisfied. Finally, third-party defendant agreed to indemnify the owner against "loss, cost or damage or expense of any kind" incurred as a result of "any claim made or liens filed by any subcontractors, suppliers, laborers, or persons furnishing materials or equipment claiming through or under [third-party defendant]."

Given the purpose of the Lien Waiver, the phrase "any claim made" is not limitless as third-party plaintiffs contend. A "claim" like a "lien" must be "on account of labor, services, materials and/or equipment, heretofore furnished by" third-party defendant, or its permitted subcontractors or suppliers. Having accepted payment and warranted that its subcontractors and suppliers had been paid in full, third-party defendant was agreeing to indemnify the owner against subsequent non-payment claims made or liens filed by its subcontractors and suppliers. There is no language in the Lien Waiver which supports interpreting "any claim" to mean a personal injury claim brought by one of third-party defendant's employees.

Since neither the language nor the purpose of the Lien Waiver evince an unmistakable intent to indemnify third-party plaintiffs against a personal injury claim brought by third-party defendant's employee, the third-party complaint should have been dismissed.

Moreover, even assuming that the Lien Waiver is ambiguous and the intent of the parties cannot be ascertained from the four corners of the document, as concluded by the motion court, such

determination, in and of itself, compels dismissal of the third-party complaint (*see Ruhland v Cowper Co.*, 72 AD2d 907 [1979], *affd* 52 NY2d 756 [1980]).

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ENTERED: JUNE 7, 2011

CLERK

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

5293N STI Prepaid LLC, Index 602032/09
Petitioner-Respondent,

-against-

James Pesce,
Respondent-Appellant.

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Law Office of Harvey S. Mars, LLC, New York (Harvey S. Mars of counsel), for appellant.

Alan B. Pearl & Associates, P.C., Syosset (Rachel A. Cartwright of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 4, 2010, which granted petitioner employer's petition to, among other things, stay arbitration of respondent employee's claim for severance benefits, and denied respondent's cross petition to compel arbitration, unanimously affirmed, without costs.

The mandatory arbitration provision that respondent seeks to enforce is contained in an employment agreement between respondent and his former employer CVTel Licensing Corporation, to which petitioner is not a signatory. The record reveals that when CVTel entered into an asset purchase agreement with petitioner, it never assigned to petitioner its rights under the employment agreement.

Petitioner did not directly benefit from the information and material that respondent disclosed during his employment with petitioner, which respondent asserts was confidential and protected under his employment agreement with CVTel. Indeed, petitioner already owned the information and material pursuant to the asset purchase agreement. At most, it can be said that petitioner received an indirect benefit from respondent's employment agreement in that it "exploit[ed] the contractual relation of parties to [the] agreement, but [did] not exploit (and thereby assume) the agreement itself" (*MAG Portfolio Consultant, GMBH v Merlin Biomed Group LLC*, 268 F3d 58, 61 [2001]). Accordingly, Supreme Court properly determined that petitioner is not equitably estopped from denying an obligation to arbitrate.

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

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

ENTERED: JUNE 7, 2011

CLERK