SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 29, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1979 The People of the State of New York, Respondent, Ind. 4456/06

-against-

Hans Alexander,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Dineen A. Riviezzo, J. at plea; Edward M. Davidowitz, J. at plea withdrawal hearing and sentence), rendered October 24, 2008, convicting defendant, on his guilty plea, of criminal sale of a controlled substance in the fifth degree and sentencing him, as a second felony offender, to a term of 1½ years, affirmed.

By indictment dated November 29, 2006, defendant was charged with criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school

grounds. By motion dated December 28, 2007, defendant moved pro se to dismiss the indictment, asserting, among other things, that the 13-month-and-5-day delay resulted in a denial of his right to a speedy trial "as guaranteed by section 30.30(1)(a) of the criminal procedure law and the sixth amendment of the United States constitution. . . ." Defendant also filed a writ of habeas corpus with this Court, asserting that the indictment was improper because of the prosecutor's failure to charge the grand jury on the defense of agency.

At a January 11, 2008 appearance, the court advised the parties, who were ready for trial, that it had just learned that this Court had granted defendant's writ [to the extent of transferring it to Bronx County for resolution] and that the trial would have to be adjourned to March to allow the People to respond. After numerous pauses and consultation with counsel, defendant pleaded guilty to a lesser charge, conditioned on the withdrawal of all outstanding writs and motions and the waiver of his right to appeal. Defendant also executed a written waiver of appeal which expressly reserved several fundamental rights, including his right to appeal "any constitutional speedy trial claim which [he] may have advanced."

On January 17, 2008, defendant moved pro se to withdraw his

guilty plea on several grounds, including that counsel was ineffective because he failed to inform him that the writ had been granted and that the plea was inherently coercive because it was conditioned on the withdrawal of his speedy trial claim. After conducting a hearing, at which defendant and counsel testified and the grand jury minutes, which showed that an agency charge had been given, were admitted into evidence, the court denied the motion. In finding that defendant had knowingly, intelligently, and voluntarily pleaded guilty, the court noted that defendant's motions and writs demonstrated his understanding of the process and that there were serious inconsistencies between defendant's testimony and the plea minutes, which established defendant's knowledge that the writ had been granted and that the plea was conditioned on its withdrawal. The court also stated that it is "perfectly proper" for a court to require that writs and motions be withdrawn before taking a plea.

Defendant now seeks to vacate his guilty plea on the ground that it was unlawfully conditioned on the withdrawal of his constitutional speedy trial motion in violation of the rule set forth in *People v Blakley* (34 NY2d 311 [1974]) and reaffirmed in *People v Callahan (Sutton)* (80 NY2d 273, 279-282 [1992]). For the reasons set forth below, we find that this case does not fall

within the ambit of *Blakley* and *Callahan* (*Sutton)* and that the conviction should be affirmed.

Our analysis begins with *People v White* (32 NY2d 393 [1973]). In *White*, the defendant moved to dismiss his indictment on the ground that his right to a speedy trial had been denied by a 51-month delay. Before the motion was decided, defendant agreed to plead guilty to a lesser charge. Employing a case specific analysis, the Court of Appeals, characterizing the prosecutor's conduct as "unfair and over-reaching," found the defendant's waiver of his constitutional speedy trial claim invalid because the prosecutor used coercion and duress to obtain the waiver and the defendant's guilty plea on a lesser crime. In contrast, an analysis of the record before us establishes that defendant's plea, including his waiver of all pending motions and writs, was not coerced in any manner.

First, the plea minutes indicate that even though the speedy trial motion remained outstanding, both defendant and the People were ready for trial on the date of the plea (*see generally People v Rodriguez*, 50 NY2d 553, 557 [1980]["the constitutional right to a speedy trial is one that may be surrendered"]).

Second, after the court informed the parties that the case would have to be adjourned to allow the People to respond to the

writ, it was defense counsel who advised the court that defendant had asked him "to make further inquiry" regarding the People's offer. In response, it was the court, not the prosecutor, that informed defendant that it would accept the plea only on the condition that defendant withdraw "all motions that are outstanding."

Third, when defense counsel first advised the court that defendant was not interested in the plea offer because he would not be immediately released, the court set an adjourned date and neither the court nor the prosecutor said anything designed to persuade defendant to change his mind and accept the plea offer. It was only after numerous pauses in the proceeding that defense counsel advised the court that, "after having had a number of conversations with [defendant] and . . . an opportunity to review the writs . . . as well as the motions," defendant had authorized him to enter a plea of guilty with the understanding that defendant would be receiving credit for time served and would waive his right to appeal and withdraw the outstanding writs or motions which counsel had adopted in the past.

Fourth, during the plea proceedings the court twice asked defendant if he understood that by taking the plea all of his outstanding writs and motions were being withdrawn. Defendant

acknowledged that he understood and was withdrawing all prior writs and motions and that he had been given enough time to discuss the disposition with counsel and was satisfied with his representation. Defendant also confirmed that he understood that he was waiving certain trial rights and that he was pleading guilty because he was in fact guilty, that no one had forced him to plead guilty and that the only promise made to him was the sentencing promise.

Indeed, at the plea withdrawal hearing, defendant explained that he inquired into the plea offer because he felt pressure as a result of the delay that would result from allowing the People to respond to his writ. Although defendant testified that he was not made to understand that the writ had been granted and that he would not have pleaded guilty had he known that the court was requiring him to withdraw it, he admitted that he understood that the withdrawal of all motions encompassed his pending motion asserting a violation of his "constitutional right to a speedy trial." At no time did defendant testify that he was concerned about the withdrawal of his speedy trial motion. Rather, he complained only that he did not know that a plea could not be conditioned on the withdrawal of certain motions.

Given these circumstances, the court properly exercised its

discretion in denying defendant's motion to vacate the plea on the ground that it was knowingly, intelligently and voluntarily entered. (*People v Flemming*, 27 AD3d 257 [2006], *lv denied* 7 NY3d 755 [2006]).

We are cognizant that in *Blakley* and *Callahan*, the Court of Appeals went beyond *White*'s case-specific analysis, holding in *Blakley* that "[b]ecause the criminal justice system should scrupulously avoid the possibility that a plea of guilty may be tainted by unfairness . . ., and because prosecutors should not be allowed to submerge speedy trial challenges, and the societal interests they represent, in plea bargains, . . . a reduced plea conditioned upon a waiver of a speedy trial claim must be vacated." (*Blakley*, 34 NY2d at 315; *see also Callahan* (*Sutton*), 80 NY2d at 279-282). However, in *Blakley* and *Callahan* (*Sutton*) the right to appeal the constitutional speedy trial claim had matured in that the defendants had pleaded guilty after their speedy trial motions had been denied. Here, as in *White*, the appellate claim had not matured in that the speedy trial motion remained pending when the plea was entered.

Defendant argues that this distinction is irrelevant in that the *Blakley* rule has not been limited to those cases where the motion has been decided and that while a defendant can

independently choose to abandon a speedy trial claim by his silence, a plea that is specifically conditioned on the withdrawal of a speedy trial claim is illegal per se. This argument is unpersuasive.

In *Blakley*, the court denied defendant's speedy trial motion even though his case did not come to trial until almost 3 years and 1 month after the indictment. On the second day of the trial, defendant pleaded guilty to a reduced plea, which the prosecutor conditioned upon defendant's withdrawal of his speedy trial claim. In considering defendant's challenge to the plea, the Court of Appeals stated:

> "The improper *denial* of a motion to dismiss the indictment on the grounds that the defendant has not been afforded a speedy trial survives a plea of guilty and may be raised on appeal. Here the *prosecutor* attempted, in effect, to deprive the defendant of his right to appeal the adverse determination of his speedy trial claim, by confronting him with a possibly unfair trial (because so tardy) on the one hand, and, on the other, offering him a reduced plea only if he would relinquish the speedy trial claim."

(*Blakley*, 34 NY2d at 314 [citations omitted and emphasis added]).

Although *Blakley* held that a waiver of appeal is ineffective to the extent that it precludes appellate review of constitutional speedy trial claims and that such claims survive a

guilty plea following the *denial* of a speedy trial motion, it is equally established that a properly interposed constitutional claim may be deemed abandoned or waived if not pursued (*see Rodriguez*, 50 NY2d at 557; *see also People v Denis*, 276 AD2d 237, 246-247 [2000], *lv denied* 96 NY2d 782 [2001]. Thus, in *Flemming* (27 AD3d 257) and *People v Tatis-Duran* (300 AD2d 84 [2002]), this Court held that a defendant who pleaded guilty *before* the court decided his constitutional speedy trial motion was foreclosed from pursuing the merits of his constitutional speedy trial claim on appeal.

In light of these principles, to accept defendant's interpretation and vacate his guilty plea would create the paradoxical result of allowing defendant to vacate his plea solely because the court, rather than remaining silent, advised him that all pending motions had to be withdrawn as a condition of his plea, even though defendant is barred from pursuing the

merits of his speedy trial motion in this Court.[1] Indeed, taken to extremes, a per se interpretation of the *Blakley* rule might have absurd consequences. For example, as interpreted by defendant, *Blakley* would require vacatur of a guilty plea conditioned on the withdrawal of a speedy trial motion even in a situation where a defendant filed the motion the day after his indictment and then pleaded guilty the following day.

Lastly, defendant ignores the factual distinctions between *Blakley* and this case. In *Blakley*, it was the prosecutor who "attempted, in effect, to deprive the defendant of his right to appeal the adverse determination of his speedy trial claim" (*Blakley* at 314), by giving him the choice of accepting a plea conditioned on the waiver of his speedy trial claim or proceeding to a trial that would be rendered unfair by the 3-year delay. Here, the alleged delay was approximately 13 months, defendant was ready to proceed to trial on the plea date despite the

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[1]Of course, if there was a basis to hold that defendant's speedy trial claim was reviewable even though the motion was not decided, as the Court of Appeals did in *White*, this case would not run afoul of *Blakley* and *Callahan (Sutton)* because defendant, in his written waiver of appeal, expressly reserved his right to appeal "any constitutional speedy trial claim which [he] may have advanced." In this regard, we note that defendant has not asked that we consider the merits of his constitutional speedy trial claim.

pendency of his speedy trial motion, defendant raised the plea offer only because he felt pressured by the fact the trial was going to be further delayed due to his writ, and, in response to defendant's inquiry about the plea, it was an impartial judge who raised the condition that defendant waive all pending motions and ensured that defendant understood and agreed to all of the terms of the plea offer (*see Ocasio v Walker*, 2004 U.S. Dist. LEXIS 12500, 15-17 [SD NY 2004]).

All concur except McGuire, J., who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

A central issue in this appeal is whether *People v White* (32 NY2d 393 [1973]) remains good law in light of *People v Blakley* (34 NY2d 311 [1974]) and *People v Callahan* (80 NY2d 273 [1992]). Although that issue is not one that commonly turns up, it is one the Court of Appeals should address.

In *People v Blakley*, the defendant pleaded guilty to a reduced charge after his motion to dismiss on constitutional speedy trial grounds had been denied. The Court vacated the plea, concluding that "[f]or a variety of reasons a prosecutor must not make the right to a speedy trial an item of barter in a plea bargaining situation" (34 NY2d at 314). The Court viewed conditioning a plea to a reduced charge on the withdrawal of a constitutional speedy trial claim as "inherently coercive" (*id.* at 313); its broad rationale was:

> "It is possible that an innocent defendant, faced with a trial that is unfair because unreasonably delayed, may plead guilty to a reduced charge rather than risk such a trial. Because the criminal justice system should scrupulously avoid the possibility that a plea of guilty may be tainted by unfairness . . ., and because prosecutors should not be allowed to submerge speedy trial challenges, and the societal interests they represent, in plea bargains, we hold that a reduced plea conditioned upon a waiver of a speedy trial claim must be vacated. (*Cf. People v White*,

> 32 NY2d 393.) And this result follows regardless of the defendant's success on the underlying speedy trial claim" (*id.* at 315 [citation omitted]).

Of course, this case is distinguishable on its facts as the court had not ruled on the merits of the speedy trial motion when defendant pleaded guilty. The issue in this case is whether defendant's plea to a reduced charge is for that reason not subject to the per se vacatur holding of *Blakley.* Notably, in adopting the per se vacatur rule, the Court cited only its decision the year before in *People v White*, and prefaced the citation with the signal, "*cf.*"

People v White does not expressly address that issue. In *White,* the defendant's motion to dismiss on constitutional speedy trial grounds had not been decided prior to his plea of guilty to a reduced charge. Critically, however, the Court did not, as it later did in *Blakley*, vacate the plea before determining whether it had been coerced. Although the Court held that the defendant had been coerced into waiving his right to a speedy trial and pleading guilty, the case seems to turn on its particular facts. After all, the coercive character of those facts is stressed in the opinion and no broad rationale is stated (*see also Callahan*, 80 NY2d at 282 [noting "*White's* case-specific analysis"]). Nor

is there any reliance on the societal interest in a speedy trial, one of the factors informing the Court's decision in *Blakley*. To the contrary, the opinion states a broad principle of law -- "[a] defendant may, of course, waive his right to a speedy trial" (32 NY2d at 399) -- that, as is clear from *People v Seaberg* (74 NY2d 1, 9 [1989]), is no longer valid in some contexts. Consistent with the fact-specific analysis in *White*, the majority stresses the non-coercive character of the circumstances surrounding defendant's guilty plea.

People v Rodriguez (50 NY2d 553 [1980]), another case in which the trial court did not rule on the merits of a motion to dismiss on constitutional speedy trial grounds, is not a guilty plea case but is relevant nonetheless if only because it is discussed in *People v Callahan*. The trial court directed a hearing on the motion, but "[f]or reasons undisclosed by the record, no speedy trial hearing was held" (50 NY2d at 556). Although the motion remained undecided, the parties proceeded to trial and the defendant was convicted. On appeal, he sought to press his claim that his right to a speedy trial had been violated. Concluding that the record "figuratively shouts out the knowing nature of the decision to abandon the speedy trial claim" (*id*. at 557), the Court held that the defendant's

"objection to the tardiness of the prosecution . . . had been knowingly and voluntarily abandoned" (*id.* at 558).

In *People v Callahan (Sutton)*, as in *Blakley*, the defendant pleaded guilty after the court had denied his motion to dismiss on constitutional speedy trial grounds (80 NY2d at 278). Presumably, he pleaded guilty to a reduced charge, but the opinion states only that he pleaded guilty to a charge in full satisfaction of the indictment (*id.*). Brushing aside the notion that *Rodriguez* undermined the continuing validity of *Blakley*, the Court reaffirmed *Blakley*, stating that it "went beyond *White's* case-specific analysis and held that 'the nature of the speedy trial guarantee renders a [waiver of such a claim] *inherently* coercive in a plea bargaining situation' so that a plea conditioned on a waiver 'must be vacated' regardless of the substantive merits of the claim (*id.* at 282, quoting *Blakley*, 34 NY2d at 313). Invoking anew the societal interest in a speedy trial, the Court stated that *Blakley's* continuing validity was evident from *Seaberg*, where that interest was stressed (*id.*). The Court also went on to make clear that *Rodriguez* should not be interpreted broadly, stating that "*Rodriguez* stands only for the limited proposition that a defendant who initially interposes a constitutional speedy trial claim but subsequently abandons it

before a determination on the claim is made cannot subsequently raise that claim on appeal" (80 NY2d at 282).[2]

Defendant argues that although his constitutional speedy trial motion had not been denied prior to his guilty plea, the per se vacatur rule of *Blakley* applies, not the case-specific approach of *White*, because *White* was supplanted, i.e., overruled, by *Blakley*. Neither in *Blakley* nor in *Callahan*, however, did the Court state that it was overruling White or disapproving its case-specific analysis. To the contrary, when the Court in *Blakley* cited *White*, it used the "cf." rather than the "but see" signal. And the statement in *Callahan* that *Blakley* "went beyond" *White's* case-specific approach would be too coy and too casual a way of overruling a precedent.

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[2]The Court did not mention the per se vacatur rule of *Blakley*, pursuant to which the guilty plea is vacated and then the merits of the constitutional speedy trial claim are reviewed. But there is no inconsistency with *Blakley* in this regard; the record on appeal makes clear that the defendant did not ask that the plea be vacated (brief for defendant-appellant at 7, 12, *People v Callahan (Sutton)*, 80 NY2d 273). In *People v Flemming* (27 AD3d 257 [2006]) and *People v Tatis-Duran* (300 AD2d 84 [2002]) we held that a defendant who pleaded guilty to a reduced charge before his constitutional speedy trial claim was decided could not obtain review of that claim. In *Flemming*, vacatur of the guilty plea was not sought and in *Tatis-Duran* there was no claim that the plea was involuntary (brief for defendant-appellant Flemming at 22; brief for defendant-appellant Tatis-Duran at unnumbered page 4).

That said, why the case-specific approach of *White* should apply when a constitutional speedy trial motion has been made but not decided is not obvious. It cannot be said, however, that the factual situation in this case and *White* always must be as inherently coercive as the situation in *Blakley*. Where, as here, the prosecution has not responded to the speedy trial motion, the prosecutor responsible for the case may not even have read it. Of course, that will not invariably be true and, even when it is, the prosecutor still may have good reason to think the motion is a formidable one. The point, however, is that when cases in which the motion has been responded to are compared to cases in which there has been no response, it is not unreasonable to think that the latter class of cases presents a reduced danger that the offer of a plea to a reduced charge represents a coercive effort by the prosecutor to "make the right to a speedy trial an item of barter" (*Blakley*, 34 NY2d at 314). Moreover, there is a good reason to be chary about extending the per se vacatur rule of *Blakley*. Plea bargaining, of course, benefits both persons charged with crimes and societal interests (*People v Selikoff*, 35 NY2d 227, 232-34 [1974], *cert denied* 419 US 1122 [1975]). However, those benefits do not come without costs. If the per se vacatur rule of *Blakley* applies as soon as a constitutional

speedy trial motion is made, prosecutors will have powerful incentives not to permit any reduced pleas until after the motion is decided, even if the motion is frivolous or the prosecutor had been planning to offer a favorable plea bargain before the motion was made. After all, the defendant would have the unilateral right to undo any plea of guilty, perhaps years later when the prosecution's case could be compromised, by filing an appeal or making a post-conviction motion and invoking the vacatur rule.

Defendant argues that extending the per se vacatur rule to this case would not require "vacat[ur] of all pleas, even those entered into voluntarily very early in a criminal case, where there was a pending constitutional speedy trial motion at the time of the guilty plea." The "critical" consideration in this case, he maintains, is that his plea to a reduced charge was "specifically conditioned on the withdrawal of his speedy trial claim." This argument is unpersuasive because it entails the proposition that an otherwise identically situated defendant is not entitled to vacatur of a guilty plea or any other relief if no one, not the court, the prosecutor or defense counsel, makes any mention of a pending constitutional speedy trial motion. In that situation, the speedy trial claim would be waived by operation of law and the defendant would be entitled to no

relief. A different result should not obtain merely because of on-the-record efforts by the court, the prosecutor or defense counsel to confirm or make clear to the defendant that the plea of guilty effectively waives the undecided constitutional speedy trial motion.

For these reasons, I agree with the majority that the case-specific analysis of *White* is applicable and that, because of the non-coercive circumstances of the plea, defendant is not entitled to vacatur of the plea.

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

ENTERED; MARCH 29, 2011

CLERK

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

3688 Peter Wagenstein, as Trustee, Index 116105/05
Plaintiff-Appellant,

-against-

Ellen Shwarts, as Trustee and
as Voluntary Administrator of
the Estate of Sophie Wagenstein,
Defendant-Respondent.
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Ellen Shwarts, etc.,
Third-Party Plaintiff-Respondent,

-against-

Peter Wagenstein, etc.,
Third-Party Defendant-Appellant.

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Fred L. Abrams, New York, for appellant.

The Richard L. Rosen Law Firm, PLLC., New York (Leonard S. Salis of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 3, 2009, which denied without prejudice plaintiff's motion to vacate a prior order transferring the action to Surrogate's Court, unanimously affirmed, without costs.

This is an appeal from the IAS court's refusal to vacate a prior order transferring this action, pursuant to SCPA 207, to the Surrogate's Court. The sole issue on the appeal is whether the Surrogate's Court has subject matter jurisdiction over this

dispute concerning a lifetime trust established by the decedent. We agree with defendant that the Surrogate's Court has jurisdiction over the dispute.

Plaintiff Peter Wagenstein and his sister, defendant Ellen Shwarts, are the sole children of decedent Sophie Wagenstein. On June 30, 1992, Sophie Wagenstein, as grantor, created an inter vivos trust for the benefit of her two children. The trust's assets consisted principally of decedent's condominium at 155 West 68th Street and a Wachovia securities account valued at approximately $431,000. The trust instrument granted decedent a life estate in the trust income, and provided that upon her death the trust would terminate and the trustees assign, transfer and pay over the then principal and accrued income in equal shares, per stirpes, to Peter and Ellen. Peter and Ellen were the sole beneficiaries and co-trustees of the trust.

On September 25, 2000, Sophie Wagenstein executed a will leaving all her remaining real and personal property to her children. Sophie Wagenstein died on November 5, 2004. On or about October 6, 2005, Ellen obtained voluntary letters of administration. On or about November 18, 2005, Peter commenced an action in Supreme Court seeking partition of his mother's apartment, or, in the alternative, a sale of the property and

division of the proceeds.

Ellen answered and interposed counterclaims for declaratory relief, specific performance of an alleged agreement regarding distribution of the trust's assets, imposition of a constructive trust, and specific performance of an alleged oral agreement to convey the condominium to Ellen.

By order to show cause dated June 2006, Ellen moved, pursuant to CPLR 325(e), to transfer the partition action to the Surrogate's Court, asserting that the action was intertwined with issues relevant to the administration of decedent's estate. Ellen noted that in his objections to her petition for letters testamentary, Peter had accused her of failing to disclose or identify certain assets, including trust assets, and of failing to provide an inventory of decedent's assets, both probate and non-probate, asking the surrogate to "protect[] his 50% beneficial interest in the estate," including his interest in the apartment. By order dated August 4, 2006, the partition action was transferred, on consent, to the Surrogate's Court.

On March 15, 2009, almost 2 ½ years later, Peter, with new counsel, moved by order to show cause in the Supreme Court for an order vacating the transfer and re-transferring the case to Supreme Court, asserting that the Surrogate's Court lacked

subject matter jurisdiction over the dispute concerning distribution of the assets of the lifetime trust. The IAS court denied the motion, ruling that the Surrogate's Court had jurisdiction over the dispute pursuant to SCPA 207. We agree.

The State Constitution imbues the Surrogate's Court with jurisdiction "over all actions and proceedings relating to the affairs of decedents [and] administration of estates and actions and proceedings arising thereunder . . . and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law." (NY Cons., art VI, § 12[d]). SCPA 201(3) provides:

> "3. The court shall continue to exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to estates and the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding, or between any party and any other person having any claim or interest therein, over whom jurisdiction has been obtained as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires."

In *Matter of Piccione*, 57 NY2d 278 [1982], the Court of Appeals explicitly rejected a narrow reading of the jurisdiction

of the Surrogate's Court, noting that matters "relating to" the affairs of decedents were subject to the jurisdiction of the Surrogate without any textual limitation, quoting with favor lower court precedent stating that "for the Surrogate's Court to decline jurisdiction, it should be abundantly clear that the matter in controversy in no way affects the affairs of a decedent or the administration of his estate" (*id*. at 288 [internal citation and quotation marks omitted] [surrogate had jurisdiction over proceeding pursuant to RPAPL 701 brought to evict tenants so that premises could be sold, notwithstanding that Surrogate's Court was not a forum denominated in RPAPL 701]).

The Surrogate's jurisdiction over inter vivos trusts is explicitly conferred by SCPA 207 as well as SCPA 209(6). In 1980, the definition of a trust contained in the SCPA was amended to include "a lifetime trust" (SCPA 103[50]), and SCPA 209[6], governing powers incidental to the jurisdiction of the Surrogate's Court, was amended to confer jurisdiction upon the Surrogate's Courts "[to] determine any and all matters relating to lifetime trusts."[3]

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[3]Initially, the SCPA conferred jurisdiction over testamentary but not inter vivos trusts. Over the years, there was a "chipping away at the line of separation," in evident recognition of the fact that testamentary trusts are often

The statute was amended again in 1984. SCPA 207, entitled "lifetime trusts," confers state-wide jurisdiction over inter vivos trusts:

> "1. The surrogate's court of any county has jurisdiction over the estate of any lifetime trust which has assets in the state, or of which the grantor was a domiciliary of the state at the time of the commencement of a proceeding concerning the trust, or of which a trustee then acting resides in the state or, if other than a natural person, has its principal office in the state" (*id.*).

These amendments to the SCPA were adopted with the intention of imbuing the Surrogate's Court with broad jurisdiction over inter vivos trusts; indeed, there is no explicit limitation on the Surrogate's jurisdiction "[to] determine any and all matters relating to lifetime trusts" (*see e.g. Matter of Srozenski*, 78 AD3d 1596 [2010] [Surrogate's Court properly concluded that it

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related to or a continuation of a trust created during the settlor's lifetime, and "insistence on barring the surrogate from overseeing the inter vivos segment of the trust in that situation was economically unsound as well as legally awkward" (David D. Siegel and Patrick M. Connors, Practice Commentary, SCPA 209). Indeed, the instant type of trust agreement, under which decedent retained the right to receive income for life, is deemed a testamentary substitute for the purposes of calculating a spouse's elective share (*see* EPTL 5-1.1-A[b][1][F]). The amendments to the SCPA, beginning in 1980, make clear that the Surrogate possesses jurisdiction to determine matters relating to inter vivos trusts concurrent with the jurisdiction of the Supreme Court.

had subject matter jurisdiction in proceeding seeking accounting of lifetime trust]; *Cipo v Van Blerkom*, 28 AD3d 602 [2006]; *Matter of Mednick*, 155 Misc2d 115 [Surr Ct NY County 1992] [granting application to consolidate testamentary and inter vivos trusts]; *see also Matter of Moros v Cohen*, 12 AD3d 372 [2004]).

The issue of whether or not Peter and Ellen entered into an agreement regarding distribution of the trust's assets, including the apartment, and the propriety of Ellen's actions with respect to decedent's assets, are matters "affecting the affairs of the decedent" and "related to the administration of the estate." Peter has alleged dishonest and fraudulent conduct with respect to decedent's assets, both probate and non-probate, including specific allegations with respect to various carrying costs associated with the apartment. The assets of the trust, including the apartment, are located in New York. The trustees, Peter and Ellen, reside in New York. It was eminently reasonable and proper for the Supreme Court to transfer the partition action to the Surrogate's Court so that all of the issues relating to the distribution of decedent's assets, including the sale or partition of the apartment and other trust assets, can be determined in one court (*see Nichols v Kruger*, 113 AD2d 878 [1985] [rejecting argument that dispute was between living

persons and not one affecting the estate, where the contract to convey real property plaintiff sought to have declared void was made by the decedent and the wrongs alleged by plaintiff concerned the attempted conversion of the decedent's assets and partial frustration of the decedent's testamentary plan]).

Finally, we reject plaintiff's related argument that the Surrogate lacked jurisdiction to partition the res pursuant to SCPA 1901.

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

ENTERED: MARCH 29, 2011

CLERK

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

4452 Tower Insurance Company of New York, Index 109826/07
Plaintiff-Respondent,

-against-

Classon Heights, LLC, et al.,
Defendants-Appellants,

Elizabeth Gonzalez,
Defendant.

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The Feinsilver Law Group, P.C., Brooklyn (H. Jonathan Rubinstein of counsel), for Appellants.

Mound, Cotton, Wollan & Greengrass, New York (Vanessa M. Bakert of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered May 14, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment declaring that plaintiff has no duty to defend or indemnify defendants-appellants in an underlying personal injury action, and denied appellants' cross motion to compel discovery, unanimously affirmed, without costs.

This declaratory judgment action arises from a disclaimer of insurance coverage based on late notice of a personal injury claim. Plaintiff Tower Insurance issued a liability insurance policy effective August 2006 to appellants Classon Heights and

Renaissance Realty (the insureds), which owned and maintained an apartment building, along with the sidewalk in front of the premises. The policy required the insureds to notify Tower Insurance "as soon as practicable of an 'occurrence' or an offense which may result in a claim."

The underlying personal injury action was brought in May 2007 by Elizabeth Gonzalez, a building resident, who alleges that on October 30, 2006 a defective condition on the sidewalk on the premises, which was under construction, caused her to fall from her wheelchair and sustain serious injuries. On or about March 15, 2007, Gonzalez's counsel notified the insureds about the impending claims against them, and on March 26, 2007, or about five months after the accident, defendant notified Tower Insurance about the claims. Tower Insurance disclaimed coverage in April 2007 on the ground that the insureds failed to notify it "as soon as practicable."

In July 2007, Tower Insurance commenced this action against the insureds and Gonzalez seeking a declaration that it had no duty to defend or indemnify the insureds in the underlying lawsuit, based on late notice of claim. The complaint alleged that the insureds knew about Gonzalez's accident on the day it occurred but failed to notify Tower Insurance for five months.

After issue was joined, Tower Insurance moved for summary judgment in December 2009. Tower Insurance submitted signed but unsworn, partially redacted statements that a porter and the manager at Gonzalez's apartment building made to a Tower Insurance investigator in April 2007. The porter stated that on October 30, 2006 he saw Gonzalez, while descending a ramp leading from the premises in her wheelchair, ride off the ramp and fall forward to the ground. After he and three other workers helped Gonzalez back into her chair, an ambulance arrived and took Gonzalez to a hospital. When the porter saw Gonzalez again later that day, she was not wearing a cast, but two days later he saw her with a cast on her arm. The porter then "called the office and told them what happened." The building manager stated that the porter had called him on October 30 and told him Gonzalez had fallen out of her wheelchair. The porter allegedly told the manager that Gonzalez "did not appear injured" but informed the manager that an ambulance had taken her to the hospital.

In opposition to the summary judgment motion, the insureds argued that they had no reasonable basis to believe that the accident could give rise to a claim against them until they were so notified by Gonzalez's counsel nearly five months after the accident. The insureds submitted, among other things, an

affirmed statement by the manager claiming that the Tower Insurance investigator omitted "material facts" when transcribing his statement and only told the manager he was investigating the merits of the underlying action, without disclosing that his statement would be used to deny the insureds' coverage. The manager reiterated that he first learned of Gonzalez's accident on October 30, 2006 when the porter telephoned him, but when he went to the apartment building either on that day or the next to discuss the matter, the porter advised him that "Ms. Gonzalez did not appear to be injured; that an ambulance was called solely for precautionary reasons; that he saw Ms. Gonzalez later that afternoon and after she had returned to the building; that she did not have a cast or a sling when she returned to the building; and that he did not see any evidence that she had sustained an injury when she returned to the building."

Supreme Court correctly granted summary judgment to Tower Insurance on the ground that the insureds failed to provide timely notice. "Where a liability insurance policy requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time" (*Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 307 [2008]; *see Great Canal Realty Co. v Seneca Ins. Co., Inc.*, 5

NY3d 742, 743 [2005]). Tower Insurance met its initial burden by offering proof of the insureds' five-month delay, because an unexcused delay of that length is untimely as a matter of law (*see e.g. Juvenex Ltd. v Burlington Ins. Co.*, 63 AD3d 554 [2009][two-month delay untimely]; *Young Israel Co-Op City v Guideone Mut. Ins. Co.*, 52 AD3d 245 [2008] [40 days]); *Heydt Contr. Corp. v American Home Assur. Co.*, 146 AD2d 497, 498 [1989], *lv dismissed* 74 NY2d 651 [1989] [four months]).

The insureds' opposition failed to raise a triable issue whether their delay may be excused because they had a good faith belief in non-liability (*see Great Canal Realty Corp.*, 5 NY3d at 743-744). An insured bears the burden of proving, under all the circumstances, the reasonableness of the belief (*see Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 749-750 [1995]). Where, as here, the policy requires prompt notice of an "occurrence" that "may result in a claim," the issue is not "whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him" (*SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1998]).

Since the insureds admitted that their building manager knew on October 30, 2006 that Gonzalez had fallen on the premises and

had been taken by ambulance to a hospital, their purported belief that no claim could possibly be filed by Gonzalez because she was not injured was unreasonable (*see Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 241 [2002]; *see also Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d at 307-308; *SSBSS Realty Corp.*, 253 AD2d at 585). At the least, the building manager's knowledge triggered a duty to further investigate the accident since Gonzalez was a tenant in their own building (*see Tower Ins. Co. v Christopher Ct. Hous. Co.*, 71 AD3d 500, 501 [2010]; *York Specialty Food, Inc. v Tower Ins. Co. of N.Y.*, 47 AD3d 589, 590 [2008]; *SSBSS Realty Corp.*, 253 AD2d at 585).

The insureds' additional contentions also lack merit. Their argument that the porter's knowledge of Gonzalez's accident cannot be imputed to them is unavailing because "knowledge of an occurrence obtained by an agent charged with the duty to report such matters is imputed to the principal" (*Paramount Ins. Co.*, 293 AD2d at 240). Although the building manager stated that the porter's primary responsibility was to clean the premises, he also stated that the porter called him to report the accident on the same day and that he then went to the subject premises to discuss the incident with the porter.

The insureds' claim that further discovery could have

provided them with the basis for an estoppel claim amounts to mere speculation. Finally, the insureds' reliance on Insurance Law § 3420(a)(5) is unavailing because the provision was enacted in January 2009 and does not apply retroactively to Tower Insurance's 2006 policy (*see* L 2008, ch 388, § 2, § 8).

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

ENTERED: MARCH 29, 2011

CLERK

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

4490-
4491 Marcos Castellon, et al.,
Plaintiffs-Respondents,

Index 7508/05
85164/06
84003/09

-against-

John Reinsberg, et al.,
Defendants,
- - - - -
SMI Construction Management, Inc.,
Defendant Third-Party Plaintiff-Appellant-Respondent,

-against-

Rose Demolition & Carting, Inc.,
Third-Party Defendant-Respondent-Appellant.

[And A Second Third-Party Action]

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Litchfield Cavo, LLP, New York, (Michael K. Dvorkin of counsel), for SMI Construction Management, Inc., appellant-respondent.

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for respondent-appellant.

Gorayeb & Associates, P.C., New York, (Mark H. Edwards of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered September 30, 2009, which, to the extent appealed from, denied defendant SMI Construction Management, Inc.'s (SMI) motion for summary judgment dismissing the complaint and granted plaintiffs' motion for partial summary judgment on liability under Labor Law § 240(1), unanimously modified, on the

law, to grant SMI's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims and to deny plaintiffs' motion, and otherwise affirmed, without costs. Order, same court and Justice, entered April 13, 2010, which, to the extent appealed from, recalled and vacated so much of the 2009 order as had dismissed SMI's third-party action, unanimously reversed, on the law, without costs, and SMI's third-party action dismissed.

Even though SMI's notice of appeal was limited to the granting of plaintiffs' motion for partial summary judgment, we may review unappealed portions of the order that are "inextricably intertwined" with the appealed-from portion (*see Foley v Roche*, 68 AD2d 558, 564 [1979]).

"[A] construction manager is generally not considered a 'contractor' or 'owner' within the meaning of Section 240(1) or Section 241 of the Labor Law" (*Lodato v Greyhawk N. Am., LLC*, 39 AD3d 491, 493 [2007]). However, "a construction manager . . . may be vicariously liable as an agent of the property owner . . . where the manager had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). There are issues of fact as to whether SMI had sufficient control to render it a statutory agent for

purposes of Labor Law § 240(1) and § 241 (*see e.g. Paljevic v 998 Fifth Ave. Corp.*, 65 AD3d 896, 897-898 [2009]; *Nienajadlo v Infomart N.Y., LLC*, 19 AD3d 384, 385 [2005]). Therefore, the court should have denied plaintiffs' motion for summary judgment under Labor Law § 240(1); however, it properly denied SMI's motion to dismiss the Labor Law §§ 240(1) and 241 claims.

To the extent that the injured plaintiff's Labor Law § 200 and common-law negligence claims are based on the method of work (e.g., the use of a ladder instead of a scaffold with railings, or the absence of a safety harness), it is undisputed that SMI did not tell him how to do his work; therefore, those claims should have been dismissed (*see e.g. Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306-307 [2007]). Moreover, the injured plaintiff's fall from a ladder that had been placed near an unguarded window opening was unrelated to a dangerous condition on the premises for purposes of Labor Law § 200 and common-law negligence. Instead, the accident stemmed from the manner in which the work was performed (*see e.g. Monterroza v State Univ. Constr. Fund*, 56 AD3d 629, 630 [2008]).

There is no triable issue of fact as to whether the December 9, 2004 indemnification agreement signed by third-party defendant Rose Demolition & Carting, Inc. was made "as of" a date preceding

plaintiff's November 8, 2004 accident. Therefore, the motion court properly dismissed SMI's third-party claim in its 2009 order (*see e.g. Temmel v 1515 Broadway Assoc., L.P.*, 18 AD3d 364, 365-366 [2005]; *Burke v Fisher Sixth Ave. Co.*, 287 AD2d 410 [2001]), and erred by vacating the dismissal in its 2010 order.

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

ENTERED: MARCH 29, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

4504 & M-439 The People of the State of New York, Respondent,

-against-

Kenny Alexis, Defendant-Appellant.

Ind. 3602/06

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

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered March 10, 2009, as amended April 10, 2009, convicting defendant, after a jury trial, of two counts of attempted murder in the second degree, two counts of assault in the first degree, three counts of attempted assault in the first degree and two counts of assault in the second degree, and sentencing him to an aggregate term of 34 years, unanimously affirmed.

The record establishes that defendant was mentally competent at the time of trial (*see Pate v Robinson*, 383 US 375 [1966]). The court's determination that defendant was fit to proceed is entitled to great weight on appeal, given the conflicting medical testimony at the competency hearing (*see People v McMillan*, 212

AD2d 445 [1995] *lv denied* 85 NY2d 976 [1995]). The record supports the court's decision to credit the People's psychiatrists, who found defendant competent.

Neither defendant's brief psychiatric hospitalization two months after the competency determination nor his behavior at trial required the court to order a further competency hearing or to reevaluate its prior ruling (*see People v Tortorici*, 92 NY2d 757, 765-766 [1999]; *People v Bowman*, 50 AD3d 291 [2008], *lv denied* 10 NY3d 956 [2008]). The fact that a defendant receives psychiatric treatment from correctional authorities shortly after a finding of competency does not necessarily call that finding into question (*see People v Figueroa*, 39 AD2d 527 [1972], *affd* 33 NY2d 660 [1973]). At most, the posthearing events confirmed the undisputed fact that defendant was psychiatrically ill, but they cast no doubt on the finding that his illness did not prevent him from understanding the legal process or assisting his attorney in his defense.

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 jury's rejection, after weighing conflicting expert testimony, of defendant's insanity defense and his claims regarding lack of

intent. These claims were significantly undermined by defendant's statements to the police and the circumstances of the crimes.

We perceive no basis for reducing the sentence.

M-439 - *People v Kenny Alexis*

Motion to expand judgment roll denied.

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

ENTERED: MARCH 29, 2011

CLERK

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

4626 Priscilla Rodriguez, Index 14159/05
Plaintiff-Appellant,

-against-

Angela Chapman-Perry, et al.
Defendants-Appellants-Respondents,

Gustavo DeLeon, et al.,
Defendants-Respondents.

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Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Dennis J. Monaco of counsel), for appellants-respondents.

Boeggeman, George & Corde, P.C., White Plains (Daniel E. O'Neill of counsel), for Gustavo DeLeon, respondent.

White, Quinlan & Staley, LLP, Garden City, (Eileen Farrell of counsel), for Emanuel Salazar, respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered November 24, 2009, which, in this personal injury action, granted the motions of defendants DeLeon and Salazar for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

Plaintiff Priscilla Rodriguez was a passenger in a vehicle, driven by defendant Devon E. Perry and owned by defendant Angela Chapman-Perry, involved in a multivehicle accident. According to Perry, shortly before the accident, he was heading southbound on White Plains Road about one car length behind a vehicle driven by

defendant Emanuel Salazar, when Salazar suddenly stopped short. In order to avoid a collision, Perry crossed the double line into northbound traffic, and collided with a vehicle driven by defendant Gustavo DeLeon.

The court properly determined that there is no evidence that either DeLeon or Salazar contributed to the accident. With respect to DeLeon, Rodriguez and Perry testified that, at the time of the accident, DeLeon's vehicle was stopped at the intersection with his left turn signal on and they never saw his vehicle move. Rodriguez's and Perry's testimony that DeLeon's vehicle must have been moving because it ultimately came into contact with their vehicle is speculative and insufficient to raise a triable issue of fact (*see generally LoBianco v Lake*, 62 AD3d 590, 590-591 [2009]). In any event, regardless of whether DeLeon's vehicle was moving, he could not be considered negligently responsible for the accident, as he was faced with an emergency situation not of his own making. Indeed, the record indicates that Perry was traveling at about 50 to 60 miles per hour when he crossed over into DeLeon's lane of traffic (*see Williams v Simpson*, 36 AD3d 507, 508 [2007]).

With respect to Salazar, Perry failed to provide a non-negligent explanation for his failure to maintain a reasonably

safe speed and distance behind Salazar's vehicle. Under the circumstances, his explanation that Salazar "stopped short" is insufficient to raise an issue of fact as to whether Salazar was negligent in operating his vehicle (*see Woodley v Ramirez*, 25 AD3d 451, 452-453 [2006]).

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

ENTERED: MARCH 29, 2011

CLERK

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

4629 In re Daniel E.,

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

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

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

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about April 16, 2010, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts, which if committed by an adult, would constitute the crimes of assault in the third degree and menacing in the third degree, and placed him in the custody of the Office of Children and Family Services for a period of 10 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. The showup identification was made in close temporal and spatial proximity to the crime, and it was not rendered unduly suggestive by any of the circumstances cited by appellant, each of which was either inherent in any showup or justified by the exigencies of

the situation (*see e.g. Matter of Terron B.*, 77 AD3d 499 [2010]). Appellant and the other suspects were lawfully detained on the basis of a joint description that was sufficiently specific, given the temporal and spatial factors, to provide reasonable suspicion (*see e.g. People v Rodriguez*, 262 AD2d 177 [1999]).

The court's fact-finding determination was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The victim testified that appellant was a member of the group that attacked him, and that every member of this group hit and kicked him.

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

ENTERED: MARCH 29, 2011

CLERK

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

4630 Barbara Casey, etc., Index 116522/08
Plaintiff-Respondent,

-against-

New York Elevator & Electrical Corporation,
Defendant-Appellant,

Winoker Realty Co., Inc.,
Defendant-Respondent.

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Babchik & Young, LLP, White Plains (Bruce Young of counsel), for appellant.

Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, New York (Richard M. Steigman of counsel), for Barbara Casey, respondent.

Patrick J. Crowe, Melville, for Winoker Realty Co., Inc., respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered March 12, 2010, which denied New York Elevator's motion for dismissal pursuant to CPLR 3211(a)(1) and (7) and/or CPLR 3211(c), unanimously affirmed, without costs.

On September 12, 2008, plaintiff's decedent Kieran Casey fell to his death in an elevator shaft at a building managed by defendant Winoker and for which defendant New York Elevator allegedly maintained the elevator.

An elevator company which agrees to maintain an elevator in

safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge, or failure to use reasonable care to discover and correct a condition which it ought to have found (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *Burgess v Otis El. Co.*, 114 AD2d 784, 785 [1985], *affd* 69 NY2d 623 [1986]). That duty, is limited, however, to cases where, pursuant to contract, the elevator company has assumed "exclusive control" of the elevator at the time of the accident and no duty can be imparted by a "piecemeal oral contract" (*see Verdi v Top Lift & Truck Inc.*, 50 AD3d 574 [2008]; *Karian v G & L Realty, LLC*, 32 AD3d 261, 263-264 [2006]). There is no evidence in this record that New York Elevator was under contract such to impart a duty upon it to third persons (*see Rogers*, 32 NY2d at 559).

However, even in the absence of a contract, an elevator company can be liable in tort, where it negligently services and/or inspects an elevator (*see Alejandro v Marks Woodworking Mach. Co.*, 40 AD2d 770 [1972]; *affd* 33 NY2d 856 [1973]; *Alsaydi v GSL Enters.*, 238 AD2d 533 [1997]). The documentary evidence proffered by New York Elevator, at this stage, does not, as a matter of law, prove that it did not negligently inspect, service or maintain the freight elevator prior to the accident (*Bartee v*

D & S Fire Protection Corp., 79 AD3d 508 [2010]).

Questions of fact also exist as to whether New York Elevator was negligent when it performed prior Department of Buildings inspections (*see Sanzone v National El. Inspection Serv.*, 273 AD2d 94 [2000]; *Alsaydi*, 238 AD2d at 534). The affidavit submitted by New York Elevator's field supervisor was not based on personal knowledge, was otherwise conclusory, and therefore was insufficient to satisfy New York Elevator's prima facie burden on the motion (*see* CPLR 3211(d); 3212[f]; *Bartee*, 79 AD3d at 508). There are also questions of fact as to what the owner and managing agent knew about the condition of the elevator, preventing a finding at this stage, that any action or inaction of New York Elevator could not have been the proximate cause of the accident (*see McLaughlin v Mine Safety Appliances Co.*, 11 NY2d 62 [1962]; *Connor v 595 Realty Assoc.*, 23 AD2d 69 [1965], *appeal dismissed* 17 NY2d 493 [1966]).

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

ENTERED: MARCH 29, 2011

CLERK

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

4631-
4631A International Finance Corporation, Plaintiff-Respondent, Index 601705/07

-against-

Carrera Holdings Inc., etc., et al., Defendants-Appellants.

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Vinson & Elkins L.L.P., New York (Steven Paradise of counsel), for appellants.

White & Case LLP, New York, (Francis A. Vasquez, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 7, 2009, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to dismiss the counterclaim for breach of contract, and order, same court and Justice, entered May 13, 2010, which, insofar as appealed from, denied defendants' motion for leave to amend their answer and counterclaims, unanimously affirmed, with costs.

The counterclaim alleging breach of contract was properly dismissed, since defendants failed to show the existence of an agreement with terms obligating plaintiff to manage a risk that the government of Tajikistan, where the parties' joint venture was located, might interfere with the enterprise (*see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp*, 93

NY2d 584, 589-590 [1999]; *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 234 [1994]). Defendants' allegations, at most, demonstrated the parties' hope that plaintiff's economic participation in the joint venture would encourage stable relations with the Tajik government. Furthermore, as found by the motion court, the alleged obligation to manage country or governmental risk is ambiguous, indefinite and non-specific, rendering it unenforceable as a matter of law (*see Freedman v Pearlman*, 271 AD2d 301, 303 [2000]).

The court also properly denied leave to amend and replead a counterclaim alleging fraudulent inducement (CPLR 3025[b]), since the proposed amendment failed to remedy the defects which led to the counterclaim's dismissal in the first instance (*see Schonfeld v Thompson*, 243 AD2d 343, 344 [1997]). In both the original and amended counterclaims, the purportedly fraudulent statements amounted to little more than expressions of hope and opinion, and related to future expectations, and hence cannot constitute actionable fraud (*id.* at 343; *Elghanian v Harvey*, 249 AD2d 206 [1998]), or were "representations of fact that should have been subjected to further scrutiny by [defendants] and therefore could

not have been relied upon justifiably" (*Elghanian* at 206). Nor do the alleged omissions support defendants' fraudulent inducement counterclaim, "inasmuch as there was no fiduciary relationship giving rise to a duty to speak" (*id.*).

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

ENTERED: MARCH 29, 2011

CLERK

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

4633 First Insurance Funding Corp., Index 602603/09
Plaintiff,

-against-

Lee Kass, etc., et al.,
Defendants.
- - - - -
Lee Kass, etc., et al,
Counterclaim and Third-Party
Plaintiffs-Appellants,

-against-

First Insurance Funding Corp.,
Counterclaim Defendant,

Phillip Wasserman, et al.,
Third-Party Defendants-Respondents.

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Todtman, Nachamie, Spizz & Johns, P.C., New York (Joseph P. Cervini, Jr. of counsel), for appellants.

Vandenberg & Feliu, LLP, New York (Jeffrey E. Gross of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 27, 2010, which granted third-party defendants' motion to dismiss the third-party complaint as against them, unanimously affirmed, without costs.

In this action, plaintiff seeks to recover damages for breach of contract under a Master Promissory Note purportedly executed by defendant Lee Kass, a/k/a Leigh Kass, as Trustee of

the Joseph Kass Irrevocable Insurance Trust, and a Personal Guaranty purportedly executed by defendants Lee Kass and Joseph Kass, individually (the Kass defendants). The complaint alleges, among other things, that pursuant to the Note, the Trust agreed to pay AI Credit Consumer Discount Company, plaintiff's predecessor-in-interest, the first year's premium on a life insurance policy that the Trust had purchased from John Hancock Life Insurance Company for investment purposes, and which AI Credit agreed to finance. The complaint further alleges that the Trust defaulted under the Note because it failed to pay the premium.

Defendants commenced a third-party action alleging, among other things, that third-party defendants, acting as agents of AI Credit and John Hancock, fraudulently induced them to participate in the investment transaction. Defendants third-party plaintiffs further allege that the third-party defendants are bound by the forum selection clause contained in the Note and Personal Guaranty. The Guaranty, a copy of which was provided to the motion court, provides: "The validity and construction of this guaranty shall be governed by the laws of the State of New York. The undersigned [the Kass defendants] consent(s) to the nonexclusive jurisdiction and venue of the state or federal

courts located in the City of New York."

The motion court properly determined that third-party defendants are not bound by the forum selection clause in the Guaranty and, thus, properly dismissed the third-party action for lack of personal jurisdiction. Third-party defendants are not signatories on the Guaranty, nor are they so closely related to the dispute that they should have foreseen that they would be bound by the forum selection clause (*cf. Freeford Ltd. v Pendleton*, 53 AD3d 32, 40-41 [2008], *lv denied* 12 NY3d 702 [2009]). In addition, third-party defendants are not beneficiaries of the Guaranty. Indeed, a plain reading of the forum selection clause shows that it applies solely to the Kass defendants, and "there is no clear intention to confer the benefit of the [Guaranty]" on third-party defendants (*id.* at 39). We reject defendants third-party plaintiffs' argument that third-party defendants are bound by the forum selection clause because the third-party tort claims are dependent on, and involve the same operative facts as, the breach of contract claim in this action (*cf. Weingrad v Telepathy, Inc.*, 2005 WL 2990645, *5-6, 2005 US Dist LEXIS 26952, *16-17 [SD NY 2005]). The forum selection clause expressly limits its application to matters involving "the validity and construction of th[e] guaranty."

Defendants third-party plaintiffs' tort claims pertain to the validity of the investment transactions as a whole, not just the validity and construction of the Guaranty.

In view of the foregoing, we need not reach the alternative arguments for dismissal.

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

ENTERED: MARCH 29, 2011

CLERK

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

4634 Robert Russo, Index 603324/08
Plaintiff-Respondent,

-against-

BMW of North America, LLC, et al.,
Defendants-Appellants.

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Biedermann, Reif, Hoenig & Ruff, P.C., New York (Philip C. Semprevivo of counsel), for appellants.

Bolz, Lovasz, Toth & Ruggiero, PLLC, Lakeville, MA (Carl Schwartz of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 7, 2010, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint pursuant to CPLR 3126 or, in the alternative, to preclude plaintiff from offering testimony at trial as to the allegedly spoliated evidence, unanimously affirmed, without costs.

The motion court exercised its discretion in a provident manner in denying defendants' motion. The record shows that defendants failed to establish how an inspection of the subject vehicle in April of 2010, which is the first time they sought to conduct such an inspection, is relevant to defending against

plaintiffs' claims under the Lemon Law (*see* General Business Law § 198-a).

Defendants also failed to demonstrate that by returning the vehicle as required by the lease agreement, plaintiff spoliated evidence. The Court of Appeals has stated that "nothing in the legislative history indicates an intention to require consumers to leave their vehicles in disrepair pending arbitration or trial" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 663 [2006]). Defendants urge this Court to adopt a construction of the Lemon Law that has no textual support and is contrary to the statute's remedial nature and purpose to protect consumers (*id.*; *Kucher v DaimlerChrysler Corp.*, 20 Misc 3d 64, 68 [2008] ["it cannot be said that the statute required a plaintiff to retain possession of a vehicle as a predicate for relief"]).

Furthermore, although sanctions may be imposed for even negligent spoliation (*see e.g. Squitieri v City of New York*, 248 AD2d 201, 203 [1998]), striking a pleading is usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability (*see Hall v Elrac, Inc.*, 79 AD3d 427, 428 [2010]; *Baldwin v Gerald Ave., LLC*, 58 AD3d 484, 485 [2009]). Here, the undisputed facts show neither. Defendants knew, as early as December 2008, that

plaintiff's lease agreement terminated in November of 2009, and plaintiff's reply to defendants' interrogatories readily offered defendants the chance to inspect the vehicle. Defendants did not seek to do so until several months after the lease expired and the vehicle was returned.

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

ENTERED: MARCH 29, 2011

CLERK

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

4635 In re Social Services Employees Union, Local 371, etc., Petitioner-Respondent, 114870/08

-against-

City of New York, Department of Juvenile Justice, Respondent-Appellant.

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Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for appellant.

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered May 18, 2009, which granted the petition to confirm an arbitration award reinstating petitioner's member Bowana Robinson to his position as an institutional aide at the City of New York's Department of Juvenile Justice and awarding him back pay and seniority, and denied respondent's cross motion to vacate the award, unanimously reversed, on the law, without costs, the petition denied, the cross motion granted, and the matter remanded to the arbitrator for a determination of an appropriate penalty.

The arbitrator's failure to give preclusive effect to Robinson's guilty plea of petit larceny was irrational (*see*

Matter of State of N.Y. Off. of Mental Health [New York State Correctional Officers & Police Benevolent Assn., Inc.], 46 AD3d 1269, 1271 [2007], *lv dismissed* 10 NY3d 826 [2008]). The arbitrator's award places Robinson back into a position where he has the responsibility to voucher property of individuals being brought into a juvenile facility (*see City School Dist. of City of N.Y. v Campbell*, 20 AD3d 313 [2005]).

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

ENTERED: MARCH 29, 2011

CLERK

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

4637 The People of the State of New York, Ind. 2995/08
Respondent,

-against-

James Wright,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about November 20, 2008, 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: MARCH 29, 2011

CLERK

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

4638 Masood Nabi, Index 601804/08
Plaintiff-Appellant,

-against-

Derek S. Sells, et al.,
Defendants-Respondents.

_____

The Abramson Law Group, PLLC, New York (Robert Frederic Martin of counsel), for appellant.

Rosato & Lucciola, P.C., New York (Donald D. Casale of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 25, 2010, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment on their first counterclaim for legal fees and damages, granted defendants' request for a hearing on the amount of fees to which they are entitled based on quantum meruit, and denied plaintiff's cross motion for partial summary judgment dismissing defendants' first counterclaim, unanimously affirmed, without costs.

The IAS court properly found that plaintiff failed to raise a triable issue of fact as to whether he discharged defendants for cause. Plaintiff's dissatisfaction with the reasonable strategic choices that his attorney made in an attempt to reach a

satisfactory settlement through mediation does not constitute discharge for cause (*see Callaghan v Callaghan*, 48 AD3d 500, 501 [2008]). Plaintiff's argument that counsel entered into an enforceable settlement agreement on his behalf without his consent is belied by the record. The alleged agreement plaintiff claims was enforceable was never signed by the parties or filled in with sufficiently definite terms as to payment (*see United Press v New York Press Co.*, 164 NY 406, 410 [1900]). Plaintiff's reliance on statements made by the parties during mediation is unavailing. The settlement agreement signed by the parties provided that any statements or "promises" made during mediation were "without prejudice to any party's legal position." There is also no evidence that defendants prolonged the mediation process longer than necessary.

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: MARCH 29, 2011

CLERK

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

4639 In re Joseph K.,

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

_____

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

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

_____

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about November 9, 2009, 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 and third degrees, resisting arrest, and obstructing governmental administration in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the court's credibility determinations.

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 period of probation. The court adopted the least restrictive dispositional alternative consistent with appellant's needs and the needs of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The underlying conduct was a serious assault on an unarmed person with a weapon made of a sock weighted with a padlock. Although it was appellant's companion who actually used the weapon, appellant's role was significant. As the companion struck the victim, appellant held the victim from behind and punched him. In addition, appellant refused to acknowledge the seriousness of his offense.

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

ENTERED: MARCH 29, 2011

CLERK

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

4640 Jonathan Poole, Index 101096/09
Plaintiff-Respondent,

-against-

West 111th Street Rehab Associates, et al.,
Defendants-Appellants.

_____

Sullivan Gardner PC, New York (Peter R. Sullivan of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 19, 2010, denying defendants' motion for summary judgment dismissing the complaint for failure to comply with the arbitration provision in the parties' partnership agreement, unanimously affirmed, with costs.

Defendants waived any right to arbitration by failing to raise it as a defense in their answer, making a dispositive motion, seeking discovery and otherwise actively participating in this litigation for almost nine months before notifying plaintiff of their intention to seek arbitration (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 371-372 [2005]). We reject defendants' contention that any waiver of the right to arbitrate by the defendants in the original complaint may not bind the

additional defendants named in the amended complaint. The newly named estates and trust, by their executors and trustee, are represented by the same persons named as defendants in the original complaint.

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

ENTERED: MARCH 29, 2011

CLERK

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

4641 The People of the State of New York, Ind. 244/09
Respondent,

-against-

Kashif Hamilton,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Phillip 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 (Charles Solomon, J.), rendered on or about June 30, 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: MARCH 29, 2011

CLERK

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

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

4642 Angel Rivera, Jr., etc., et al., Index 22318/94
Plaintiffs-Respondents,

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about December 9, 2009, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

Plaintiffs are the surviving children of the late Naomi Vasquez, whose live-in boyfriend, Harry Bonilla, killed her and her daughter, Wanda Rivera, in 1993 (*see People v Bonilla*, 251 AD2d 82 [1998], *lv denied* 92 NY2d 893 [1998]). At the time of the murders, defendant Child Welfare Administration (CWA) was investigating plaintiffs' home. Family Court had ordered the

investigation after the children's paternal grandmother alleged in a petition for visitation rights that Bonilla was "on drugs" and that Naomi "[was] not caring for oldest child properly." Plaintiffs allege, inter alia, that the proximate cause of their mother's and sister's deaths, and the attendant injury to themselves, was defendants' negligence in conducting the investigation.

Since the CWA caseworker who investigated the family was engaged in discretionary action, defendants may not be held liable for any negligence on her part (*see Carossia v City of New York*, 39 AD3d 429 [2007]; *Sean M. v City of New York*, 20 AD3d 146, 156 [2005]). The record presents no issues of fact whether the caseworker was actually conducting her investigation or exercising her discretion when the murders occurred.

In any event, the record demonstrates no special relationship between the parties or special duty owed by defendants to plaintiffs (*see McLean v City of New York*, 12 NY3d 194, 203 [2009]). There is no evidence that defendants voluntarily undertook any obligation beyond those already required of them by law (*see Pelaez v Seide*, 2 NY3d 186, 202 [2004]) or that the caseworker was "clearly on notice of palpable danger" (*Kovit v Estate of Hallums*, 4 NY3d 499, 508 [2005]). Nor

is there any evidence that plaintiffs relied on defendants to protect them and that their reliance induced them to forgo other possibilities of relief (*see Cuffy v City of New York*, 69 NY2d 255, 260-261 [1987]; *Badillo v City of New York*, 35 AD3d 307, 308 [2006]).

In the absence of evidence suggesting that the caseworker engaged in "willful misconduct or gross negligence," defendants are also entitled to the immunity afforded by Social Services Law § 419 to those investigating allegations of child abuse (*see Sean M.*, 20 AD3d at 158 [internal quotation marks and citation omitted]). The evidence permits no inference that the case worker acted in bad faith, "failed to exercise even slight care, or exhibited a complete disregard for the rights and safety of others" (*see Carossia*, 39 AD3d at 430 [internal quotation marks and citation omitted]).

In addition to the absence of evidence as to a special duty, there also is no evidence to support the inference that any act or omission on the part of defendant Board of Education proximately caused the injury to plaintiffs.

In view of the foregoing, we do not reach defendants' remaining arguments.

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

ENTERED: MARCH 29, 2011

CLERK

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

4644N Jorge Pena-Vazquez, et al., Index 300875/09
Plaintiffs-Appellants,

-against-

Tell V. Beharry,
Defendant,

Frank A. Cesario, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellants.

Methfessel & Werbel, New York (Frederic P. Gallin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about March 4, 2010, which denied plaintiffs' motion for a default judgment against defendants Frank A. Cesario and Mid Island Auto Wreckers, Inc. and, sua sponte, deemed said defendants' answer timely served nunc pro tunc, unanimously affirmed, without costs.

The court providently exercised its discretion in denying plaintiffs' motion and deeming defendants' answer timely served nunc pro tunc. Plaintiffs' acceptance of defendants' answer, without objection, constituted a waiver of the late service and default (*see Ligotti v Wilson*, 287 AD2d 550, 551 [2001]). In any event, the settlement discussions between plaintiffs and

defendants' insurer constitute a reasonable excuse for defendants' delay in answering (*see* CPLR 3012[d]; *see also Finkelstein v East 65th St. Laundromat*, 215 AD2d 178 [1995]). Contrary to plaintiffs' contention, defendants were not required to demonstrate the existence of a meritorious defense (*see Verizon N.Y. Inc. v Case Constr. Co.*, Inc., 63 AD3d 521 [2009]).

The court providently exercised its discretion in considering defendants' surreply. The court granted permission for the filing of the surreply, which contained courtesy copies of affidavits that had been filed with the Clerk prior to the motion return date (*see generally Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 623-624 [2003]).

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

ENTERED: MARCH 29, 2011

CLERK

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

4645 In re Masao Yonamine, Index 401772/10
[M-679] Petitioner,

-against-

Hon. Martin Schoenfeld,
Respondent.

_____

Masao Yonamine, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed as moot, without costs or disbursements.

ENTERED: MARCH 29, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4646 The People of the State of New York, Ind. 20538C/05
Respondent,

-against-

Eddie Irizarri,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County, (Barbara F. Newman, J.), rendered January 24, 2007, convicting defendant, after a jury trial, of endangering the welfare of a child, and sentencing him to a term of 10 months. unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. In performing weight of evidence review, we may consider the jury's verdict on other counts (*see People v Rayam*, 94 NY2d 557, 563 n [2000]). Nevertheless, we find that the jury's mixed verdict does not warrant a different result. "Where a jury verdict is not repugnant, it is imprudent to speculate concerning the factual determinations that underlay the verdict because what

might appear to be an irrational verdict may actually constitute a jury's permissible exercise of mercy or leniency" (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 7 n [2004]). Moreover, aside from considerations of leniency, the jury could have found that the victim's testimony was corroborated as to the child endangerment count but not as to the other charges.

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

ENTERED: MARCH 29, 2011

CLERK

Tom, P.J., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4647 Il Cambio, Inc., etc., et al., Index 105030/06
Plaintiffs-Appellants,

-against-

U.S. Fidelity and Guaranty Company, et al.,
Defendants-Respondents.

_____

Alpert & Kaufman, LLP, New York (Morton Alpert of counsel), for appellants.

Lazare Potter & Giacovas, LLP, New York (Andrew M. Premisler of counsel), for U.S. Fidelity and Guaranty Company and The St. Paul Companies, respondents.

Cherny & Podolsky, PLLC, Brooklyn (Steven V. Podolsky of counsel), for Joseph Galante, respondent.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 12, 2010, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiffs are precluded from obtaining reimbursement on a replacement cost claim since they "failed to satisfy the condition precedent of rebuilding" (*DeLorenzo v BAC Agency*, 256 AD2d 906 [1998]; *see D.R. Watson Holdings, LLC v Caliber One Indem. Co.*, 15 AD3d 969 [2005], *lv dismissed* 5 NY3d 842 [2005]; *Alpha Auto Brokers v Continental Ins. Co.*, 286 AD2d 309, 310 [2001]). Plaintiffs have the burden of proving that the alleged

loss is covered under the policy (*see Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [2003]), and the record establishes that there is no dispute that plaintiffs have never rebuilt or replaced the restaurant. Thus, their request for further discovery would not be productive (*see Oates v Marino*, 106 AD2d 289, 292 [1984]).

The complaint is also barred by the clear and unambiguous two-year suit limitations period in the policy (*see Costello v Allstate Ins. Co.*, 230 AD2d 763 [1996]). Contrary to plaintiffs' contention, defendant insurer did not waive, nor or is it estopped from asserting, its contractual limitations defense based upon the fact of its payment of a portion of plaintiffs' claim before the expiration of the limitations period (*see New Medico Assoc. Inc. v Empire Blue Cross & Blue Shield*, 267 AD2d 757, 759 [1999]).

Claims in negligence are governed by the three-year limitations period set forth in CPLR 214(4) (*see Tischler Roofing & Sheet Metal Works Co. v Sicolo Garage*, 64 Misc 2d 825 [1970]). The record demonstrates that the date of the loss of the restaurant was September 11, 2001; plaintiff received payment in the sum of $3,400,000 from the insurance carrier and the claim was closed on December 19, 2001; plaintiff's representative was

able to reopen the claim in March 2002; and plaintiff received an additional $181,288 on September 27, 2002. Since this action was brought on April 12, 2006, plaintiffs' claim against their adjuster was properly dismissed as time-barred.

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

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

ENTERED: MARCH 29, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4648 In re Isaiah J.,

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

Janice J.,
Respondent-Appellant,

New York Foundling Hospital,
Petitioner-Respondent.

_____

Michael S. Bromberg, Sag Harbor, for appellant.

Law Office of Quinlan and Fields, Hawthorne (Daniel Gartenstein of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about August 21, 2009, which, upon a finding of mental illness, terminated respondent mother's parental rights and committed the child's custody and guardianship to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent was mentally ill within the meaning of Social Services Law § 384-b(4)(c) and (6)(a) was supported by clear and convincing evidence. The agency presented

uncontroverted testimony from a psychologist who, after reviewing respondent's medical records, found that she suffered from schizoaffective disorder. This rendered her incapable of caring for the child presently and for the foreseeable future (*see Matter of Roberto A. (Altagracia A.)*, 73 AD3d 501, 501 [2010], *lv denied* 15 NY3d 703 [2010]).

Given the psychologist's unrebutted testimony and respondent's repeated requests for adjournments, the lapse in time between the psychological 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]).

A dispositional hearing was not necessary to find that termination of respondent's parental rights is in the child's best interests (*see Matter of Ashanti A.*, 56 AD3d 373, 374 [2008]).

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

ENTERED: MARCH 29, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4649 Teresa Maksimiak, Index 102746/09
Plaintiff-Appellant,

-against-

Schwartzapfel Novick Truhowsky Marcus, P.C., et al.,
Defendants-Respondents.

Jaroslawicz & Jaros LLC, New York (David Tolchin of counsel), for appellant.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (William T. McCaffery of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 14, 2010, which, in an action for legal malpractice and treble damages under Judiciary Law § 487, granted defendants' motion to dismiss the complaint based on documentary evidence and for failure to state a cause of action, unanimously affirmed, without costs.

The motion court properly determined that plaintiff failed to state a cause of action for legal malpractice. The documentary evidence established that plaintiff's successor counsel had sufficient time and opportunity to adequately protect plaintiff's rights. Indeed, plaintiff's English counsel timely commenced a lawsuit in England based on the underlying motor

vehicle accident that occurred in England. Accordingly, defendants' alleged negligence cannot be considered a proximate cause of plaintiff's alleged injury (*see Somma v Dansker & Aspromonte Assoc.*, 44 AD3d 376 [2007]).

The court also properly dismissed plaintiff's claim under Judiciary Law § 487. Plaintiff's allegations of deceit are belied by the record, and she failed to allege that she sustained damages as a result of defendants' conduct (*see Havell v Islam*, 292 AD2d 210 [2002]).

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: MARCH 29, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4653 Salvatore Imburgio, et al., Index 601282/09
Plaintiffs-Appellants,

-against-

Glenn Toby, et al.,
Defendants,

Wachovia Securities, LLC,
Defendant-Respondent.

_____

Robert Goldman, New York, for appellants.

Bressler, Amery & Ross, P.C., New York (Robert E. Goldberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 11, 2009, which granted the motion of defendant Wachovia Securities, LLC to dismiss the complaint as against it, unanimously affirmed, with costs.

Plaintiffs failed to allege facts that, even with "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see People v Coventry First LLC,* 13 NY3d 108, 115 [2009]), would impute liability to defendant Wachovia for the conduct of its employee. While plaintiffs asserted that defendant's employee was vested with apparent authority based upon the employee's representations concerning the transactions at issue, such authority may arise only from the conduct of the

principal, not the agent (*see Parlato v Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 112 [2002], *lv denied* 99 NY2d 508 [2003]). Nor was there any basis for a claim against Wachovia based on respondeat superior. Plaintiffs failed to allege that the employee's car customizing venture was in furtherance of securities dealer Wachovia's business and within the scope of the employee's employment as a registered representative (*see id.* at 113-114).

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

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

ENTERED: MARCH 29, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4656 Greta Martin, et al., Index 305199/08
Plaintiffs-Appellants,

-against-

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

Wayne Systems,
Defendant.

_____

Reardon & Sclafani, P.C., Tarrytown (Michael V. Sclafani of counsel), for appellants.

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

McCusker, Anselmi, Rosen & Carvelli, P.C., New York (Paul G. McCusker of counsel), for Exxon Mobil Corporation and ExxonMobil Oil Corporation, respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 2, 2010, which, in this action for personal injuries sustained when plaintiff Greta Martin tripped on a curb in a service station and fell, granted the motion of defendant ExxonMobil Oil Corporation and the cross motion of defendant City of New York for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants demonstrated their prima facie entitlement to judgment as a matter of law. Plaintiff testified at her

deposition that she was unable to identify the cause of the fall (*see Reed v Piran Realty Corp.*, 30 AD3d 319 [2006], *lv denied* 8 NY3d 801 [2007]). Contrary to plaintiff's contention, the unsigned deposition transcript could be used as an admission against her since no party challenged the accuracy of the testimony as transcribed and it was certified as accurate (*see Zabari v City of New York*, 242 AD2d 15, 17 [1998]; CPLR 3116[a]).

In opposition, plaintiffs failed to raise a triable issue of fact. Although plaintiff alleged that a curb on the property caused her fall and that the curb posed an optical confusion, the photographic evidence is not sufficient to defeat the motions (*see Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665 [2010]; *compare Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 211 [1988]).

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

ENTERED: MARCH 29, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4657 Elizabeth Studdivant as Proposed Administratrix for the Estate of Julia Jennings, Plaintiff-Appellant, -against- Bronx-Lebanon Hospital Center, Defendant-Respondent. Index 15504/05

_____

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

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daryl Paxson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about October 28, 2009, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie its entitlement to summary judgment in this medical malpractice action by submitting the affirmations of experts who concluded, based on the medical records and the affirmation of the nurse involved in administering the IV antibiotic, that the IV line was appropriately placed in the decedent's foot after attempts to locate a vein in her arms proved unsuccessful. The conclusory expert affirmations submitted by plaintiff in opposition failed

to raise a triable issue of fact. The record demonstrates that defendant's medical personnel considered alternatives and validly rejected them before placing the IV line in the decedent's foot and that the decedent was actively monitored before and after the IV line was dislodged. The treating nurse stated in her affirmation that she and the attending physician checked the decedent's arms for veins in which to place an IV line with no success before the physician ultimately resorted to a vein in the decedent's foot. The nurse also explained that she made no note of this in the medical record because it was routine for a physician to be called to place an IV line when a nurse could not locate a vein in the upper extremities (*see Topel v Long Is. Jewish Med. Ctr.*, 55 NY2d 682, 684 [1981]). Plaintiff's experts also failed to refute the evidence that the ulcer on the decedent's foot stabilized and healed while she was under defendant's care.

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: MARCH 29, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4658 The People of the State of New York, Ind. 131/09
Respondent,

-against-

Melinda Evans, etc.,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about April 20, 2010, 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: MARCH 29, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4659 The People of the State of New York, Ind. 3611/99
Respondent,

-against-

Keith Scott,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about January 8, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the motion. Defendant had an extensive record of felony drug convictions, and

a very serious record of misconduct while incarcerated (*see e.g.* *People v Hidalgo*, 47 AD3d 455 [2008]).

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

ENTERED: MARCH 29, 2011

CLERK

Tom, J.P., Sweeney, Catterson, Acosta, Manzanet-Daniels, JJ.

4660 In re Rita Leibert,
Petitioner,

-against-

New York State Office of Children
and Family Services, et al.,
Respondents.

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Robert P. Santoriella, PC, Brooklyn (Helen T. Montana-Marson of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Marion R. Buchbinder of counsel), for The New York State Office of Children and Family Services and John Udochi, Bureau of Special Hearings, respondents.

Rosin Steinhagen Mendel, New York (Benjamin J. Rosin of counsel), for Children's Aid Society, respondent.

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Determination of respondent New York State Office of Children and Family Services (OCFS), dated September 19, 2008, which affirmed the decision of respondents Administration for Children Services and the Children's Aid Society to remove two foster children permanently from petitioner's home, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Paul G. Feinman, J.], entered on or about August 19, 2009) dismissed, without costs.

The record contains substantial evidence that supports the

determination that the children's best interests would be served by their removal from petitioner's home (see *Matter of O'Rourke v Kirby*, 54 NY2d 8, 16 [1981]). The evidence also supports the finding that petitioner failed to provide one of the boys with his prescribed medication (*see Matter of Joshua Noel A.*, 40 AD3d 749 [2007]).

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

ENTERED: MARCH 29, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4662 Admiral Indemnity Company, etc., Index 102038/09
Plaintiff-Respondent,

-against-

Derek Sudan,
Defendant-Appellant.

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

Wenig & Wenig, New York (Alan Wenig of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered September 17, 2010, denying defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

This subrogation action arises out of property damage to the building located at 376 Broadway, New York, New York, owned by Mandarin Plaza Condominium, plaintiff's subrogor, caused by a leaking toilet hose in apartment 7E, owned by defendant. Defendant seeks dismissal of the complaint, claiming that he had no notice of any defect, and therefore cannot be held liable for the resulting damages. However, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Here, defendant failed to make a prima facie showing of entitlement to summary dismissal of the complaint.

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

ENTERED: MARCH 29, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4663 Kristofer Llauger, an Infant Under the Age of Sixteen, by his Mother and Natural Guardian, Lucy Morales, et al,
Plaintiffs-Respondents,

-against-

Archdiocese of New York, et al.,
Defendants-Appellants.

[And A Third-Party Action]

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83892/08

Windels Marx Lane & Mittendorf, LLP, New York (Christopher D. Mehno of counsel), for appellants.

Jay S. Hausman & Associates, P.C., Hartsdale (Elizabeth M. Pendzick of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 7, 2010, which, in an action for personal injuries sustained when infant plaintiff collided with a voting machine during gym class, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of

adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). Here, dismissal of the complaint was not warranted since the record presents triable issues of fact including whether defendants were negligent in allowing the gym class, which was comprised of approximately 35 students, to take place while the voting machines were present. The gym teacher testified that the students were instructed to run laps around the gymnasium; that he advised the students to be careful of the voting machines; and that plaintiff's fall into the voting machine was the end result of several students tripping over one another. Accordingly, viewing the evidence in the light most favorable to plaintiffs (*see e.g. Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), it cannot be said, as a matter of law, that the subject accident was not foreseeable. We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: MARCH 29, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4664N Paula Lockard, Index 150065/09
Plaintiff-Appellant,

-against-

Betty Sopolsky, et al.,
Defendants-Respondents.

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Diamond & Diamond, LLC, New York (Stuart Diamond of counsel), for appellant.

James G. Dibbini & Associates, P.C., Yonkers (James G. Dibbini of counsel), for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered August 13, 2010, which, to the extent appealed from, granted defendant's motion to vacate the default judgment dismissing the action, unanimously reversed, on the law and the facts, without costs, and the motion denied.

Defendant failed to demonstrate the reasonable excuse and meritorious defense required to vacate a judgment on the ground of excusable default (CPLR 5015[a]; *see Benson Park Assoc., LLC v Herman*, 73 AD3d 464, 465 [2010]). The record shows that she was represented by counsel, obtained multiple extensions of time to answer the complaint, and was aware of upcoming deadlines. Nevertheless, counsel failed to serve an answer or request an additional extension of time to serve, and defendant offered no

explanation for this failure (*see Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455 [2010], *lv dismissed* 15 NY3d 863 [2010], *Tandy Computer Leasing v Video X Home Lib.*, 124 AD2d 530, 531 [1986]). In defense of this personal injury action alleging that defendant failed to maintain the sidewalk abutting her building in a reasonably safe condition, defendant claims that the defect may have been caused by the City of New York six years earlier. This defense is unsupported by any evidence (*see Facsimile Communications Indus., Inc. v NYU Hosp. Ctr.*, 28 AD3d 391, 392 [2006]; *Peacock v Kalikow*, 239 AD2d 188, 190 [1997]). Moreover, even if proved, it would not absolve defendant, an abutting landowner with constructive notice of the defect, from liability (*see Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [2010]; Administrative Code of City of NY § 7-210).

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

ENTERED: MARCH 29, 2011

CLERK