SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 3, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., McGuire, Acosta, Román, JJ.

1468 The People of the State of New York, Ind. 797/01
Respondent,

-against-

Manuel Rodriguez,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Gregory Carro, J.), rendered October 7, 2008, resentencing defendant to a term of 25 years to life with 3 years' postrelease supervision, unanimously affirmed.

This case was one of the cases consolidated in *People v Sparber* (10 NY3d 457 [2008]). The Court of Appeals directed "a resentencing hearing that will include the proper pronouncement of the relevant PRS term" (*id.* at 473). Defendant argues that the resentencing court was obligated to reconsider the length of

the original prison term, and requests that the case be remanded for another resentencing. This case presents the issue this Court found unnecessary to decide in *People v Edwards* (62 AD3d 467, 468 [2007], *lv denied* 12 NY3d 924 [2009]), "whether a proceeding conducted for the purpose of compliance with *Sparber* is a plenary resentencing that permits the court to reconsider the length of the prison component of the sentence." We now conclude that such a resentencing only involves PRS, and is not an occasion to revisit the original prison sentence. According to *Sparber*, a court's failure to include PRS in its oral pronouncement of sentence "amounts only to a procedural error, akin to a misstatement or clerical error, which the sentencing court could easily remedy" (10 NY3d at 472). Moreover, there was no legal error, whether procedural or substantive, in the imposition of the term of incarceration. The fact that the proceeding at issue was designated a resentencing does not necessarily imply that defendant was entitled to a completely de novo sentencing (*see e.g. People v Green*, 62 AD3d 1024, 1026 [2009], *lv denied* 13 NY3d 744 [2009] [limited-purpose resentencing does not require reconsideration of original sentence found to be validly imposed]; *People v Quinones*, 22 AD3d 218 [2005], *lv denied* 6 NY3d 817 [2006] ["resentencing does not

place a defendant, for all purposes, in the position of a person being sentenced for the first time"]).

We have considered and rejected defendant's double jeopardy and due process challenges to the imposition of PRS. To the extent defendant is requesting a reduction of his prison sentence as a matter of discretion in the interest of justice, we are without authority to grant that request.

> The Decision and Order of this Court entered herein on May 18, 2010 is hereby recalled and vacated (*see* M—3195 decided simultaneously herewith).

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

ENTERED: MARCH 3, 2011

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3861-
3862 Index 20710/06

Chrisila L. Roberts, as Executrix of the Estate of Kathleen Hughes, etc.,
Plaintiff-Respondent,

-against-

Jeaneth Hughes, et al.,
Defendants,

Impac Funding Corporation,
Defendant-Appellant,

EMC Mortgage Corporation,
Intervenor-Appellant.

_____

Pollock & Maguire, LLP, White Plains (Peter S. Dawson of counsel), for EMC Mortgage Corporation, appellant.

Sonnenschein Nath & Rosenthal LLP, New York (Brendan E. Zahner of counsel), for Impac Funding Corporation, appellant.

James M. Visser, Bronx, for respondent.

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Order, Supreme Court, New York County (Geoffrey Wright, J.), entered August 11, 2009, which, inter alia, granted plaintiff's cross motion for summary judgment setting aside the deed to real property located at 1142 Wheeler Avenue, Bronx, New York, dated December 19, 2005 and recorded April 19, 2006, setting aside the mortgage on the aforesaid real property granted by defendant Jeaneth Hughes to defendant Impac Funding Corporation, awarding plaintiff costs of the motion as against Impac, and awarding

plaintiff, sua sponte, various categories of monetary relief against defendants related to the unlawful possession of the premises, the amounts to be determined at inquest; denied defendant Impac's cross motion for summary judgment dismissal of the complaint as against it; and granted EMC Mortgage Corp.'s motion to intervene, unanimously modified, on the law and the facts, to the extent of vacating, as against defendants Impac and EMC, the awards of interim monetary relief for: taxes, bills (including water, gas and sewer), lawsuits and other liabilities incurred on the property during the pendency of this action; any decrease in market value of the property during the pendency of this action; lost rents and/or reasonable use and occupancy until such time as plaintiff takes possession; attorneys' fees; punitive damages; costs and possible sanctions against defendants, and otherwise affirmed, without costs. Appeal from the underlying decision, same court and Justice, entered December 9, 2008, unanimously dismissed, without costs, as taken from a nonappealable paper.

The motion court correctly granted plaintiff summary judgment voiding the deed and the mortgage. Plaintiff demonstrated, prima facie, its entitlement to judgment as a matter of law by showing that defendant Jeaneth Hughes,

decedent's daughter, lacked any legal basis to convey to herself the subject premises or to use it as security for the mortgage, since it was lawfully under the control of the estate. The record shows that the several defects in the putative chain of title and on the face of the putative deed, among others, would have been readily ascertainable had Impac, as mortgagee, or EMC, as assignee of Impac, exercised any reasonable diligence in this regard. In response, defendants-appellants failed to raise any triable issue of material fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Since the complaint and plaintiff's motion specifically sought to void the mortgage in addition to voiding the deeds, and the December 9, 2008 decision granted plaintiff's motion in its entirety, the fact that it did not specify, in its text, that the mortgage was also thereby voided, did not make that decision inconsistent with the subsequent August 11, 2009 settled order which did specify that the mortgage was voided.

However, there was no basis for the court, at this stage of the proceedings, to enter any monetary award against the present appellants. Furthermore, the court erred in awarding attorneys' fees to plaintiff against appellants inasmuch there was no apparent statutory or other legal authorization for it (*see*

Flemming v Barnwell Nursing Home & Health Facilities, Inc., 15 NY3d 375 [2010]).

Finally, Impac was the record holder of the mortgage during the relevant time periods, and its status as mortgagee of property that properly should have been held by plaintiff estate, remains the subject of this litigation, so that we find no basis to dismiss either Impac or EMC from the action at this juncture.

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

ENTERED: MARCH 3, 2011

CLERK

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

3694 Diamond Castle Partners IV PRC, L.P., et al., Plaintiffs-Respondents, Index 602427/08

-against-

IAC/InterActiveCorp, Defendant-Appellant.

Wachtell, Lipton, Rosen & Katz, New York (Stephen Richard DiPrima of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Jonathan H. Hurwitz of counsel), for respondents.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered June 2, 2010, which, in an action for breach of a contract under which defendant sold its subsidiary to an acquisition entity formed by plaintiffs, insofar as appealed from, denied defendant's motion to dismiss the complaint for lack of standing, unanimously affirmed, with costs.

Plaintiffs are a group of private equity funds and related entities. In July 2006, plaintiffs submitted a proposal to purchase PRC, a wholly-owned subsidiary of defendant. Following due diligence, plaintiffs submitted a bid for PRC of approximately $286.5 million, which defendant accepted. In order to effect the transaction, plaintiffs formed Panther as an

acquisition vehicle. On November 2, 2006, Panther, defendant and PRC entered into a purchase agreement providing for the transfer of all of defendant's outstanding interest in PRC to Panther. Plaintiffs merged Panther into PRC immediately following the closing. PRC filed for bankruptcy in January 2008, and plaintiffs' equity interest in PRC was extinguished by the plan of reorganization.

On August 20, 2008, plaintiffs commenced the instant suit alleging breaches of various representations, warranties and covenants in the purchase agreement and seeking indemnification under Article X. Defendant moved to dismiss, asserting, inter alia, that the claims of plaintiffs, which were not signatories to the agreement, were barred by the "No Third-Party Beneficiaries" provision in the agreement.

The motion court correctly rejected defendant's claim that plaintiffs lack standing. Although not signatories to the purchase agreement, the agreement was plainly intended to give them enforceable rights. Section 10.2 of the purchase agreement expressly provides that defendant shall indemnify and hold harmless the buyer and its "Affiliates," defined to include plaintiffs, from and against any and all losses sustained due to breaches by defendant or PRC of the representations, warranties

and covenants in the purchase agreement. The term "parties," though undefined, was used in various clauses in the agreement to include nonsignatory affiliates of the buyer and seller. For example, the "Buyer Indemnified Parties" are granted rights under Section 2.3, relating to claims against the purchase escrow, and Section 7.3, relating to indemnification for certain tax obligations.

It is "elementary" that "clauses of a contract should be read together contextually in order to give them meaning" (*HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [2001]). "[I]t is a "cardinal rule of construction that a court adopt an interpretation that renders no portion of the contract meaningless" (*Matter of Wallace v 600 Partners Co.*, 205 AD2d 202, 206 [1994], *affd* 86 NY2d 543 [1995] [internal quotation marks and citation omitted]). The motion court properly construed the agreement as granting plaintiffs enforceable rights that were not extinguished by the "boilerplate 'no third-party beneficiaries' language" contained in Section 11.7, which limited enforcement of the agreement to "parties." In light of the numerous contract provisions granting plaintiffs enforceable rights, it was reasonable to construe Section 11.7 to exclude only persons who are neither signatories nor buyer or seller indemnified parties.

This reading is supported by the plain language of Section 11.7, which precludes claims by any person other than the "parties" and their respective successors and permitted assigns.

To construe the purchase agreement in the manner suggested by defendant would be to ignore the clear, specific provisions of the purchase agreement recognizing plaintiffs' rights under the agreement, which we decline to do (*see Board of Mgrs. of Alfred Condominium v Carol Mgt.*, 214 AD2d 380, 382 [1995], *lv dismissed* 87 NY2d 942 [1996] [contract's reference to unit owners as beneficiaries trumped general disclaimer of obligations to third parties in agreement between construction manager and sponsor]; *see also Amirsaleh v Board of Trade of the City of New York, Inc.*, 2008 WL 4182998, * 5, 2008 Del Ch LEXIS 131, *16 [Del Ch 2008] [contract's "specific grant of benefits" afforded nonsignatories the right to sue to enforce the agreement, notwithstanding "a general provision disclaiming the existence of any third-party beneficiaries"]).[1] Further, it would leave

[1]We recognize that a federal court in the Southern District of New York has suggested that the ability of a contracting party to bring suit on behalf of an injured indemnitee/third-party beneficiary, in a case where a contract, like the one herein, contains both an indemnification provision in favor of a third-party and a no third-party beneficiary clause, may preclude direct suit by the third-party beneficiary (*see Control Data*

plaintiffs without remedy since Panther, the contracting entity, was merely an acquisition vehicle which was merged into PRC immediately following the closing.

We have considered defendant's other arguments and find them unavailing.

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

ENTERED: MARCH 3, 2011

CLERK

Sys., Inc. v Computer Power Group, Ltd., 1998 WL 178775, 1998 US Dist LEXIS 5277 [SD NY 1998]). Nonetheless, even in that case, the district court found that "practical considerations" warranted joinder of the non-contracting third-party beneficiary in the action (1998 WL 178775, at *3, 1998 US Dist LEXIS 5277, at *7). In any event, the no third-party beneficiary clause in *Control Data Systems* differed from the clause herein insofar as it applied to "any person not a signatory" (1998 WL 178775, at *2, 1998 US Dist LEXIS 5277, at *5). To the extent the opinion in *Control Data Systems* may be construed as reaching a different conclusion from this Court's today, we respectfully disagree with the district court's reasoning.

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

3757-
3758 Index 350372/98

Bart Shachnow,
Plaintiff-Respondent,

-against-

Jennifer Shafer,
Defendant-Appellant.

_____

Jennifer Shafer, New York, appellant pro se.

Karl Savryn, New York, for respondent.

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Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered September 23, 2009, which, inter alia, denied defendant wife's application for an upward modification of basic child support under the parties' settlement agreement, reallocated the parties' future responsibilities for certain add-on expenses, denied defendant's request for child support arrears and attorney's fees, and granted plaintiff husband's cross motion for child support arrears to the extent of directing defendant to pay plaintiff the sum of $48,445.41 for tuition payments made by plaintiff on defendant's behalf, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 16, 2010, which denied defendant's motion for reargument, unanimously dismissed, without costs, as

unappealable.

The court properly granted plaintiff's cross motion for arrears for the child's private school tuition owed by defendant under the separation agreement. Plaintiff's failure to file a current statement of net worth did not render the cross motion defective as determination of the amount of arrears does not implicate plaintiff's financial circumstances. In addition, defendant's admitted receipt of multiple notices of default sent by plaintiff contradicts her claim that plaintiff waived his right to defendant's contribution of 50% toward the child's private school tuition.

Defendant has not demonstrated that the child's diagnosis of attention deficit hyperactivity disorder following execution of the parties' separation agreement resulted in medical and educational expenses that impacted defendant's ability to meet the needs of the child, and defendant failed to make a prima facie showing that a substantial, "unanticipated and unreasonable change in circumstances has occurred resulting in a concomitant need" such that an upward modification in child support is warranted (*Merl v Merl*, 67 NY2d 359, 362 [1986]). In the absence of evidence that the child's needs are not being met, a hearing is unnecessary (*cf. Mandell v Karr*, 7 AD3d 382, 383 [2004];

Matter of Saltzman v Friedman, 226 AD2d 245, 246 [1996]).

The denial of defendant's application for counsel fees was a provident exercise of discretion under the circumstances (*see Lee v Lee*, 68 AD3d 622 [2009]; *Kamerman v Kamerman*, 269 AD2d 165 [2000]).

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

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4394 The People of the State of New York, Ind. 370/08
Respondent,

-against-

Malik Yusuf, also known as
Yusuf M. Ashford,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), and Milbank, Tweed, Hadley & McCloy, LLP, New York (Andrew H. Morton of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael R. Ambrecht, J. at initial suppression motion and first two renewal motions; Daniel P. Conviser, J. at third renewal motion, jury trial and sentence), rendered March 3, 2009, convicting defendant of criminal possession of a controlled substance in the third and fourth degrees and criminally using drug paraphernalia in the second degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of 6 years, unanimously affirmed.

The motion and trial courts properly denied defendant's initial and renewed motions to suppress physical evidence. There was no need for an evidentiary hearing on any of the issues

defendant raised. Suppression "hearings are not automatic or generally available for the asking" (*People v Mendoza*, 82 NY2d 415, 422 [1993]). Instead, a hearing is required only when "the defendant raises a factual dispute on a material point which must be resolved before the court can decide the legal issue of whether evidence was obtained in a constitutionally permissible manner" (*People v Burton*, 6 NY3d 584, 587 [2006] [internal quotation marks and citation omitted]).

The police entered defendant's apartment to execute a search warrant. The apartment contained drugs and packaging material in open view. At the police station, the officers recovered additional drugs from defendant's person.

In addition to authorizing the search of the apartment, the warrant described four unnamed men and authorized a search of their persons. In his initial and subsequent suppression motions, defendant never disputed the existence of probable cause for the issuance of the warrant. Instead, he claimed his description was excessively general. However, the issue of specificity could be determined from the face of the warrant and the parties' submissions. Furthermore, defendant never raised a factual issue as to whether he fit one of the descriptions. Accordingly, the degree of specificity of the description was not

a matter requiring the taking of testimony. In any event, the description was sufficiently specific to permit the police to "reasonably ascertain and identify" (*People v Nieves*, 36 NY2d 396, 401 [1975]) the persons to be searched.

Defendant also claims he was entitled to a hearing because of an alleged factual dispute over the timing and location of his arrest and the recovery of drugs from his person. While the People gave conflicting information on these matters at different stages of the proceedings, they satisfactorily explained the discrepancy. Again, there was no material factual issue to require an evidentiary hearing.

Finally, defendant also claims he was entitled to a hearing on the issue of whether he was subjected to an unauthorized body cavity search. Defendant was in a position to include this claim in his initial motion, but he failed to do so. Therefore, he was not entitled to raise it in a renewal motion (*see* CPL 710.40[4]). In any event, defendant never raised a genuine factual issue requiring a hearing. Defendant did not sufficiently controvert the People's detailed showing that the police recovered the drugs from his clothing.

The sentencing court properly adjudicated defendant a second felony drug offender whose prior felony conviction was a

violent felony under Penal Law § 70.70(4) and CPL 400.21. The court properly concluded (22 Misc 3d 1127[A], 2009 NY Slip Op 50311[U][2009], *2-*8), that a defendant may qualify as this particular type of predicate felon on the basis of a foreign conviction. It also properly concluded (*id.* at *8-*10), after examining the accusatory instrument, that defendant's North Carolina robbery conviction was equivalent to a New York violent felony.

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4395 Craig Fishman, Index 100985/09
Plaintiff-Appellant,

-against-

Charles H. Greenthal Management Corp., et al.,
Defendants-Respondents.

_____

Peter R. Bray, Parsippany, NJ, of the Bar of the State of New Jersey, admitted pro hac vice, for appellant.

Braverman & Associates, P.C., New York (Scott S. Greenspun of counsel), for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 22, 2010, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff failed to raise an inference that the board of directors of defendant cooperative corporation acted in bad faith in rejecting the prospective purchaser of plaintiff's shares in the coop (*see Jones v Surrey Coop. Apts.*, 263 AD2d 33, 36 [1999]). Indeed, his own evidence demonstrates that the board, which under the proprietary lease had the right to withhold its approval of a sale "for any reason or for no reason," rejected the proposed purchaser for financial reasons.

Plaintiff also failed to substantiate his request for additional discovery (*see id.*, 263 AD2d at 37-38).

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4396 Daniel Smith, Index 107307/07
Plaintiff-Appellant,

-against-

985 Amsterdam Avenue Housing
Development Fund Corporation,
Defendant-Respondent.

_____

Bader Yakaitis & Nonnenmacher, LLP, New York (Robert E. Burke of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 14, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant met its initial burden of showing entitlement to summary judgment by submitting evidence in the form of a property survey and expert affidavit averring that the defective condition was located on an adjacent property. In opposition, plaintiff failed to raise an issue of fact concerning the location of the defective condition. The survey and the affidavit of the surveyor both identify the raised portion of the concrete slab upon which plaintiff claimed to have tripped as being on the

property adjacent to defendant's property. Further, plaintiff testified that he was walking north on Amsterdam Avenue, that his foot caught on a piece of concrete and that he tripped and fell in front of the barbershop. Plaintiff does not dispute that the barbershop is located at 983 Amsterdam Avenue, which is adjacent to and south of defendant's property (*see Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296-297 [1988], *lv denied in part, dismissed in part* 73 NY2d 783 [1988]).

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4397 Doris Meza, Index 111212/07
Plaintiff-Appellant,

-against-

509 Owners LLC, et al.,
Defendants-Respondents.

_____

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

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for 509 Owners LLC and Emmes Realty Services, LLC, respondents.

Raven & Kolbe, LLP, New York (George S. Kolbe of counsel), for Nouveau respondents.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 28, 2010, which, in an action for personal injuries allegedly sustained when plaintiff tripped and fell while exiting an elevator, granted the motion of defendants Nouveau Elevator Industries, Inc. and Donald Speranza, Sr. and the cross motion of 509 Owners LLC and Emmes Realty Services, LLC for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Defendants building owners and elevator service contractors

established their prima facie entitlement to judgment as a matter of law. Defendants submitted evidence demonstrating that they did not have notice of any defective condition of the subject elevator and that the elevator was regularly inspected and maintained (*see Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 713-714 [2005]).

In opposition, plaintiff failed to produce evidence of a prior problem with the elevator that would have provided notice of the specific defect alleged. Although there had been a misleveling problem with the elevator almost three weeks before plaintiff's accident, the evidence established that the condition had been resolved and that a different condition with the elevator was observed the day after the accident (*see Gjonaj v Otis El. Co.*, 38 AD3d 384, 385 [2007]). Furthermore, plaintiff's reliance on the doctrine of res ipsa loquitur is misplaced under the circumstances. "[P]laintiff's fall could have occurred in the absence of negligence and could have been caused by a misstep

on [her] part" (*Cortes v Central El., Inc.*, 45 AD3d 323, 324 [2007]).

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4401 The People of the State of New York, Ind. 4327/07
Respondent,

-against-

William Carter,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow 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 (Ruth Pickholz, J.), rendered on or about November 25, 2008,

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

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

ENTERED: MARCH 3, 2011

CLERK

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

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4402 In re Aria E.,

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

Lisette B.,
Respondent-Appellant,

Daniel E.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Schindler, Cohen & Hochman LLP, New York (Karen Marie Steel of counsel), for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about July 23, 2009, which, upon a fact-finding of neglect against respondent mother, committed the subject child to the care and custody of her maternal great-grandmother, unanimously affirmed, without costs.

The mother's argument that the finding of neglect was against the weight of the evidence is without merit. In a prior appeal by the child's father, this Court found that the mother's hearing testimony that the father "was actively engaged in criminal activity in the home was sufficient alone to establish

by a preponderance of the evidence that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a consequence of [the father's] failure to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Aria E. (Daniel E.)*, 73 AD3d 489, 489 [2010] [internal quotation marks and citation omitted]). This evidence of the mother's knowledge of the father's ongoing criminal activity in the home and the evidence that she failed to act to protect the child, including her testimony that on one occasion she remained in the apartment with the child while such activity was occurring, established that she failed to provide the child with adequate supervision (*see e.g. Matter of Alena O.*, 220 AD2d 358, 361-362 [1995]).

In the father's appeal, we rejected the argument that the Family Court improperly relied on the mother's out-of-court statement, noting that the statement was authenticated by the mother (73 AD3d at 489). In any event, as her hearing testimony amply established neglect, any error in admitting the hearsay statement against the mother was harmless.

The court properly drew a negative inference against the mother from her failure to testify (*Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 437 [2010]). Contrary to the mother's

contention, "[i]nasmuch as proceedings under Article 10 of the Family Court Act are civil rather than criminal in nature, any inference drawn from the mother's failure to testify does not violate her Fifth Amendment rights in a criminal case pending at the time of the hearing" (*Matter of Nicole H.*, 12 AD3d 182, 183 [2004]).

Notwithstanding her compliance with the agency's recommendation that she undergo domestic abuse counseling, the mother's continued denial of responsibility for her past neglect of the child and her lack of insight into her parental duties justify the court's determination that it is in the child's best interest to be placed with her maternal great-grandmother.

We have reviewed respondent's remaining arguments and find them without merit.

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4403 In re Wolk Properties, LLC, Index 101008/10
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

740 West End Avenue Tenants Association,
Respondent-Intervenor-Respondent.

_____

Kucker & Bruh, LLP, New York (Robert H. Berman of counsel), for appellant.

Gary R. Connor, New York (Dawn Ivy Schindelman of counsel), for NYSDHCR, respondent.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (David Hershey-Webb of counsel), for 740 West End Avenue Tenants Association, respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered June 7, 2010, which denied and dismissed the petition brought pursuant to CPLR article 78 to annul a determination of respondent Division of Housing and Community Renewal (DHCR), denying petitioner-owner's application for a major capital improvement (MCI) rent increase, unanimously affirmed, without costs.

The determination was not arbitrary and capricious and was rationally based on the record (*see Matter of Pell v Board of*

Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]; *Matter of 370 Manhattan Ave. Co., L.L.C. v New York State Div. of Hous. & Community Renewal*, 11 AD3d 370, 372 [2004]). Petitioner failed to meet its burden of establishing that the criteria for an MCI rent increase had been met with regard to the claimed pointing and waterproofing work (*see Matter of West Vil. Assoc. v Division of Hous. & Community Renewal*, 277 AD2d 111, 113 [2000]).

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4404 Alison F. Root, Index 650098/09
Plaintiff-Appellant,

-against-

Swig Equities, LLC,
Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered on or about February 17, 2010,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated February 4, 2011,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4405 The People of the State of New York, Ind. 99011/07
Respondent,

-against-

Tomas Arocho,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about November 5, 2007, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's contention that he should receive a downward departure from his presumptive risk level is improperly raised for the first time on appeal (*see People v Arps*, 65 AD3d 939 [2009]). In any event, we find no basis for such a departure. Defendant's lack of prior sexual offenses or felonies was adequately taken into account by the risk assessment instrument. We have considered and rejected the remaining circumstances

alleged by defendant to be mitigating factors. We also note that defendant's point score was almost enough for a level three adjudication.

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4407-
4408 The People of the State of New York,
Respondent,

-against-

Shawndale Mickens,
Defendant-Appellant.

Ind. 1392/07

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew L. Mazur of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White J.), rendered April 22, 2008, as amended November 11, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first and second degrees, criminal possession of a controlled substance in the third degree, criminal possession of a weapon in the second and third degrees, and criminal sale of a firearm in the third degree, and sentencing him, as a persistent felony offender, to an aggregate term of 16 years to life, unanimously affirmed.

The evidence at the *Hinton* hearing established an overriding interest that warranted the limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]). Therefore, the closure

order did not violate defendant's right to a public trial. The officer testified, among other things, that he continued his undercover work in the vicinity of the charged crimes, that he had open investigations, that he had cases pending in the courthouse, that he had been threatened in other undercover investigations, and that he took precautions to protect his identity. This demonstrated that his safety and effectiveness would be jeopardized by testifying in an open courtroom, and it satisfied the requirement of a particularized showing (*see People v Ramos*, 90 NY2d 490, 498-499 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]). Furthermore, the court considered and adopted a reasonable alternative to full closure, and the closure, which allowed family members to attend, was no broader than necessary. The court made adequate findings on the record to support its limited closure order.

The persistent felony offender statute (Penal Law § 70.10) is constitutional (*People v Quinones*, 12 NY3d 116 [2009]). Defendant's other challenges to the procedures by which he was adjudicated a persistent felony offender are without merit. The

2009 resentencing corrected any defects in the original adjudication. The court properly exercised its discretion regarding the adjudication, and we perceive no basis for reducing the sentence.

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4410 Eloisa O. Ferrer, Index 106174/09
Plaintiff-Appellant,

-against-

New York State Division of Human Rights,
Defendant,

Wilson, Elser, Moskowitz Edelman
& Dicker, LLP,
Defendant-Respondent.

_____

Law Office of Kenneth W. Richardson, New York (Kenneth W. Richardson of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Nancy V. Wright of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered December 1, 2009, granting defendant-respondent Wilson, Elser, Moskowitz Edelman & Dicker, LLP's (the law firm) cross motion to deny and dismiss the petition to vacate the determination of defendant New York State Division of Human Rights (DHR), dated March 4, 2009, which found no probable cause to believe that the law firm had engaged in or was engaging in the unlawful discriminatory practice complained of and dismissed the complaint, unanimously affirmed, without costs.

Petitioner contends that DHR's determination was arbitrary

and capricious in that DHR failed to investigate and consider petitioner's claim that she was subjected to a hostile work environment by the law firm. However, this claim was not reasonably discernable from the complaint petitioner filed with DHR. A claim not raised before an administrative agency may not be raised for the first time in an article 78 proceeding (*see Matter of Johnson v New York State Tax Commn.*, 117 AD2d 867, 868 [1986]; *Matter of Seitelman v Lavine*, 36 NY2d 165, 170 [1975]).

Moreover, the specific conduct alleged by petitioner in the complaint and petition, if true, is legally insufficient to establish that the workplace was "permeated with 'discriminatory intimidation, ridicule and insult' that [was] 'sufficiently severe or pervasive to alter the conditions of [her] employment'" (see *Harris v Forklift Sys.*, 510 US 17, 21 [1993] [citation omitted]). "[I]solated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment" (see *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 [1996], *lv denied* 89 NY2d 809 [1997] [citations omitted]). There was no

evidence of record which established that the specific incidents described in the petition were anything more than isolated, occasional or benign.

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4412 Bartholomew Pirone, Index 306297/09
Plaintiff-Respondent,

-against-

Francisco S. Castro, et al.,
Defendants-Appellants.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for appellants.

Richard L. Giampá, Bronx, for respondent.

_____

Order, Supreme Court, Bronx County (Laura Douglas, J.), entered on or about July 1, 2010, which, insofar as appealed from, in this action for personal injuries resulting from a motor vehicle accident, denied defendants' motion to compel plaintiff to provide authorizations to obtain his medical, psychological, and pharmaceutical records pertaining to his treatment for hepatitis and depression, unanimously reversed, on the law and the facts, without costs, and the motion granted.

Defendants met their burden of showing that the requested records relating to plaintiff's hepatitis are relevant to a physical condition that plaintiff placed "in controversy" through his deposition testimony (*Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]). Furthermore, the records relating to plaintiff's

depression were relevant. Plaintiff alleged that because of defendants' conduct, he suffered physical injuries that has resulted in him spending "everyday or at least part of everyday from the date of the accident confined to his bed and home" (*see id.*).

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4413 Daniel Claudio, Index 300458/08
Plaintiff, 84266/09

-against-

The Show Piers on the Hudson, et al.,
Defendants.
- - - - -
Port Parties, Ltd.,
Third-Party Plaintiff-Appellant,

-against-

The Burlington Insurance Company,
Third-Party Defendant-Respondent,

Metropolitan Exposition Services, et al.,
Third-Party Defendants.

_____

Quinn McCabe LLP, New York (Christopher P. McCabe of counsel), for appellant.

Lazare Potter & Giacovas LLP, New York (Yale Glazer of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 12, 2010, which granted so much of third-party defendant Burlington Insurance Company's motion for summary judgment as sought to dismiss the third-party complaint as against it and denied third-party plaintiff Port Parties, Ltd.'s cross motion for summary judgment, unanimously modified, on the law, to declare that Burlington has no obligation to defend or

indemnify third-party plaintiff Port Parties, Ltd. in the first-party action, and otherwise affirmed, without costs.

The motion court properly charged Port Parties with knowledge of plaintiff's claim as of May 15, 2008. Service of process on Port Parties was "complete" when the summons and complaint were personally served upon an authorized agent of the Secretary of State on that date (Business Corporation Law § 306[b][1]; CPLR 311). Port Parties' contention that it did not actually receive the copy mailed to it by the Secretary of State is unsupported by the record and, in any event, unavailing. Business Corporation Law § 306(b)(1) does not make completion of service contingent upon the Secretary of State's mailing (*see Flick v Stewart-Warner Corp.*, 76 NY2d 50, 56-57 [1990]).

We have considered Port Parties' remaining arguments and find them unavailing.

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

ENTERED: MARCH 3, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4414N Bank Hapoalim B.M., et al., Index 603458/09
Plaintiffs-Appellants,

-against-

WestLB AG, etc., et al.,
Defendants-Respondents.

_____

Bruce Green, New York, for appellants.

Hughes Hubbard & Reed LLP, New York (Christopher M. Paparella of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 23, 2010, which granted defendants' motion to disqualify Jordan W. Siev and Reed Smith LLP as counsel for plaintiffs, unanimously affirmed, without costs.

As a preliminary matter, counsel's conduct in taking on the conflicting representation is governed by the Code of Professional Responsibility, which was in effect at the time of the conduct, rather than by the Rules of Professional Conduct, which were in effect when the motion to disqualify was brought (*see Lee v Cintron*, 25 Misc 3d 1210[A], 2009 NY Slip Op 52023[U], *2 [2009]; *see generally Matter of Hays v Ward*, 179 AD2d 427, 429 [1992], *lv denied* 80 NY2d 754 [1992]).

Code of Professional Responsibility DR 5-108 (22 NYCRR 1200.27) prohibits an attorney from "representing interests adverse to a former client on matters substantially related to the prior representation" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130 [1996]). Although defendants' initial consultation about taking on the defense of the case did not lead to counsel's retention, defendants' description of the matters, coupled with the circumstances surrounding the meeting, gives rise to a reasonable inference that confidences were revealed, which establishes a fiduciary relationship of loyalty with respect to those communications (*see Rose Ocko Found. v Liebovitz*, 155 AD2d 426, 427 [1989]; *Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 99 [2008]).

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4415 The People of the State of New York, Ind. 4852/08
Respondent,

-against-

David Selby,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J. at suppression hearing; Renee A. White, J. at jury trial and sentence), rendered September 29, 2009, convicting defendant of criminal possession of a weapon in the second degree (two counts) and criminal possession of a controlled substance in the seventh degree, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). In an area known for drug activity, a trained and experienced narcotics officer saw defendant converse briefly with a man known to the officer to be

a local seller of heroin and cocaine. Defendant received an unidentified object from the known drug dealer in exchange for money. These circumstances provided probable cause for defendant's arrest (*see People v Jones*, 90 NY2d 835, 837 [1997]; *People v Frierson*, 61 AD3d 448 [2009], *lv denied* 12 NY3d 915 [2009]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4416-
4416A Index 303790/07

Michael Dominguez,
Plaintiff-Respondent,

-against-

OCG, IV, LLC,
Defendant-Appellant,

1663 Eastburn Ave., LLC,
Defendant.

_____

Miranda Sambursky Slone Sklarin Verveniotis LLP, Elmsford (Michael V. Longo of counsel), for appellant.

Burns & Harris, New York (Andrea V. Borden of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered June 1, 2010, which, inter alia, in an action for personal injuries allegedly sustained when plaintiff tripped and fell after his foot became caught in a crack on the edge of a step on premises owned by defendant-appellant, denied appellant's motion for summary judgment dismissing the complaint and all cross claims as against it, and order, same court (Laura G. Douglas, J.), entered on or about August 18, 2010, which denied appellant's motion to vacate a conditional order of preclusion subject to the discretion of the presiding trial judge, unanimously affirmed, without costs.

Appellant failed to demonstrate its entitlement to summary judgment since it did not establish that the defect in the subject step was trivial as a matter of law. Whether a defect in a sidewalk or step is trivial is generally a matter for a jury, and "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]). Appellant relied on photographs of the step to establish that the defect was trivial, but the photographs show an irregular, patched and worn surface, which is not inconsistent with plaintiff's testimony that he fell when his foot became caught in a crack on the edge of the step (*see Tineo v Parkchester S. Condominium*, 304 AD2d 383 [2003]; *Nin v Bernard*, 257 AD2d 417 [1999]). Appellant did not provide testimony of any person with knowledge of the condition of the entranceway at the time of the accident.

Appellant's motion to vacate the conditional order of preclusion was properly denied. The record shows that appellant failed to produce a witness with knowledge for deposition by the extended deadline imposed by court order, despite clear warning that preclusion would result. Thereafter, appellant produced a witness without knowledge of the condition of the building at the time of the accident and the court properly rejected the claim

that the witness was too sick to attend the scheduled deposition (*see Wheeler v New York City Tr. Auth.*, 270 AD2d 104 [2000]).

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4417- Index 114079/08
4418 Alma Garnett, As Liquidating Trustee of
Boylan International, Inc.,
Plaintiff-Appellant,

-against-

Fox, Horan & Camerini, LLP,
Defendant-Respondent.

_____

The Law Offices of Neal Brickman, P.C., New York (Neal Brickman of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Thomas W. Hyland of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Jane S. Solomon, J.), entered December 3, 2009, which granted defendant's motion to dismiss the complaint for failure to state a cause of action, and granted leave to plaintiff to amend the legal malpractice causes of action, unanimously dismissed, without costs. Order, same court and Justice, entered August 16, 2010, which granted defendant's motion to dismiss the amended complaint, unanimously modified, on the law, to deny the motion as to the legal malpractice causes of action, and otherwise affirmed, without costs.

Plaintiff's appeal from the first order, which decided a motion addressed to the sufficiency of the original complaint,

was rendered academic by her timely amendment of the complaint (*see Langer v Garay*, 30 AD2d 942 [1968]).

The amended complaint alleges that defendant was negligent in failing to advise Boylan International properly, that defendant's negligence caused Boylan's loss, and that Boylan sustained actual damages (*see Reibman v Senie*, 302 AD2d 290 [2003]). Specifically, it alleges, inter alia, that defendant failed to mount a defense to Boylan's tax assessment arrears based on *Blackstar Publ. Co. v 460 Park Assoc.* (137 Misc 2d 414 [1987] [escalation clauses should not be applied where the tax increase is caused by extensive renovation that does not inure to the tenant's benefit]), negotiated a settlement less beneficial than simply paying the demanded amount, and coerced Boylan into executing the settlement although it knew of the dire consequences thereof. "A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that the settlement of the action was effectively compelled by the mistakes of counsel" *(Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428, 430 [1990] [citation omitted]). The amended complaint further alleges that, but for defendant's negligence, Boylan would not have had to declare bankruptcy and incur additional attorney's fees. These allegations are sufficient to withstand a

CPLR 3211(a)(7) motion. At this stage, plaintiff does not have to show a "likelihood of success," as the motion court found, but is required only to plead facts from which it could reasonably be inferred that defendant's negligence caused Boylan's loss (*see InKine Pharm. Co. v Coleman*, 305 AD2d 151 [2003]). Plaintiff also does not have to *show* that Boylan actually sustained damages but is required only to allege facts from which actual damages could reasonably be inferred (*see id.*).

The breach of fiduciary duty cause of action is based on the same facts and seek the same relief as the legal malpractice causes of action and is therefore redundant (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [2004]; *LaBrake v Enzien*, 167 AD2d 709, 709 [1990]).

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4419 In re Raymond W.,

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 (Elina Druker of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about April 28, 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 possession of a stolen vehicle in violation of Vehicle and Traffic Law § 426, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and instead adjudicating him a juvenile delinquent and imposing a term of probation. That disposition was the least restrictive alternative consistent with the needs of appellant

and the community, particularly in light of appellant's pattern of truancy and other behavioral problems, and the very short duration of any supervision that an ACD might have provided (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4420 Hassan Chakrani, Index 15790/06
Plaintiff-Respondent,

-against-

Beck Cab Corp., et al.,
Defendants-Appellants.

_____

Feinman & Grossbard, P.C., White Plains (Steven N. Feinman of counsel), for appellants.

Marder, Eskesen & Nass, New York (Chad P. Ayoub of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered August 10, 2010, which, in an action for personal injuries sustained when plaintiff was struck by a motor vehicle, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to establish their entitlement to judgment as a matter of law. Defendants' examining orthopedic surgeon found, inter alia, limited ranges of motion in plaintiff's cervical and lumbar spines, as well as in his left ankle and foot. These findings clearly raise triable issues of fact as to whether plaintiff sustained serious injuries within the meaning of Insurance Law § 5102(d) (*see Servones v Toribio*, 20 AD3d 330 [2005]). Furthermore, even assuming that defendants had met

their initial burden, plaintiff's submissions were sufficient to defeat the motion.

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4421 Balestriere Fariello, Index 116159/09
Plaintiff-Appellant,

-against-

Checkmate Holdings, LLC, et al.
Defendants-Respondents.

_____

Balestriere Fariello, New York (John G. Balestriere of counsel), for appellant.

Marc M. Coupey, Millwood, for respondents.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered on or about May 19, 2010, which, in an action seeking to recover legal fees, granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to the extent of reinstating the fourth cause of action for quantum meruit, and otherwise affirmed, without costs.

The motion court erred by dismissing the quantum meruit claim. Accepting the allegations of the complaint as true (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), plaintiff law firm was discharged without cause and thus, its remedy is "to recover[] in quantum meruit the reasonable value of the services rendered" (*Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 43-44 [1990]; *see Nabi v Sells*, 70 AD3d 252, 253 [2009]; *Robert M.*

Simels, P.C. v Silver, 303 AD2d 322 [2003]). Because plaintiff's exclusive remedy is quantum meruit, the cause of action alleging breach of contract was properly dismissed, as the retainer agreement was cancelled by the client (*see Nabi* at 253-255).

The causes of action for fraudulent inducement and promissory fraud were properly dismissed. The claims were not pleaded with particularity, and were "bare-bones," without referencing, for example, specific places and dates of the alleged misrepresentations (*Nicosia v Board of Mgrs. of the Weber House Condominium*, 77 AD3d 455, 456 [2010]). In any event, "[g]eneral allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *see 767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 [2004]). Furthermore, to the extent that the fraud claims rely on the alleged misrepresentations about defendant Joe Bobker's relationship to the Bobker Group (a non-existent entity), or that there were judgments executed against him in the past, such information was readily verifiable through public records and there could be no justifiable reliance on the

misrepresentations (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1056 [2009]).

The promissory estoppel cause of action was properly dismissed, since it was barred by the retainer agreement which explicitly set forth that the agreement contained the entire understanding of the parties (*see Capricorn Invs. III, LP v CoolBrands Intl., Inc.* 66 AD3d 409, 410 [2009]).

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: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4422 Shelton Stewart, Index 13911/99
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

_____

Judgment, Supreme Court, Bronx County (George D. Salerno, J.), entered May 7, 2009, inter alia, awarding plaintiff, upon a jury verdict, $2 million for past pain and suffering, $2.7 million for future pain and suffering over 20 years, $400,000 for past loss of earnings, $900,000 for future loss of earnings, and $1.3 million for future medical expenses, and apportioning liability 80% to defendant and 20% to plaintiff, unanimously modified, on the facts, to vacate the awards for past and future loss of earnings, and future medical expenses, and the matter remanded for a new trial solely as to such damages, unless plaintiff, within 30 days of service of a copy of this order, with notice of entry, stipulates to reduce the awards for past loss of earnings to $360,000, for future loss of earnings to

$337,500, and for future medical expenses to $665,000, and to the entry of a judgment in accordance therewith, and otherwise affirmed, without costs.

The notice of claim included sufficient information to allow defendant to investigate the claim (*see Brown v City of New York*, 95 NY2d 389, 393 [2000]). It advised defendant of the place and approximate time of the accident, and stated that the nature of the claim involved steps which were "slippery, dirty and greasy." Further, the claim stated that defendant and its employees were negligent in their maintenance and inspection of the stairways, that the stairways were not in a reasonably safe condition, and that defendant knew or should have known of the condition. Nor did plaintiff change his theory of liability from that set forth in the notice of claim. The theory of liability always was and remained negligence (*see Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 67 [2007]).

There was nothing manifestly untrue or incredible about plaintiff's testimony that he often observed pigeon droppings on the subway stairs that he used every day and that he was caused to slip because of the presence of pigeon droppings on the very same set of stairs. Indeed, the station cleaner similarly testified that he had "experience on a daily basis with pigeon

[droppings] and having to clean it from these steps," and that he was taught to put sand over the pigeon droppings because they were slippery.

At trial, plaintiff testified that he always saw pigeon excrement all over the station, that he often saw it on the stairs where he fell, that he had complained repeatedly to station workers, that he saw it 14 hours before the accident, and that he saw it again at the time of the accident. The station cleaner agreed that pigeons often left their droppings throughout the station, and while he denied seeing accumulations of droppings on the steps, he also stated that he had experience cleaning the droppings on a daily basis from the steps. He also testified that part of his duties included cleaning the steps of the droppings, and while he denied that the droppings were slippery, he also stated that he was trained to put sand over the droppings because they were slippery, and to then clean them off the steps. In addition, he maintained that he did not work on the day of the accident and thus could not dispute plaintiff's account of the condition of the steps on that day.

There was sufficient evidence from which the jury could infer that defendant had actual knowledge that pigeons regularly left their droppings on the stairway which were regularly

permitted to remain for an unreasonable period of time. The jury was therefore entitled to charge defendant with constructive knowledge of each reoccurrence of the hazardous condition (*see Alvarez v Mendik Realty Plaza*, 176 AD2d 557, 558 [1991], *lv denied* 79 NY2d 756 [1992]). The jury also reasonably credited plaintiff's claim that he slipped on bird droppings. Notably, there was no evidence to the contrary, such as evidence that the steps had been cleaned of droppings shortly before the accident, and the jury was free to find plaintiff credible. Accordingly, there was a valid line of reasoning and permissible inferences which could lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

In view of the Transit Authority's failure to act diligently to procure its proposed witness, the trial court's preclusion of the Transit Authority from calling such witness did not rise to the level of an abuse of discretion (*see Rosa v New York City Tr. Auth.*, 55 AD3d 344 [2008]). Similarly, we find that the preclusion of certain accident reports was not an abuse of discretion as the Transit Authority claimed for years that it had no such reports. In any event, even assuming there was error, we find the error harmless.

The trial court did not commit error when it restricted the use of plaintiff's pre-existing conditions to the issue of damages. Indeed, as the trial court remarked, there was no evidence that plaintiff was unable to walk up and down the steps on the day of the accident, and it would have been overly prejudicial to permit the jury to speculate that plaintiff fell because of his prior condition (*see Kaminer v John Hancock Mut. Ins. Co.*, 199 AD2d 53 [1993]). While the court should have charged PJI 2:47 to the jury (*see Sherman v City of New York*, 206 AD2d 272, 275 [1994], *lv denied* 85 NY2d 802 [1995]), the court did give the jury a comparative negligence charge and advised it that negligence is the failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Following that charge, the jury found plaintiff 20% at fault for the accident. Accordingly, any error in refusing to charge PJI 2:47 was harmless (*see e.g. Askin v City of New York*, 56 AD3d 394 [2008], *lv dismissed* 12 NY3d 769 [2009]).

The evidence at trial demonstrated that plaintiff sustained a contusion of the cervical spine and required a laminectomy and fusion of vertebrae, with insertion of metal plates and screws. Plaintiff also suffered compression fractures of his thoracic

spine, and later required a lumbar laminectomy with fusion and insertion of metal screws and struts. This was followed by extensive physical therapy and rehabilitation at the hospital. Thereafter, plaintiff required a baclofen pump to be surgically implanted to pump medication to his legs on a continuous basis so as to prevent muscle spasm. Plaintiff can no longer work due to his injuries, has difficulty sitting, standing, walking, bending, dressing himself, and sleeping. He also reported constant pain in his lower back, which radiates down both legs.

Plaintiff's injuries are serious and permanent. We find that the jury's awards for past and future pain and suffering, covering 29 years and three months, does not deviate materially from what would be reasonable compensation.

As plaintiff concedes, the jury award of $1.3 million for future medical expenses was not supported by the evidence. Accordingly, we reduce the award as indicated.

The jury's award of $400,000 for past loss of earnings was speculative as to what plaintiff might have earned in overtime pay (*see Lipshultz v K & G Indus., Inc.*, 18 AD3d 515 [2005]). Accordingly, we reduce that award to the amount requested, which was supported by the evidence.

There was no basis for the jury to conclude that plaintiff

would work for the remainder of his life. Indeed, a work-life expectancy of 7.5 years is much more realistic based on the statistical averages. Further, given the extensive evidence regarding plaintiff's pre-existing conditions, the jury's determination that plaintiff would work another 20 years was against the weight of the evidence (*see Lopiano v Baldwin Transp.*, 248 AD2d 161 [1998], *lv dismissed* 92 NY2d 876 [1998]; *Khulaqi v Sea-Land Servs.*, 185 AD2d 973 [1992])). Accordingly, the award for future loss of wages is reduced as indicated.

Defendant may seek relief before the trial court with regard to collateral source setoffs (see CPLR 4545[a]).

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

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4423 The People of the State of New York, Ind. 5745/07
Respondent,

-against-

Marvin Holmes,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered June 18, 2008, convicting defendant, after a jury trial, of murder in the first degree (two counts), murder in the second degree, burglary in the first degree and criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of life without parole, unanimously affirmed.

The court properly denied defendant's motion to suppress his statements to the police and his videotaped statement. There was no need for the police to repeat previously administered *Miranda* warnings before reinterviewing defendant. The second interview came within a reasonable time after the initial warnings, and custody had remained continuous (*see People v Gauger*, 268 AD2d

386 [2000] *lv denied* 95 NY2d 852 [2000]). The length and circumstances of defendant's custody were not unduly coercive. Furthermore, defendant's statement reveals that, after realizing he had been picked out of a lineup, he freely decided to retract his prior exculpatory statements and admit his guilt.

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4424 Denise Lynch, et al., Index 109339/07
Plaintiffs-Appellants,

-against-

Consolidated Edison, Inc.,
Defendant-Respondent,

Nico Asphalt, Inc.,
Defendant.

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Morton Povman, P.C., Forest Hills (Bruce Povman of counsel), for appellants.

Richard W. Babinecz, New York (Helman R. Brook of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Harold B. Beeler, J.), entered December 16, 2009, which denied plaintiffs' motion to set aside the jury's verdict and order a new trial on liability and damages as to defendant Consolidated Edison, Inc. (Con Ed), unanimously dismissed, without costs, for failure to perfect the appeal in accordance with the CPLR and the rules of this Court.

Plaintiff Denise Lynch was injured when she tripped on a defect on a roadway in the area of a manhole cover. Approximately one month before the accident, defendant Nico Asphalt, which was hired by Con Ed, re-paved the area surrounding

the manhole cover. The jury found that the area surrounding the manhole cover was not in a reasonably safe condition, but that Nico Asphalt was not negligent in paving the area. Due to the configuration of the verdict sheet, the jury then concluded its deliberations without reaching the issue of Con Ed's liability.

The appeal is dismissed because plaintiff failed to assemble a proper record on appeal, including the trial transcript and the minutes of the charge conference (*see Sebag v Narvaez*, 60 AD3d 485 [2009], *lv denied* 13 NY3d 711 [2009]; CPLR 5526; Rules of App Div, 1st Dept [22 NYCRR] § 600.5). Without the benefit of a proper record, this Court cannot "render an informed decision on the merits" (*Matison v County of Nassau*, 290 AD2d 494, 495 [2002]).

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4425 Horizon Asset Management, Inc., Index 602509/08
Plaintiff-Respondent,

-against-

Raymond V. Duffy, etc.,
Defendant/Counterclaim
Plaintiff-Appellant,

-against-

Murray Stahl, et al.,
Counterclaim Defendants-Respondents.

_____

Collier, Halpern, Newberg, Nolletti & Bock, LLP, White Plains (Philip M. Halpern of counsel), for appellant.

Schulte Roth & Zabel, LLP, New York (Robert M. Abrahams of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered August 16, 2010, which denied defendant-counterclaim plaintiff's motion to compel production of certain attorney-client communications, unanimously affirmed, with costs.

Defendant-counterclaim plaintiff Raymond Duffy was an employee of plaintiff Horizon Asset Management, Inc. After an SEC investigation, Horizon requested that defendant make several changes in the way he worked, so as to avoid misrepresentations and to avoid violations of the Investment Advisors Act of 1940. When defendant did not comply to plaintiff's satisfaction,

plaintiff terminated his employment and brought the within action against him, alleging, inter alia, breach of fiduciary duty and breach of contract. Defendant counterclaimed, also alleging, inter alia, breach of fiduciary duty, and asserted that the SEC investigation had been used by plaintiff as a "cover" to "squeeze [him] out" of the benefits of a separate operating agreement allegedly in effect between the parties.

Prior to defendant's termination, Horizon consulted with its in-house counsel and retained outside counsel. Defendant seeks to obtain, inter alia, communications between Horizon and its counsel and testimony of counsel with respect to their advice surrounding defendant's termination.

Defendant failed to demonstrate that the requested communications were in furtherance of an alleged breach of fiduciary duty by Horizon to defendant. Thus, refusing to allow defendant to invade the attorney-client privilege between Horizon and its counsel constituted a proper exercise of the court's broad discretion in the supervision of pretrial disclosure (*see Art Capital Group LLC v Rose*, 54 AD3d 276 [2008]).

"[W]hether a particular document is or is not protected . . . is necessarily a fact-specific determination . . ., most often requiring in camera review" (*Spectrum Sys. Intl. Corp. v Chemical*

Bank, 78 NY2d 371, 378 [1991]). It was not an abuse of discretion for Supreme Court to deny in camera review of the privileged documents absent evidence to credit the allegation that the crime-fraud exception to the attorney client privilege applied (*see Galvin v Holblock*, US Dist Ct, SD NY, 00 Civ 6058, 2003 WL 22208370, *5; *see also United States v Zolin*, 491 US 554, 572 [1989]).

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

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4426 Maryann Mignoli, etc., et al., Index 116434/05
Plaintiffs-Appellants,

-against-

Samwel Oyugi, M.D., et al.,
Defendants-Respondents.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph III of counsel), for appellants.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for Samwel Oyugi, M.D., Staten Island Hospitalists, P.C. and Staten Island University Hospital, respondents.

Amabile & Erman, P.C., Staten Island (Anthony A. Lenza, Jr. of counsel), for Ralph Ciccone, M.D., Staten Island Pulmonary Associates, P.C., Thomas Kilkenny, M.D., Jeffrey Tambor, M.D., Premier Medical, PLLC, Kayal Sambandam, M.D., Deepak Vadhan, M.D. and Brook-Island Medical Associates, P.C., respondents.

Kopff, Nardelli & Dopf LLP, New York (Catherine R. Richter of counsel), for Raja Flores, M.D., Memorial Hospital for Cancer and Allied Diseases and Memorial Sloan-Kettering Cancer Center, respondents.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered August 17, 2009, which, in an action for medical malpractice arising out of defendants' alleged failure to properly diagnose and treat plaintiff's decedent's lung cancer, granted defendants' motions and cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

To sustain a cause of action for medical malpractice, a plaintiff must prove a deviation or departure from accepted practice and that such departure was a proximate cause of plaintiff's injury (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [2009]). Here, defendants established their entitlement to judgment as a matter of law by submitting evidence, including the decedent's hospital records, the deposition testimony and the affirmations of various medical experts, including a board certified medical oncologist with a thoracic speciality and a thoracic surgeon, demonstrating that they did not deviate from good and accepted medical practice in their diagnosis and treatment of the decedent.

In opposition, plaintiffs failed to raise a triable issue of fact. The expert affirmation relied upon by plaintiffs was insufficient, inasmuch as it failed to address the detailed affirmations of defendants' experts, averred the alleged departures from the standard of care and proximate cause only in conclusory terms, and was at times contradicted by the record (*see Browder v New York City Health & Hosps. Corp.*, 37 AD3d 375 [2007]). Furthermore, even assuming that there was a delay in diagnosing the decedent's lung cancer, defendants established that such delay was not a proximate cause of injury since the

decedent's cancer had already progressed to stage IV cancer with metastasis to the brain by the time he first presented to defendant Staten Island University Hospital in June 2003.

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4427 The People of the State of New York, Ind. 2551/08
Respondent,

-against-

Cory Johnson, also known as Cory Christopher,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about December 10, 2008,

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

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

ENTERED: MARCH 3, 2011

CLERK

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

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4428 Carl Wright, Index 22821/06
Plaintiff-Respondent,

-against-

Riverbay Corporation,
Defendant-Appellant.

_____

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellant.

Robin G. Neiger, Bronx (Jeffrey Zeichner of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered August 12, 2009, after a jury trial, awarding plaintiff damages, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for a new trial on the issue of whether plaintiff was comparatively negligent.

Contrary to defendant's objection to the jury charge and the other rulings of the court that placed the burden on defendant to show that it did not have notice of the absence of lights in the stairwell, plaintiff's evidence that a lack of illumination in violation of Multiple Dwelling Law § 37 was a proximate cause of

his accident shifted the burden to defendant on the issue of notice (*see Santiago v New York City Hous. Auth.*, 268 AD2d 203 [2000]).

Defendant's request for a jury charge on comparative negligence should have been granted given the issue of whether plaintiff should have entered and descended an unlit stairwell under the facts of this case.

Defendant's remaining arguments concerning various evidentiary rulings and the jury charge on the Multiple Dwelling Law are unpreserved for appellate review.

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4429 The People of the State of New York, Respondent,

-against-

Rahee Roman, Defendant-Appellant.

Ind. 4130/08

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

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

Judgment, Supreme Court, New York County (Laura A. Ward, J. at hearing; Lewis Bart Stone, J. at plea and sentence), rendered May 22, 2009, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248 [2006]). The court did not conflate the right to appeal with the rights automatically forfeited by pleading guilty. Instead, in a separate part of the allocution, it explained that, in return for the negotiated disposition, defendant was additionally agreeing to waive his right to appeal, and defendant accepted that condition. Furthermore, defendant

also signed a valid written waiver, in which he acknowledged, among other things, that he had discussed the waiver with counsel. This waiver forecloses defendant's suppression claim.

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4430 936 Second Avenue, L.P., Index 601734/09
Petitioner-Appellant,

-against-

Second Corporate Development, Co., Inc., et al.,
Respondents-Respondents.

_____

Goldberg Weprin Finkel Goldstein LLP, New York (Kevin J. Nash of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered February 5, 2010, which, in a proceeding brought pursuant to CPLR article 75, denied the petition seeking to vacate an arbitration/appraisal award and granted respondents' cross motion to confirm the award, unanimously affirmed, without costs.

There is no basis to disturb the award. The appraisal was made pursuant to the procedure set forth in the parties' lease. The appraisers averred that they complied with the Court of Appeals' order that the net lease must be taken into account when valuing the demised premises (*see 936 Second Ave. L.P. v Second Corporate Dev. Co., Inc.*, 10 NY3d 628 [2008]). The motion court

properly determined that there was no evidence of fraud, bias or bad faith in the appraisal process. Nor was the award irrational. Absent such evidence, "the appraisal should stand" (*Rice v Ritz Assoc.*, 88 AD2d 513, 514 [1982], *affd* 58 NY2d 923 [1983]).

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4431 Edward A. Kaminsky, Index 602540/09
Plaintiff-Appellant,

-against-

Herrick Feinstein, LLP,
Defendant-Respondent.

_____

Meyerowitz Law Firm, New York (Ira S. Meyerowitz of counsel), for appellant.

Herrick, Feinstein LLP, New York (Susan T. Dwyer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 24, 2010, which, to the extent appealed from as limited by the briefs, in this action involving a legal fee dispute, granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The complaint was properly dismissed as barred by the doctrine of res judicata. Plaintiff's action arose out of the same set of circumstances as his prior 2006 action, which was dismissed (*see* 59 AD3d 1 [2008], *lv denied* 12 NY3d 715 [2009]), and "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or

if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

We have considered plaintiff's remaining arguments, including that he did not have a full and fair opportunity to litigate his claims, and find them unavailing.

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4433 Meghan Hopkins, Index 115489/06
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellant.

Fischer and Burnstein, P.C., Kew Gardens (Steven Herschkowitz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 14, 2009, insofar as appealed from as limited by the briefs, upon a jury verdict, awarding plaintiff $350,000 for past pain and suffering and $275,000 for future pain and suffering for 55.4 years, unanimously affirmed, without costs.

The 22-year-old plaintiff suffered a trimalleolar fracture of her right ankle when she tripped and fell on a section of cracked and raised concrete in a subway station. She has endured two painful surgeries, one open insertion to repair her broken bones by means of a metal plate and screws, and a second to remove the surgical hardware. She can no longer run or participate in sports and continues to have pain. Early signs of

arthritis, which is likely to further restrict her motion and activities, have been detected in her ankle, which may require an additional surgery. Under these circumstances, the amounts awarded for past and future pain and suffering do not deviate materially from what is reasonable compensation (*see e.g. Colon v New York Eye Surgery Assoc., P.C.*, 77 AD3d 597 [2010]; *Ruiz v Hart Elm Corp.*, 44 AD3d 842 [2007]; *Rydell v Pan Am Equities*, 262 AD2d 213 [1999]; *Po Yee So v Wing Tat Realty*, 259 AD2d 373 [1999]; CPLR 5501[c]).

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

ENTERED: MARCH 3, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4434 NYCTL 1998-2 Trust, etc., Index 115924/01
Plaintiff-Respondent,

-against-

Norman Ackerman,
Defendant-Appellant,

The Urban Partnership, et al.,
Defendants.

_____

Norman Ackerman, appellant pro se.

Shapiro, DeCaro & Barak, LLC, Melville (John D. Dello-Iacono of counsel), for respondent.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered October 7, 2009, which granted plaintiff's motion to vacate tax lien discharges, and ordered that plaintiff may proceed with the sale of the premises, unanimously affirmed, without costs.

The court properly vacated the tax lien discharges upon a finding that they had been procured by fraud. With respect to defendant's claim that the tax lien was the result of an erroneous classification of the premises, the court correctly noted that this argument had previously been found to be unavailing. A certiorari proceeding pursuant to article 7 of the Real Property Tax Law is a taxpayer's exclusive remedy for

challenging real property assessments (*see Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 204 [1991]).

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

ENTERED: MARCH 3, 2011

CLERK