SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 25, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

5594 Michael Steinberg, et al., Index 100186/07
Plaintiff-Respondents,

-against-

New York City Transit
Authority, et al.,
Defendants,

Five Star Electric Corp,
Defendant-Appellant.

_____

Nicoletti, Hornig & Sweeney, New York (Barbara A. Sheehan of counsel), for appellant.

Thomas Torto, New York, for respondents.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered September 23, 2010, which, inter alia, denied defendant Five Star Electric Corp.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

This negligence action arises out of a criminal assault on plaintiff Michael Steinberg as he entered a subway station. Defendant Tareyton Williams allegedly attacked plaintiff with

battery-operated reciprocating saws. He obtained the saws from a site where employees of Five Star (defendant) were performing work on the station's public address system.

Five Star does not enjoy governmental immunity. First, Five Star is a private contractor (*see Matter of S.S. Silberblatt, Inc. v Tax Commn. of State of N.Y.*, 5 NY2d 635, 641 [1959], *cert denied* 361 US 912 [1959]). Second, subway construction is proprietary, not governmental, in character (*see Huerta v New York City Tr. Auth.*, 290 AD2d 33, 38 [2001], *appeal dismissed* 98 NY2d 643 [2002]; *compare Altro v Conrail*, 130 AD2d 612, 613 [1987] [action alleging failure to allocate sufficient resources could not be maintained against MTA or against Conrail, which was performing "an essential governmental function for the MTA"]). Thus, the doctrine of governmental immunity would not apply in these circumstances.

Supreme Court correctly found that, as movant, defendant failed to show that it did not breach a duty to plaintiff. Defendant relied on hearsay testimony and accident reports submitted without an adequate foundation for their admission as business records (*see Wen Ying Ji v Rockrose Dev. Corp.*, 34 AD3d 253, 254 [2006]; *compare Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462-463 [2007]). In view of the testimony of defendant's foreman

that it was necessary to safeguard the tools from theft and that defendant's other employees had seen Williams hovering around them, talking and yelling, it cannot be found as a matter of law that Williams's criminal acts were unforeseeable and therefore a superseding cause of plaintiff's injuries (*see Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944 [1997]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5626 The People of the State of New York, Ind. 928/08
Respondent,

-against-

Eric Bowman,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J. at initial motion for new counsel; Renee A. White, J. at renewed motion, plea and sentencing), rendered September 16, 2008, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 6 years, unanimously affirmed.

We reject defendant's contention that the trial court deprived him of the right to retain counsel of his own choosing by failing to conduct a minimal inquiry into the merits of the allegations set forth in his pro se motion for assignment of substitute counsel. Although engaging in a brief and direct inquiry into the reasons for defendant's dissatisfaction with

counsel would likely have obviated this appeal, Justice Berkman's failure to do so does not warrant reversal. There were no specific factual allegations in defendant's pro se motion that would indicate a serious conflict with counsel that would require the trial court to engage in an inquiry of defendant (*see People v Porto*, 16 NY3d 93, 100-101 [2010]; *see also People v Adger*, 83 AD3d 1590 [2011]). In any event, after characterizing defendant's request as a "delaying tactic," Justice Berkman allowed defendant to speak, and he provided no additional reasons for his dissatisfaction with counsel. Instead, he merely protested his innocence.

Nor did Justice White abuse her discretion by declining to reconsider the issue later that same morning. In the absence of any change in circumstances warranting reconsideration of defendant's request, it was a proper exercise of discretion to

defer to the earlier ruling by Justice Berkman *(see People v Beauchamp*, 84 AD3d 507, 508 [2011]; *People v Sims*, 18 AD3d 372, 373 [2005], *lv denied* 5 NY3d 833 [2005]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5636 The People of the State of New York, Ind. 394/02
Respondent,

-against-

Andre Pacheco,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, Bronx County (John P. Collins, J.), entered on or about September 23, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The record supports the court's determination that substantial justice dictated that defendant's application be denied (*see e.g. People v Marti*, 81 AD3d 418 [2011], *lv denied* 17 NY3d 798 [2011]). Defendant was given four opportunities to complete the drug treatment program to which he was initially sentenced, and he did not succeed. He has an extensive criminal history, which includes five felonies and nine misdemeanor

convictions, and six prison disciplinary infractions, including a March 2010 infraction for creating a disturbance, interference and harassment.

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., DeGrasse, Freedman, Román, JJ.

5645 Nina Lewis Stryker as Executor, etc., Index 106313/08
Plaintiff-Appellant,

-against-

D'Agostino Supermarkets Inc., et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & De Cicco, New York (Jillian Rosen of counsel), for appellant.

Torino & Bernstein, P.C., Mineola (Charles R. Strugatz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol Edmead, J.), entered June 16, 2010, which granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny summary judgment as to defendant D'Agostino Supermarkets Inc., and otherwise affirmed, without costs.

In this personal injury action, plaintiff Mirjana Lewis alleges that she tripped and fell on a raised corner of a mat located in a vestibule of a D'Agostino's supermarket. To establish their entitlement to summary judgment, defendants were required to demonstrate as a matter of law that they maintained the subject property in a reasonably safe condition and neither created the alleged dangerous condition nor had actual or constructive notice

thereof (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421, [2011]).

The record shows that a question of fact exists as to constructive notice due to evidence that D'Agostino was "aware of an ongoing and recurring unsafe condition which regularly went unaddressed" (*Mazerbo v Murphy*, 52 AD3d 1064, 1066 [2008], *lv dismissed* 11 NY3d 770 [2008] [internal quotation marks omitted]). Contrary to D'Agostino's contention, the supermarket patron's deposition testimony that she made multiple complaints to the supermarket's manager prior to the accident was sufficient to establish that D'Agostino had notice of the hazardous condition that caused plaintiff to trip and fall (*see Simoni v 2095 Cruger Assoc.*, 285 AD2d 431, 432 [2001]).

However, summary judgment was properly granted in favor of the owner of the premises, New 56-79 IG Associates, L.P., and its managing agent, BLDG Management Co., Inc. In light of the owner's status as an out-of-possession landlord, plaintiff was required, but failed, to show "that the purported hazard constituted a structural or design defect that violated a

specific statutory provision" (*Boateng v Four Plus Corp.*, 22 AD3d 323, 324 [2005]).

We find the parties' remaining arguments unavailing.

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

ENTERED: OCTOBER 25, 2011

CLERK

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

5719-
5720 The People of the State of New York,
Respondent,

-against-

Terrence Scarborough,
Defendant-Appellant.

Ind. 1043/02

_____

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

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

_____

Order, Supreme Court, Bronx County (John S. Moore, J.), entered March 15, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for further proceedings on the motion.

The court denied the motion on the ground of ineligibility. The court also determined, in the alternative, that substantial justice dictated denial of the motion.

Defendant is eligible for consideration for resentencing even though he had been released from custody on his drug conviction but reincarcerated for a parole violation (*see People v Paulin*, 17 NY3d 238 [2011]). Under the circumstances of this

case, defendant is entitled to further proceedings on the issue of substantial justice.

An applicant for resentencing under the Drug Law Reform Act is entitled to be "brought before the court and given an opportunity to be heard" (*People v Soler*, 45 AD3d 499, 499 [2007], *lv dismissed* 9 NY3d 1009 [2007]). As the People concede, defendant was not produced in court on the date the court handed down its decision. Nor does the record show that he was given an opportunity to be heard at the court appearances before the decision was issued (*People v Jenkins*, 86 AD3d 522, 523 [2011]). Furthermore, there appears to be a disputed issue as to the extent of defendant's prison disciplinary record.

Defendant's request for assignment of the case to a different Justice is denied.

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5808 The People of the State of New York, Ind. 13847C/09
Respondent,

-against-

Darren Malone,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jenetha G. Philbert of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered May 14, 2009, convicting defendant, after a nonjury trial, of attempted assault in the third degree, attempted criminal mischief in the fourth degree, attempted menacing in the third degree, and harassment in the second degree, and sentencing him to an aggregate term of 3 months, unanimously affirmed.

The court properly declined to draw an adverse inference from the People's failure to preserve cell phone photographs that the victim took of her injuries and showed to the prosecutor. The photos were not discoverable under *Brady v Maryland* (373 US 83 [1963]) because there is no indication they were exculpatory or otherwise favorable to the defense. They were not discoverable under *People v Rosario* (9 NY2d 286 [1961], *cert*

denied 368 US 866 [1961]) because they were not prior statements of a witness (*see* CPL 240.45[1][a]; *People v Wilson*, 210 AD2d 520, 521 [1994], *lv denied* 85 NY2d 982 [1995]).

Defendant's argument that the People were required by CPL 240.20(1)(d) to obtain and disclose the photographs is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that defendant did not establish any basis for an adverse inference.

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5810 In re Roxanne R.,
Petitioner-Appellant,

-against-

Luis A. F.,
Respondent,

Administration for Children's Services,
Respondent-Respondent.

_____

Elisa Barnes, New York, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about November 20, 2009, which, following a hearing, denied and dismissed appellant's petition for custody of her biological grandchild, unanimously affirmed, without costs.

Family Court properly determined that freeing the child for adoption by her foster parents was in her best interests (*see Matter of Guinta v Doxtator*, 20 AD3d 47, 53-55 [2005]). The standard for custody as between nonparents does not afford appellant a preference (*Matter of Vanisha J. [Patricia J.]*, 87 AD3d 696 [2011]; *Matter of Jennifer A.*, 225 AD2d 204, 206 [1996],

lv denied 91 NY2d 809 [1998]). Nevertheless, we note that appellant is free to seek visitation (*see Matter of Shelia B. v Shirelle Jasmine B.*, 67 AD3d 610 [2009]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5811& M-4215 In re John Samuelsen, etc., et al., Petitioners-Respondents, Index 105957/10

-against-

Jay Walder, etc., et al. Respondents-Appellants.

_____

Martin B. Schnabel, Brooklyn (Florence Dean of counsel), for appellants.

Salles & Schwartz, New York (Arthur Z. Schwartz of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 9, 2010, enjoining respondents from closing subway token booths and customer assistant kiosks to the extent that those closings were, since December 2009, effectuated through mass closings, rather than attrition, without first posting notices and holding public hearings as required by Public Authorities Law § 1205(5), unanimously reversed, on the law, without costs, the judgment vacated, and the proceeding dismissed.

The individual petitioners have standing to bring this article 78 petition as members of the subway-riding public who have the right, under Public Authorities Law § 1205(5), to comment on respondents' contemplated closing of station booths

and customer assistant kiosks. Petitioners Local 100 Transport Workers Union of Greater New York and the Association of Community Organizations for Reform Now, Inc., have associational standing as organizations that represent the interests of the union members and the subway-riding public in connection with public comment on respondent Transit Authority proposals that implicate access to the subway system (*see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]).

The petition filed on May 5, 2010, was timely under the four-month statute of limitations (CPLR 217[1]). Petitioners' claim that respondents were required to hold hearings in connection with their December 2009 determination to implement the kiosk eliminations via layoffs rather than attrition did not accrue until February 26, 2010, when respondents transmitted to petitioner union notices of the intended May 7, 2010, layoff of 600 station agents (*see Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]). It was on that date that respondents "reached a definitive position . . . that inflict[ed] actual, concrete injury" that could not have been "prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*see id.*).

In January and February 2009, the MTA held hearings as required by Public Authorities Law § 1205(5) on various proposed changes, including the issue of whether to close certain SCA kiosks and reduce the attendant workforce. While it is unclear whether the various means of implementing this proposal were specifically addressed at the hearings, that was the time for public comment on such matters. Although petitioners complain that the hearings presented only the "vaguest of plans," they nowhere assert that those hearings did not satisfy PAL § 1205(5). Following those hearings, the Board voted to approve the proposal to close the kiosks "as soon as reasonably practicable," and within months, issued its plan to do so via attrition of SCA agents. Respondents were not required to hold new public hearings in connection with their December 2009 decision to effect those kiosk eliminations by means of layoffs rather than attrition.

The notice, hearing, and board approval requirements of Public Authorities Law § 1205(5) are applicable where the Transit Authority contemplates closing station booths and customer assistant kiosks, since these closings constitute "partial closing[s] of . . . [a] means of public access" under the statute (*see Matter of New York Pub. Interest Research Group Straphangers*

Campaign v Reuter, 293 AD2d 160, 164, 168 [2002]). However, even interpreting this remedial statute broadly (*see id.* at 160), we find that respondents are entitled to alter the means of implementing a policy that was approved after public hearings without undertaking a fresh round of public comment.

M-4215- *John Samuelsen, et al. v Jay Walder, et al.*

Motion to supplement the record denied.

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5812 Olivenya Cascante, Index 301391/08
Plaintiff,

-against-

Bazar Kakay, et al.,
Defendants-Appellants,

Khalid Mohammed,
Defendant-Respondent.

_____

Alexander J. Wulwick, New York, for appellants.

The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr. J.), entered January 26, 2011, which granted defendant Mohammed's motion for summary judgment dismissing the complaint and all cross claims as against him, unanimously affirmed, without costs.

Mohammed established his prima facie entitlement to judgment as a matter of law in this action where plaintiff was injured when the vehicle in which she was riding, which was operated by defendant Kakay and owned by defendant Chester Cab Corp. (collectively Kakay), collided with Mohammed's vehicle. Mohammed demonstrated that Kakay's negligence was the sole proximate cause of the accident by submitting, inter alia, deposition testimony of plaintiff and Mohammed indicating that the accident at issue

occurred when, while driving northbound, Kakay drove from the left lane into the right lane, without first ascertaining whether he could safely change lanes (*see* Vehicle and Traffic Law § 1128[a]; *Flores v City of New York*, 66 AD3d 599 [2009]).

In opposition, Kakay failed to raise a triable issue of fact. Although plaintiff's testimony is somewhat unclear as to whether Mohammed's vehicle was traveling northbound and parallel to Kakay's vehicle, or whether it was heading westbound when it entered the intersection where the accident occurred, such testimony does not contradict the evidence establishing that Kakay was negligent and the sole proximate cause of the accident (*see Zummo v Holmes*, 57 AD3d 366 [2008]; *see also Rivera v Corbett*, 69 AD3d 916 [2010]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5813 The People of the State of New York, Ind. 2691/07
Respondent,

-against-

Avial Peguero,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered July 2, 2008, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fourth degrees, and sentencing him to an aggregate term of 1½ years, unanimously affirmed.

The court properly exercised its discretion when it admitted expert testimony concerning circumstances that indicate an intent to sell drugs (*see People v Hicks*, 2 NY3d 750 [2004]). Defendant did not preserve his claim that the expert improperly opined that defendant was a drug seller, and we decline to review it in the interest of justice. As an alternative holding, we find that the

testimony was within the scope permitted under *Hicks*, and that defendant was not prejudiced in any event.

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5814 In re Anthony B.,
Petitioner-Respondent,

-against-

Priscilla B.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

Andrew H. Rossmer, Bronx, attorney for the child.

_____

Order, Family Court, Bronx County (Andrea Masley, J.), entered on or about June 3, 2010, which, to the extent appealed as limited by the briefs, found that New York was not an inconvenient forum pursuant to Domestic Relations Law § 76-f, unanimously affirmed, without costs.

The court's decision was not an improvident exercise of discretion (*see e.g. Matter of Hissam v Mancini*, 80 AD3d 802, 803 [2011], *lv denied* 16 NY3d 870 [2011]). Even though the court did not explicitly discuss all the factors listed in Domestic Relations Law § 76-f(2), the record is sufficient to permit us to consider them (*see e.g. Matter of Sutton v Sutton*, 74 AD3d 1838, 1839 [2010]).

We note that a decision regarding inconvenient forum

depends on the specific issue(s) to be decided in the pending litigation (*see Matter of Jenkins v Jenkins*, 9 AD3d 633, 636 [2004], *appeals dismissed* 5 NY3d 881 [2005], 6 NY3d 751 [2005]; *see also* Domestic Relations Law § 76-f[2][f]-[h]), and should there be changed circumstances in the future, the mother will not be precluded from arguing that New Jersey is a more appropriate forum (*see* Domestic Relations Law § 76-f[1] [court "may decline to exercise its jurisdiction *at any time*"] [emphasis added]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5815 The People of the State of New York, Ind. 1658/06
Respondent,

-against-

Jamel Davis,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered on or about January 6, 2009, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5817 Sydelle Lazar, et al., Index 109336/08
Plaintiff-Respondents,

-against-

Burger Heaven, et al.,
Defendants-Appellants.

_____

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

The Feinsilver Law Group, P.C., Brooklyn (Steven I. Roth of counsel), for respondents.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered October 18, 2010, which, in this action for personal injuries allegedly sustained when plaintiff Sydelle Lazar, while walking on the sidewalk, tripped over an occupied chair that was part of defendants' sidewalk café and fell to the ground, 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 accordingly.

Defendants established their prima facie entitlement to judgment as a matter of law. Defendants submitted evidence showing that the chair was an open and obvious condition and not inherently dangerous (*see Matthews v Vlad Restoration Ltd.*, 74 AD3d 692 [2010]; *Schulman v Old Navy/Gap, Inc.*, 45 AD3d 475

[2007]). Defendants also demonstrated that the placement of the cafe's chairs on the sidewalk was in compliance with 34 RCNY 2-10(c), which provides that "[e]ight feet or one-half the sidewalk width, whichever is greater, shall be maintained by the permittee for unobstructed pedestrian passage."

In opposition, plaintiffs failed to raise a triable issue of fact. Indeed, plaintiff admitted to having previously observed the alleged condition and does not maintain that the condition was obscured (*compare Centeno v Regine's Originals*, 5 AD3d 210 [2004]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5818 Cynthia Warren, Index 104197/06
Plaintiff-Appellant,

-against-

New York Presbyterian Hospital,
Defendant-Respondent.

_____

Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for appellant.

Martin Clearwater & Bell LLP, New York (Arjay G. Yao of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered October 23, 2009, after a jury trial in an action alleging medical malpractice, dismissing the complaint, unanimously affirmed, without costs.

The trial court properly exercised its discretion in denying plaintiff's request for a continuance, after the close of evidence, to call an expert surgical witness. While notice of such expert witness had been given two years in advance, and the witness was present in court at the time the continuance was sought, plaintiff's counsel failed to alert the court of such fact, and the court, upon inquiry, learned that the witness was unavailable to testify the next day. Under the circumstances, plaintiff was not diligent in presenting the expert witness, and

there was no offer of proof as to the materiality of the proposed expert's testimony in light of the trial record (*see Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42 [2008]; *see also Matter of Sakow*, 21 AD3d 849 [2005], *lv denied* 7 NY3d 706 [2006]).

The jury's verdict was based upon a fair interpretation of the evidence (*see generally McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 205-206 [2004]). The evidence showed that defendant did not deviate from accepted medical practices in assigning the surgeon it did and in allowing plaintiff to undergo an open gastric bypass procedure, notwithstanding her medical history. Defendant's expert testimony established that, as of 2003, an open gastric bypass procedure was an appropriate surgical option for plaintiff, and that the medical profession's apparent transition to predominantly laparoscopic gastric bypass procedures did not occur until some years after plaintiff's procedure. Furthermore, the testimony of defendant's experts demonstrated that plaintiff was fully informed of the surgical risks, benefits and alternative treatments available. To the extent that plaintiff's evidence conflicted with defendant's proof on such issue, the jury's resolution of the disputed facts is entitled to deference (*see Bykowsky v Eskenazi*, 72 AD3d 590

[2010], *lv denied* 16 NY3d 701 [2011]).

Since plaintiff failed to timely object to the majority of the evidentiary rulings she now challenges, as well as to a portion of the court's jury charge regarding expert opinion, in arguing that she was denied a fair trial, she has not preserved those contentions for appellate review (*see e.g. Cohen v Kasofsky*, 55 AD3d 859, 860 [2008]). Were we to consider plaintiff's arguments, we would find them unavailing, because even assuming that there was merit to the claims, the cumulative effect did not deny plaintiff a fair trial (*compare Diaz v Williams*, 22 AD2d 873 [1964], *appeal dismissed* 15 NY2d 1029 [1965]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5819 In re Sukwa Sincere G.,

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

Shamiqua Latisha S.,
Respondent-Appellant,

Catholic Guardian Society and
Home Bureau, et al.,
Petitioners-Respondents.

_____

Daniel R. Katz, New York, for appellant.

Magovern & Sclafani, New York (Frederick J. Magovern of counsel), for respondents.

Steven Banks, The Legal Aid Society, New York (Judith Waksberg of counsel), and Kasowitz, Benson, Torres & Friedman LLP, New York (David A. Lewis of counsel), attorneys for the child.

_____

Order of disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about May 17, 2010, which, inter alia, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). The record shows that the agency acted diligently by issuing several referrals for the mother to attend programs mandated by her service plan, and caseworkers repeatedly reminded the mother of her need to complete the programs in order to regain custody. Despite these diligent efforts, in the four years since the child's removal, the mother failed to complete her service plan in that she did not complete mental health treatment and never enrolled in a drug treatment program (*see Matter of Aniya Evelyn R. [Yolanda R.]*, 77 AD3d 593 [2010]; *Matter of Lady Justice I.*, 50 AD3d 425 [2008]).

A preponderance of the evidence establishes that the best interests of the child were served by the termination of the mother's parental rights (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The evidence demonstrated that the child had been provided a loving and stable home environment by his paternal grandmother, who wished to adopt him. Furthermore, contrary to the mother's contention, a suspended judgment was not

warranted under the circumstances (*see Matter of Michael B.*, 80 NY2d 299, 311 [1992]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5820 Joseph Ricketts, Index 116667/09
Petitioner,

-against-

New York City Health
and Hospitals Corporation, et al.,
Respondents.

_____

Franklin N. Meyer, New York, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Andrew S. Wellin of counsel), for respondents.

_____

Determination of respondent New York City Health and Hospitals Corporation (HHC), dated July 27, 2009, terminating petitioner's employment, 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 [Saliann Scarpulla, J.], entered July 29, 2010), dismissed, without costs.

Substantial evidence, including the parties' stipulation and the testimony of petitioner's supervisor, supports HHC's determination that petitioner engaged in misconduct consisting of excessive absences, absence without official leave (AWOL), and failure to follow HHC's call-in policy (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]).

We decline to review petitioner's argument that the determination violated the New York City Human Rights Law (Administrative Code of City of NY § 8-107[1][a]), since he never raised it before the Administrative Law Judge (ALJ) (*see Matter of Colton v Riccobono*, 67 NY2d 571, 575 [1986]). Were we to review it, we would reject it. The determination did not violate the New York City Human Rights Law, the New York State Human Rights Law (Executive Law § 296[1][a], [3][a]), the Americans with Disabilities Act (42 USC § 12112[a]), or HHC's own policies. The ALJ did not credit petitioner's uncorroborated testimony that his alleged misconduct was due to his disability — namely, diabetes. The ALJ found that the medical note petitioner submitted did not support his claim. The ALJ also found that, before his absences, petitioner never requested or proposed a reasonable accommodation for his disability (*see Pimentel v Citibank, N.A.*, 29 AD3d 141, 148 [2006], *lv denied* 7 NY3d 707 [2006]). There is no basis for disturbing the ALJ's findings and credibility determinations (*see Berenhaus*, 70 NY2d at 443; *cf. Matter of McEniry v Landi*, 84 NY2d 554 [1994]).

Because petitioner was terminated based on "misconduct shown after a hearing upon stated charges" (Civil Service Law § 75[1]), the determination did not violate Civil Service Law § 75.

Disciplinary sanctions may be imposed pursuant to the statute even if petitioner's acts of misconduct were not shown to be willful or intentional (*see Matter of Brockman v Skidmore*, 39 NY2d 1045, 1046 [1976]; *Matter of Moorehead v New York City Tr. Auth.*, 190 AD2d 674, 675 [1993]).

The determination did not violate the notice requirement of the Family Medical Leave Act (FMLA) (29 USC § 2619[a]). The ALJ did not credit petitioner's uncorroborated testimony that HHC failed to post a notice mandated by the FMLA (FMLA), and there is no basis for disturbing that credibility determination (*Berenhaus*, 70 NY2d at 443).

The ALJ properly considered petitioner's prior disciplinary record only in the penalty phase of the proceeding (*see Matter of Marcondes v Ward*, 172 AD2d 318, 319 [1991]). The parties' November 2007 stipulation, which resolved prior disciplinary proceedings against petitioner, was properly admitted to impeach petitioner's testimony. The stipulation provided that it would be admissible in subsequent disciplinary proceedings involving AWOL charges, and petitioner is charged with notice of its attachments. The stipulation also provided that where, as here, petitioner is charged with misconduct involving being AWOL and the charges are sustained, the only penalty that can be imposed

is termination.

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

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5821 In re Best Payphones, Inc., Index 112128/08
Petitioner-Appellant,

-against-

Environmental Control Board of
the City of New York, et al.,
Respondents-Respondents.

_____

George M. Gilmer, Brooklyn, for appellant.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Marcy Friedman, J.), entered November 24, 2011, dismissing petitioner's article 78 petition seeking to annul an appeal decision and order of respondent Environmental Control Board of the City of New York, dated May 1, 2008, which affirmed an administrative decision and order, dated October 25, 2005, upholding the issuance of 51 Notices of Violation issued by respondent Department of Information, Technology, and Telecommunications of the City of New York, unanimously affirmed, without costs.

Previously in this litigation, the Court of Appeals (5 NY3d 30 [2005]) affirmed dismissal of petitioner's article 78 petition seeking, inter alia, to compel a public pay telephone (PPT)

franchise agreement between it and respondent the Department of Information, Technology, and Telecommunication of the City of New York, concluding that petitioner's challenge to a January 2000 letter from Corporation Counsel purporting to disapprove PPT franchise rights was time barred, having been brought more than four months after the letter's issuance (*see* CPLR 217 [1]).

In the instant article 78 proceeding, petitioner challenges the enforcement of notices of violation (NOVs) issued for the unauthorized operation of PPTs, again challenging the January 2000 letter from Corporation Counsel and arguing that it did not effectively disapprove franchise rights to petitioner. Under principles of res judicata, the Court of Appeals' prior judgment on the merits between the parties, in which it conclusively decided that petitioner's challenge to the 2000 letter was time barred, renders petitioner's claim in the instant proceeding untimely (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 473-74 [2011]).

In light of 2001 letters from petitioner's counsel agreeing to accept the NOVs, we conclude that respondent satisfied its initial burden of establishing the propriety of service (*Matter of 72A Realty Assoc. v New York City Envtl. Control Bd.*, 275 AD2d 284, 285-286 [2000]). Although petitioner sought to defend

against the NOVS with counsel's 2005 contrary statement, it failed to provide competent evidence to explain the contradiction. Further, having reviewed the record on appeal, we conclude that the administrative tribunal did not improperly shift the initial burden as to the propriety of service.

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5822 101 Maiden Lane Realty Co., LLC, Index 570620/06
Petitioner-Respondent,

-against-

Tran Han Ho, et al.,
Respondents-Appellants.
- - - - -
101 Maiden Lane Realty Co., LLC,
Petitioner-Respondent,

-against-

Sun Mei Inc., etc.,
Respondent-Appellant.

_____

Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for appellants.

Ofeck & Heinze, LLP, Hackensack, NJ (Mark F. Heinze of counsel), for respondent.

_____

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on or about January 18, 2007, which, to the extent appealed from, affirmed an order of Civil Court, New York County (Anil C. Singh, J.), entered on or about December 16, 2005, denying respondents tenants' motion to vacate the final judgment in a commercial nonpayment summary proceeding on the ground of fraud, unanimously affirmed, with costs.

In affirming the Civil Court's denial of the motion to

vacate the final judgment pursuant to CPLR 5015(a)(3), the Appellate Term held the issue of the validity of the lease has been "firmly finally resolved in prior litigation," including an order by this Court affirming the dismissal of a plenary action challenging the validity of the lease on grounds of res judicata and collateral estoppel (*Sun Mei Inc. v. Chen,* 21 AD3d 265 [2005]). While appellants are correct that this court has "inherent and plenary authority to exercise its discretion to review a previous order obtained by means of misconduct by a party towards the court" (*Cohoes Realty Assoc. v Lexington Ins. Co.,*292 AD2d 51 [2002] (internal citations omitted); *see also Shouse v Lyons,* 4 AD3d 821 [2004]), respondents have not made an adequate showing in this case.

Although respondents assert that the December 1992 lease which was produced at trial was a fabrication and a forgery, the unsworn reports of their forensic expert are not in admissible form and therefore lack probative value (*see Grasso v Angerami,* 79 NY2d 813 [1991]; *Quinones v Ksieniewicz,* 80 AD3d 506 [2011]; *Shin v Catanzaro,* 1 AD3d 195 [2003]). Even were this Court to consider the forensic reports as competent evidence, there is no proof as to when the lease was allegedly altered or that petitioner, who purchased the property in 1998, knew that the

1992 lease produced at trial was a "fake," or any evidence of wrongdoing by petitioner which could serve as a basis for vacatur of the judgment pursuant to CPLR 5015(a)(3).

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, JJ.

5823 Karen Krin, Index 112183/07
Plaintiff-Respondent,

-against-

Lenox Hill Hospital,
Defendant,

Thomas Romo, III, et al.,
Defendants-Appellants.

_____

Peltz & Walker, New York (Bhalinder L. Rikhye of counsel), for appellants.

The Edelsteins, Faegenburg & Brown, LLP, New York (Glenn K. Faegenburg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered March 11, 2011, which granted plaintiff's motion to strike the Romo defendants' (defendants) answer on the ground of spoliation of evidence to the extent that, at trial, plaintiff would be entitled to a missing document charge, pursuant to PJI 1:77, unanimously affirmed, without costs.

The court properly exercised its discretion in directing that a missing document charge be given at the end of the trial in this case. While the record presents questions about whether

the pertinent document, a cosmetic operative report which defendants failed to turn over to plaintiff, ever existed in their file, there exists sufficient evidence from which a reasonable person could conclude that defendant's dictation of this report was transcribed and was, at one time, in his file. Defendant, Thomas Romo, admits that he dictated the document for transcription, and the functional operative report from the same operation was discovered in his file. Thus, the issue as to whether any spoliation of evidence actually occurred should be presented to the jury, along with the inferences to be drawn therefrom (*see Marcano v Calvary Hosp., Inc.*, 13 AD3d 109 [2004]). Defendants will then be permitted to argue to the jury that the document either never existed in his file, is irrelevant to the issue of this case, that other documents cover the same information, or any other issue he believes will persuade the jury that no adverse inference is warranted. Under the circumstances of this case, the court's sanction was

"appropriately tailored to achieve a fair result" (*Balaskonis v HRH Constr. Corp.*, 1 AD3d 120, 121 [2003][internal quotation marks and citation omitted]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5824 The People of the State of New York, Ind. 1458/04
Respondent,

-against-

Gerard Spann,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about February 5, 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 (*see generally People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]). Defendant's history of recidivism and absconding outweighed the positive factors cited by defendant, including his

prison record (*see e.g. People v Soler*, 45 AD3d 499 [2007], *lv denied* 9 NY3d 1009 [2007]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5825 Maria Isabel Lopez, Index 114050/08
Plaintiff, 590306/09

-against-

Guei Shun Shiau, et al.,
Defendants.
- - - - -
Guei Shun Shiau,
Third-Party Plaintiff-Appellant,

-against-

Sheba Ethiopian Restaurant, Inc., etc.,
Third-Party Defendant-Respondent.

_____

D'Amato & Lynch, LLP, New York (Bill V. Kakoullis of counsel), for appellant.

Faust Goetz Schenker & Blee LLP, New York (Lisa De Lindsay of counsel), for respondent.

_____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 8, 2010, which, in this action for personal injuries sustained by plaintiff when she allegedly slipped and fell on an uneven sidewalk abutting property owned by defendant-third-party plaintiff Guei Shun Shiau and leased to defendant-third-party defendant Sheba Ethiopian Restaurant, Inc. d/b/a Queen of Sheba Ethiopian Restaurant, to the extent appealed from, denied Shiau's motion for summary judgment on his cross claim for contractual indemnity against Sheba, unanimously affirmed,

without costs.

Issues of fact exist as to whether the lease requires Sheba to indemnify Shiau for the type of injury or damages at issue here. This Court will not read into the contract an indemnity obligation that is not "unmistakably" present in the lease agreement (*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 [2006]). Here, the lease's indemnification and insurance provisions are ambiguous, and thus denial of summary judgment was appropriate. We reject Shiau's contention that the facts of this case are similar to those of *Hogeland v Sibley, Lindsay & Curr Co.* (42 NY2d 153 [1977]).

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

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5827 The People of the State of New York, Ind. 17282C/09
Respondent,

-against-

Enrique Oliva,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Adam J. Petitt of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John Byrne, J.), rendered on or about April 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: OCTOBER 25, 2011

CLERK

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

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5828 In re The State of New York, Index 341104/08
Petitioner-Respondent,

-against-

C.B.,
Respondent-Appellant.

_____

Andrea Risoli, New York, for appellant.

Eric T. Schneiderman, Attorney General, New York (Robert C. Weisz of counsel), for respondent.

_____

Order of commitment, Supreme Court, Bronx County (Dineen Ann Riviezzo, J.), entered August 24, 2009, which, upon a finding made after a jury trial of mental abnormality, and a determination made after a dispositional hearing that appellant is a dangerous sex offender requiring confinement, committed appellant to a secure facility, unanimously affirmed, without costs.

The court properly denied appellant's application for a pretrial hearing on the voluntariness of a confession that was ultimately admitted at trial. Sex offender management proceedings under article 10 of the Mental Hygiene Law are civil rather than criminal (*People v Harnett*, 16 NY3d 200, 206 [2011];

see also Smith v Doe, 538 US 84, 92 [2003]; *Kansas v Hendricks*, 521 US 346, 361 [1997]). Therefore, the requirement of a judicial determination of voluntariness (*see People v Huntley*, 15 NY2d 72 [1965]) does not apply to such proceedings. Instead, appellant's confession was admissible as a party admission under the principles applicable to civil litigation. Appellant's other evidentiary claims are without merit.

Appellant received effective assistance of counsel, even under the state and federal standards applicable to criminal cases (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Appellant claims his trial counsel should have sought to preclude, as unreliable, any testimony regarding the STATIC-99 actuarial risk assessment instrument (*see Matter of State of New York v Rosado*, 25 Misc 3d 380, 388-394 [Sup Ct, Bronx County 2009] [discussion of STATIC-99]). Instead, it was appellant's counsel who brought the STATIC-99 into the case on cross-examination of the State's expert. This was a strategy designed to discredit the expert by showing that, in forming his opinion, he placed excessive emphasis on statistics rather than appellant's personal attributes. The strategy was objectively reasonable, and in any event it did not cause appellant any prejudice.

Finally, there is no merit to appellant's argument that he is entitled to release on the ground that his initial confinement under article 9 of the Mental Hygiene Law had been illegal (*see People ex rel. Joseph II. v. Superintendent of Southport Correctional Facility*, 15 NY3d 126 [2010]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5829N- Index 107700/08
5829NA Antonio Jenkins, 113272/08
Plaintiff-Appellant

-against-

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

_____

Antonio J. Jenkins, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondents.

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered August 12, 2010, which granted defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, the motion denied, the complaint reinstated, the plenary action converted to an article 75 proceeding, and the matter remanded for further proceedings. Appeal from order, same court (Geoffrey D. Wright, J.), entered February 2, 2011, which denied plaintiff's motion to restore the action to the calendar, unanimously dismissed, without costs, as moot.

In granting defendants' motion to dismiss, the motion court found that plaintiff's claims are time-barred because the complaints filed in this consolidated action were not filed

within 10 days of the arbitrator's determination as required by Education Law § 3020-a(5). However, plaintiff commenced the action before the arbitrator's ruling was issued. Accordingly, the prudent course would have been to convert the instant action to an article 75 proceeding and to consider defendants' alternative bases for dismissal (*see e.g. Scaduto v DT Indus.*, 266 AD2d 149 [1999]; *Broderick v Board of Educ., Roosevelt Union Free School Dist.*, 253 AD2d 836 [1998], *lv denied* 93 NY2d 802 [1999]; CPLR 103[c]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5830 The People of the State of New York, Ind. 2438/09
Appellant,

-against-

Eduardo Rodriguez,
Defendant-Respondent.

_____

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

Andrew H. Freifeld, New York, for respondent.

_____

Order, Supreme Court, New York County (Analisa Torres, J.), entered on or about March 9, 2010, which dismissed the second count of the indictment, charging defendant with failure to verify registration information in violation of Correction Law § 168-f(3), unanimously reversed, on the law, the count reinstated, and the matter remanded for further proceedings.

The Sex Offender Registration Act imposes reporting requirements for all levels of registered sex offenders pursuant to Correction Law § 168-f, and failure to comply with these requirements is a felony under Correction Law § 168-t. All sex offenders are subject to a mail-in verification requirement (Correction Law § 168-f[2]). For level three offenders such as

this defendant, section 168-f(3) imposes an additional requirement of in-person verification every 90 days, commencing at the time of "release or commencement of parole or post-release supervision, or probation, or release on payment of a fine, conditional discharge or unconditional discharge."

Section 168-f(3) contemplates that the judicial determination of an offender's risk level is to be made prior to the offender's release. The date of judicial determination is not specified as the commencement of the 90-day period in which the offender is required to report. For that reason, Supreme Court found the statute was vague as applied to defendant, who was not adjudicated by the court as a level three sex offender until after his release to parole supervision. This was error.

There was no basis for dismissing the count of the indictment charging defendant with failing to appear in person to verify his registration information with the Sex Offender Monitoring Unit. The indictment specified that defendant committed acts constituting every material element of the crime charged (*see People v D'Angelo*, 98 NY2d 733, 734-745 [2002]; *People v Iannone*, 45 NY2d 589, 600 [1978]).

Although defendant had not yet been adjudicated a level

three offender at the time of his release, the People alleged that the violation of the statute occurred well after the judicial determination, and after defendant had personally verified his address every 90 days on at least five occasions. On January 9, 2008, the last date on which defendant reported, he was told to report on April 9, 2008, but he failed to do so. Thus, he was properly charged with failure to verify registration information within a 90-day period. The indictment correctly set forth the date of the crime as on or about April 10, 2008.

There was no infirmity in the indictment, because defendant was only charged with failing to appear in that particular 90-day period. It was not necessary to examine previous 90-day periods or the commencement date of the reporting requirement to determine whether he committed the charged offense.

The statute was not unconstitutionally vague (*see People v Stuart*, 100 NY2d 412, 421-425 [2003]). It was "sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," and also provided "explicit standards for those who apply them, so as to avoid resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"

(*People v Nelson*, 69 NY2d 302, 307 [1987] [internal quotation marks and citations omitted]). The date on which the initial 90-day period commenced presented a purely academic question, since defendant failed to personally verify his address for a subsequent, clearly defined 90-day period.

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5831 Heyddi Suazo, Index 20219/07
Plaintiff-Respondent,

-against-

Edwin F. Brown,
Defendant,

Mitzy Transportation, Inc., et al.,
Defendants-Appellants.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered April 20, 2011, which, in this action for personal injuries sustained in a motor vehicle accident, denied the motion of defendants Mitzy Transportation, Inc. and Eduardo Chacan for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants failed to establish their entitlement to judgment as a matter of law on plaintiff's claim to recover for serious injuries under the 90/180-day category of Insurance Law § 5102(d). In support of their motion, defendants submitted, among other things, the reports of plaintiff's radiologist indicating

disc herniations in the cervical and lumbar spines, and meniscal and ligament tears and joint effusion in the right knee. Furthermore, the postoperative report of plaintiff's surgeon diagnosed plaintiff with meniscal and anterior cruciate ligament tears. Such medical evidence, which contradicts defendants' medical evidence, raises issues of fact as to the existence and causation of plaintiff's injuries (*see Martinez v Pioneer Transp. Corp.*, 48 AD3d 306 [2008]; *Zeigler v Ramadhan*, 5 AD3d 1080, 1081 [2004]). Although defendant's orthopedist concluded that plaintiff's injuries had resolved based on his examination, there was no opinion offered as to the 90/180-day claim (*see Quinones v Ksieniewicz*, 80 AD3d 506 [2011]; *Bejaran v Perez*, 78 AD3d 571 [2010]).

Accordingly, since defendants did not meet their prima facie burden, the burden of proof never shifted to plaintiff (*see Martinez*, 48 AD3d at 307).

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5832-
5833 In re Isis S.C.,

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

Lamont C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Howard M. Simms, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner 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 (Rhoda Cohen, J.), entered on or about January 5, 2010, which, to the extent appealed from, upon a fact-finding that respondent father's consent was not required for the adoption of his daughter, committed the custody and guardianship of the child to petitioner Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent's consent to the child's adoption was not required because respondent did not maintain "substantial and

continuous or repeated contact with the child" and failed to provide support for her while she was in foster care (*see* Domestic Relations Law § 111[1][d]; *Matter of Norman Christian K.*, 60 AD3d 542 [2009]). Respondent was neither relieved of his responsibility to support and maintain regular communication with the child by his repeated incarceration nor excused from paying financial support by the fact that the agency did not instruct him to do so (*Matter of Marc Jaleel G. [Marc E.G.]*, 74 AD3d 689 [2010]). His belated expressions of interest in visiting with the child are insufficient after many years in which he had no contact with his child.

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5834- Index 8112/03
5834A The Estate of Edis Estevez, etc.,
Plaintiff-Appellant,

-against-

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

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jessica Wisniewski of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered July 29, 2009, which granted defendants' motion for summary judgment dismissing the complaint, and order, same court and Justice, entered on or about March 15, 2010, which denied plaintiff's motion to renew, unanimously affirmed, without costs.

There is no evidence in the record that defendant police officers, responding to a call to assist "an emotionally disturbed person," used excessive force in restraining and handcuffing the decedent, whom they found extremely agitated and holding a large piece of broken ceramic vase in his hand (*see Koeiman v City of New York*, 36 AD3d 451 [2007], *lv denied* 8 NY3d 814 [2007]). The record demonstrates that the officers believed

that the decedent intended to injure himself, that the decedent resisted the officers' efforts to restrain him, fracturing the wrist of one and biting the other, and that the officers used the amount of force they reasonably believed was necessary to restrain and handcuff the decedent.

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

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5835 Sandra Jimenez, Index 306785/08
Plaintiff-Appellant,

-against-

Nelson J. Polanco, et al.,
Defendants-Respondents.

_____

Elefterakis & Elefterakis, P.C., New York (John Elefterakis of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered June 21, 2010, which, in this action for personal injuries allegedly sustained when plaintiff pedestrian was struck by defendants' motor vehicle, granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law. They submitted the affirmed reports of expert physicians showing that plaintiff's injuries were the result of preexisting and degenerative conditions (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]). Defendants also submitted evidence showing that plaintiff was involved in another car accident years

before the subject accident for which she brought a lawsuit and alleged injuries similar to those set forth in this action (*see Becerril v Sol Cab Corp.*, 50 AD3d 261 [2008]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's medical evidence did not address the degeneration found by defendants' physicians, and did not purport to explain why the prior accident could be ruled out as the cause of her current alleged limitations (*see Moses v Gelco Corp.*, 63 AD3d 548 [2009]). Furthermore, without evidence that the injuries are related to the accident, "it does not avail plaintiff's 90/180-day claim that defendants' experts did not address [her] condition during the relevant period of time" (*Reyes v Esquilin*, 54 AD3d 615, 616 [2008]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5836 Yvonne Carswell, Index 100234/10
Plaintiff-Respondent,

-against-

Tahiru Banda, et al.,
Defendants-Appellants.

_____

Marjorie E. Bornes, New York, for appellants.

Law Office of Robert A. Flaster, P.C., New York (Jonathan A. Fier of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered December 29, 2010, which, in an action for personal injuries, granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff pedestrian alleges that she was injured when, while crossing the street within the crosswalk and with the traffic light in her favor, she was struck by defendants' taxicab. In contrast, defendant driver stated that he had a green light with a left-turn signal, that his vehicle was past the crosswalk, and that plaintiff was distracted by talking on her cell phone when the accident occurred. These conflicting accounts raise triable issues of fact as to whether plaintiff had

the right-of-way and was in the crosswalk at the time of the accident and whether defendant driver failed to exercise due care to avoid the accident or was negligent in any manner (*see Villaverde v Santiago-Aponte*, 84 AD3d 506 [2011]; *see also Marquis v Eisenstein*, 5 AD3d 741 [2004]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5837 The People of the State of New York, Ind. 6772/99
Respondent,

-against-

Aaron Williams,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 25, 2009, resentencing defendant to a term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We have no authority to revisit defendant's prison sentence on this appeal,

and there is no basis upon which to remand for further sentencing proceedings (*see id.* at 635).

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

ENTERED: OCTOBER 25, 2011

CLERK

Friedman, J.P., Catterson, Renwick, Richter, JJ.

5839 Evolution Trading Management LLC, et al.,
Plaintiffs-Respondents,

-against-

The Bank of New York Mellon Corporation,
Defendant-Appellant,

BNY Convergex LLC, et al.,
Defendants.

Index 104767/10

_____

Pillsbury Winthrop Shaw Pittman LLP, New York (David A. Crichlow of counsel), for appellant.

Stuart J. Moskovitz, New York, for respondents.

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Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered on or about March 23, 2011, which, insofar as appealed from, granted plaintiffs' motion for summary judgment in their favor on their claims and on defendant Bank of New York Mellon Corporation's counterclaims, and denied said defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, plaintiffs' motion denied, defendant's motion granted, the counterclaims severed, and the matter remanded for further proceedings. The Clerk is directed

to enter judgment in defendant's favor dismissing the complaint.

The asset purchase agreement between defendant and plaintiffs' predecessor provided that the escrow funds would be released in the event of the "Resolution" of the underlying patent infringement lawsuit between Lava Trading Inc. and plaintiff's predecessor. It defined "Resolution" as "entry of a final unappealable order or judgment . . . that does not impose any liability or payment obligations on [defendant] for any Losses or settlement amounts." The agreement settling the lawsuit provided that nothing in it restricted Lava Trading's right to sue defendant for patent infringement. Since the time limitation on damages for patent infringement is six years (35 USC § 286), defendant will remain subject to such a lawsuit until July 2014. Thus, the settlement of the underlying lawsuit did not effect a "Resolution" as contemplated by the parties, and plaintiffs are not entitled to the release of the escrow funds.

The counterclaims adequately pleaded that defendant was damaged by plaintiffs' conduct (*see Fielding v Kupferman*, 65 AD3d 437, 442 [2009]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5840 In re Lincoln Spencer Apartments, Inc., Petitioner-Respondent, Index 112676/10

-against-

Zeckendorf-68th Street Associates, Respondent,

The Copley Condominium and Club, etc., Respondent-Appellant.

_____

Cyruli Shanks Hart & Zizmor LLP, New York (James E. Schwartz of counsel), for appellant.

Dean Lakis, Roslyn Heights, for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered June 6, 2011, which, inter alia, granted the petition for a conditional and temporary license to access the roof of respondent The Copley Condominium and Club (Copley), unanimously reversed, on the law, with costs, the petition denied, and the proceeding brought pursuant to Real Property Actions and Proceedings Law § 881 dismissed.

RPAPL 881 is the means by which a landowner seeking "to make improvements or repairs" to its property may seek a license to enter an adjoining landowner's property when those "improvements or repairs cannot be made" without such entry. Here, the court

erred by granting petitioner a license to access Copley's roof because petitioner failed to "state the facts making such entry necessary," as the statute requires (*id.*). The petition, and the affidavit of a "senior associate" submitted for the first time in petitioner's reply papers, conclusorily state that access to Copley's roof was necessary. Petitioner has failed to put forward any explanation as to why the work could not otherwise be performed or indeed, any facts whatsoever (*see Matter of 155 W. 21st St., LLC v McMullan*, 61 AD3d 497, 504-505 [2009]; *see also Amalgamated Dwellings v Hillman Hous. Corp.*, 299 AD2d 199, 200 [2002]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5841 The People of the State of New York, Respondent, Ind. 1142/09

-against-

Victor Duperroy, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered February 24, 2010, convicting defendant, after a jury trial, of two counts of criminal contempt in the first degree, and two counts of criminal contempt in the second degree, and sentencing him to an aggregate term of 1½ to 3 years, unanimously modified, on the law, to the extent of vacating both convictions of second-degree contempt, and dismissing those counts, and otherwise affirmed.

The court properly exercised its discretion in admitting uncharged crimes evidence. This case involved longstanding and ongoing domestic conflict, and many of the counts submitted to the jury required proof that defendant intended to instill fear, harass, or otherwise inflict psychological injury on his wife.

Defendant's extensive history of threatening and violent conduct was highly probative of intent and motive, and it provided valuable background information (*see People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Garvin*, 37 AD3d 372 [2007], *lv denied* 8 NY2d 984 [2007]). The probative value of this evidence outweighed its prejudicial effect, which was minimized by the court's thorough instructions. In any event, any error in receipt of this evidence was harmless.

The People concede that defendant is entitled to dismissal of the second-degree contempt counts as lesser included offenses of the first-degree counts. Defendant's remaining double jeopardy argument is unpreserved (*see People v Gonzalez*, 99 NY2d 76, 82-83 [2002]; *People v Jordan*, 77 AD3d 405 [2010], *lv denied* 15 NY3d 953 [2010]), and we decline to review it in the interest of justice.

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5842 Diana Joy Ingham derivatively on behalf of Cobalt Asset Management, L.P., Plaintiff-Respondent,

-against-

Charles R. Thompson, et al., Defendants,

H.G. Wellington Co., Inc., Defendant-Appellant,

Cobalt Asset Management, L.P., Nominal Defendant.

Index 651145/10

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Curtis, Mallet-Prevost, Colt & Mosle LLP, New York (Jason Gottlieb of counsel), for appellant.

Joseph M. Heppt, New York, for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 9, 2011, which denied defendant H.G. Wellington Co.'s motion to dismiss plaintiff's claims of aiding and abetting breach of fiduciary duty and unjust enrichment against Wellington, unanimously reversed, on the law, with costs, the motion granted, and the complaint dismissed as against Wellington. The Clerk is directed to enter judgment accordingly.

Plaintiff, a limited partner in Cobalt Asset Management, L.P. (CAM), alleged that Wellington aided and abetted defendant

Thompson's alleged breach of his fiduciary duties to CAM, and was thereby unjustly enriched. Thompson was a general partner of CAM when he entered into two agreements with Wellington in April 1995. In the assignment agreement, Wellington agreed to pay CAM $35,000 for, among other things, the right, title and interest in the investment management agreements governing 38 client accounts managed up to that time by CAM. In the executive services agreement, Wellington agreed to pay Thompson a base salary of $50,000 per year plus a portion of the management fees received by Wellington from CAM's investment management clients.

We find that the aiding and abetting claim is barred by the statute of limitations. The applicable limitations period for that claim is six years, since plaintiff's fraud cause of action against co-defendants is not merely "incidental" to the breach of fiduciary duty cause of action against them (*see* CPLR 213 [1], [8]; *Kaufman v Cohen*, 307 AD2d 113, 121 [2003]. However, the complaint contains no allegations of any conduct by Wellington after 1995, except the receipt of monies owed under the contracts through 2001. Wellington correctly contends that the various theories argued by plaintiff for tolling the limitations period are inapplicable here. Equitable estoppel does not apply, as there are no allegations that Wellington made any affirmative

representations or had a fiduciary duty to plaintiff (*see Kaufman*, 307 AD2d at 126). The discovery accrual rule does not apply in cases alleging constructive fraud (*id.*; *see* CPLR 213 [8], 203 [g]). Repudiation is also unavailing, as the requirement of a clear repudiation applies only to claims seeking an accounting or other equitable relief (*see Matter of Kaszirer v Kaszirer*, 286 AD2d 598, 599 [2001]).

Moreover, plaintiff failed to state a cause of action for aiding and abetting breach of fiduciary duty against Wellington, as the assignment agreement expressly represented that the transfer of the partnership's assets was conducted in accordance with the partnership agreement and investment management agreements. In the face of such a representation, it does not necessarily follow that Wellington should have suspected it was assisting wrongdoing simply because the terms of the agreements appear one-sided. Nor does plaintiff point to any duty Wellington – an outsider to the partnership – would owe to the limited partners to conduct any further investigation as to the "fairness" of the transaction. Based on the documentary evidence and the facts in the complaint, it could not be inferred that Wellington had actual knowledge that it sought to conceal from the limited partners (*see Kaufman*, 307 AD2d at 125; *compare Oster*

v Kirschner, 77 AD3d 51, 55-56 [2010]).

Plaintiff's unjust enrichment claim against Wellington also fails, inasmuch as a valid and enforceable contract governs the subject matter of the claim (*see Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., Inc.*, 85 AD3d 680, 682 [2011]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5844 The People of the State of New York, Ind. 6196/08
Respondent,

-against-

Donald Bishop,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

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Judgment, Supreme Court, New York County (Kibbie F. Payne, J.), rendered on or about September 14, 2009, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5847 In re Joseph D.,

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

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

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

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Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about August 12, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute sexual abuse in the first and second degrees, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

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

disturbing the court's credibility determinations, including its evaluation of alleged inconsistencies in testimony.

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter JJ.

5848 The People of the State of New York, Ind. 1749/99
Respondent,

-against-

Pedro Perez,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Gregory Carro, J.), rendered November 17, 2009, resentencing defendant to a term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5849 James G. Regno, et al., Index 109524/09
Plaintiffs,

-against-

The City of New York, et al.,
Defendants.
- - - - -
Almar Plumbing & Heating Corp., etc.,
Third-Party Plaintiff-Appellant,

-against-

Bruno Grgas, Inc.,
Third-Party Defendant-Respondent.

[And Another Action]

_____

Marshall Conway Wright & Bradley, P.C., New York (Leonard Steven Silverman of counsel), for appellant.

Milber Makris Plousadis & Seiden, LLP, New York (Peter J. Morris of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered October 4, 2010, which granted third-party defendant's motion for summary judgment dismissing the third-party complaint as against it, unanimously affirmed, with costs.

Third-party defendant Bruno Grgas, Inc. (Grgas) established prima facie that there was no written indemnity agreement in

existence between the parties on the date of plaintiff's accident. The burden then shifted to third-party plaintiff-appellant Almar Plumbing & Heating Corp. (Almar). Almar failed to raise an issue of fact as to whether the agreement signed in 2009, seven months after the accident, was effective as of a date before plaintiff's accident and that the parties intended it to have retroactive effect (*see Burke v Fisher Sixth Ave. Co.*, 287 AD2d 410 [2001]; *compare Podhaskie v Seventh Chelsea Assoc.*, 3 AD3d 361 [2004]). Moreover, Almar failed to establish that, at the time of plaintiff's accident, Grgas was contractually obligated to procure insurance on its behalf and to name it as an additional insured. Thus, Almar's claim for breach of contract was properly dismissed (*see id.*).

In addition, Almar failed to demonstrate an evidentiary basis for its assertion that discovery will reveal further facts or evidence essential to opposing the summary judgment motion,

and therefore, the motion was not premature (*see 2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158, 162-163 [2008], *lv denied* 11 NY3d 716 [2009]).

We find Almar's remaining arguments unavailing.

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5850 Everett Stembridge, Index 111343/09
Plaintiff-Appellant,

-against-

New York City Department of Education,
Defendant-Respondent.

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Everett Stembridge, appellant pro se.

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

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Order, Supreme Court, New York County (Cynthia Kern, J.), entered March 18, 2010, which, in an action alleging discrimination and wrongful termination, granted defendant's motion to dismiss the complaint as time-barred, unanimously affirmed, without costs.

This action was appropriately dismissed since plaintiff's causes of action accrued on August 15, 2006, when he was terminated from an Aspiring Principals program. Plaintiff's complaint acknowledges as much and the written notice of termination references that day. Accordingly, the action, commenced in August 2009, was untimely as it was beyond the one-year statute of limitations (Education Law § 3813[2-b]; *see Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d

367, 373 [2007]). The record also shows that plaintiff did not file a timely notice of claim (Education Law § 3813[1]).

Plaintiff's reliance on the arbitration held in 2009, which found that defendant could not recoup monies it had inadvertently paid to plaintiff following his termination from the program, is misplaced. The arbitration did not create a new accrual date for the subject action, as it did not deal with issues of either termination from the program or defendant's alleged discrimination, but only with whether there was a contractual basis for defendant to recoup the alleged overpayments.

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

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5851 Yamilet Mendoza, an infant under the age of fourteen (14) years, by her mother and natural guardian, Carolina Pelaez, et al., Plaintiffs-Respondents,

-against-

Mortlen Realty Corp., et al., Defendants-Appellants.

Index 109483/07

_____

Kardisch, Link & Associates, P.C., Mineola (Beth L. Rogoff of counsel), for appellants.

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

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered January 22, 2010, which to the extent appealed from, granted plaintiffs' motion for partial summary judgment as against defendant Mortlen Realty Corp, unanimously affirmed, without costs.

In this action alleging injury to the infant plaintiff caused by lead-paint poisoning, plaintiffs met their initial burden of establishing entitlement to summary judgment on the issue of liability based on evidence that defendant Mortlen Realty had actual and/or constructive notice that at least one child under the age of six was residing in the subject apartment

in August 2006. They also established that the building is a multiple dwelling subject to the Lead Paint Hazard Reduction Law (Administrative Code of City of NY former § 27-2013[h], now §§ 27-2056.3, 27-2056.18 [requiring the owner of a multiple dwelling to remove or cover paint containing specified hazardous levels of lead in any apartment in which a child six years of age or younger resides]).

The evidence submitted by defendants in opposition to the motion was insufficient to raise a factual issue to defeat summary judgment. Although defendants contend that the court improperly considered documents submitted by plaintiffs to rebut the argument that the building is not a multiple dwelling because they were unauthenticated and/or uncertified, defendants failed to preserve this issue for appellate review (*see DiLeo v Blumberg*, 250 AD2d 364, 366 [1998]). Were we to review this issue, we would find that the motion court properly considered the certificate of occupancy as well as printouts from the website of the New York City Department of Housing Preservation and Development which established that the building had been

classified as a multiple dwelling (*see* CPLR 4511(b); *Elkaim v Elkaim*, 176 AD2d 116 [1991], *appeal dismissed* 78 NY2d 1072 [1991]).

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

ENTERED: OCTOBER 25, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5853N Sabrina Bruno, Index 113633/08
Plaintiff-Respondent,

-against-

3 West 35th Company, LLC,
Defendant,

M&S 276 Corp. doing business as
Café Au Bon Gout, Inc.,
Defendant-Appellant.

_____

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Bryan Goldstein of counsel), for appellant.

Talkin, Muccigrosso & Roberts, LLP, New York (Mark Muccigrosso of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered January 24, 2011, which, inter alia, granted plaintiff's motion, pursuant to CPLR 306-b, for an extension of time to serve the summons and complaint on defendant M&S 276 Corp., unanimously affirmed, without costs.

The court acted within its discretion in granting plaintiff an extension of time to serve defendant, pursuant to CPLR 306-b, in the interest of justice (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-106 [2001]). Defendant received notice of the lawsuit and served an answer before the statute of limitations expired (*cf. Slate v Schiavone Constr. Co.*, 4 NY3d

816 [2005]). Contrary to defendant's contention, under these circumstances, plaintiff was not required to show either diligent efforts or exigent circumstances (*see Leader*, 97 NY2d at 105).

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

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

ENTERED: OCTOBER 25, 2011

CLERK