SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 14, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Moskowitz, Acosta, Richter, JJ.

6303 The United States Life Insurance Company in the City of New York,
Plaintiff-Respondent,

-against-

Rebeka Blumenfeld, et al.,
Defendants-Appellants.

Index 601212/08

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Lipsius BenHaim Law, LLP, Kew Gardens (Ira S. Lipsius of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Michelle M. Arbitrio of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 29, 2011, which, in a declaratory judgment action seeking rescission of a life insurance policy, denied defendants' motion for summary judgment dismissing the amended complaint, unanimously reversed, on the law, without costs, and the motion granted, and it is declared that the life insurance policy is valid.

On April 25, 2006, plaintiff insurer issued a life insurance policy with a $5,000,000 death benefit, requiring quarterly

premiums of $70,658.25. Defendant Rebeka Blumenfeld was the insured, and the beneficiary/policy owner was defendant the Blumenfeld Family Irrevocable Life Insurance Trust (the Trust). The policy included a two-year contestability clause, pursuant to New York Insurance Law § 3203(a)(3).

Defendant insured, who was retired and in her late 70s, represented in her January 2006 life insurance application to plaintiff that she had a net worth of $35-40 million and household income of $400,000-500,000 and that she was a beneficiary of two multi-million dollar life insurance policies. The application gave her address as an apartment in Williamsburg, Brooklyn. The Trust's address was given as 2 West 47th Street in Manhattan.

By letter dated April 22, 2008, plaintiff notified the Trust of its intent to rescind the policy because of material misrepresentations concerning the insured's financial status at the time of her signing the life insurance application. Plaintiff noted an ongoing fraud investigation. The letter cited a March 2007 investigative report that had revealed the insured owned no real estate and that she rented an apartment in a neighborhood in Brooklyn that had a median household income of $29,625. The letter further noted that plaintiff would refund

any applicable premiums and that it would file a declaratory judgment action to rescind the policy unless it received additional information from the insured or a signed copy of the rescission agreement enclosed with the letter.

It is undisputed that after the insurer received the March 2007 investigative report, plaintiff retained and processed premium payments in April and May 2007, in the respective amounts of $43,452.50 and $130,387.50.

An investigative report from February 2008 identified the insured's residence as 2 West 47th Street, the same address the insured gave as the Trust's address in the policy application in January 2006.

Plaintiff commenced this action against the insured and the beneficiary/policy owner, on April 23, 2008, two days before the end of the policy's two year contestability provision. The insurer sought a declaratory judgment rescinding the policy based upon alleged misrepresentations in the insured's application. Plaintiff amended the complaint in September 2009.

Thereafter, by letter dated September 25, 2008, plaintiff notified the Trust that the policy was in its grace period and would terminate without value unless plaintiff received an additional premium in the amount of $81,262.73 prior to November

25, 2008. The Trust timely paid this premium.

In June 2010, defendants moved for summary judgment dismissing the amended complaint, arguing that plaintiff had ratified the policy and waived its right to rescind by failing to promptly seek rescission upon learning, as early as March 2007, of the insured's alleged misrepresentations (*see S.E.C. v Credit Bancorp, Ltd.*, 147 F Supp 2d 238, 256-57 [SD NY 2001]). Defendants further argued that plaintiff was estopped from rescinding the policy because it had retained premiums after learning of the insured's alleged misrepresentations (*see Continental Ins. Co. v Helmsley Enters.*, 211 AD2d 589 [1995]).

In opposition to defendants' motion, plaintiff argued that it did not waive its right to rescind because its retention of premiums was inadvertent. Plaintiff claimed that its computer system was not designed to reject premiums. Moreover, rejecting premiums could be potentially detrimental to the policy holder in the event the court rejected the insurer's request for a declaration of rescission. Plaintiff further argued that it could not have waived its right to rescind because it lacked the requisite intent, citing its April 22, 2008 letter to the Trust that plaintiff did not intend to waive its rights or remedies.

The trial court, while expressing doubt as to the merit of

plaintiff's arguments, denied defendants' motion, pending further discovery, noting plaintiff's argument that summary judgment was premature as discovery was incomplete.

An insurer's failure to rescind a policy promptly after obtaining sufficient knowledge of alleged misrepresentations by an insured constitutes ratification of the policy (*see S.E.C.*, 147 F Supp 2d at 256). The court in *S.E.C.* rejected the insurers' argument that it was not fully aware of the insured's alleged fraud, noting that "'knowledge which is sufficient to lead a prudent person to inquire about the matter, when it could have been ascertained conveniently, constitutes notice of whatever the inquiry could have disclosed, and will be regarded as knowledge of the facts'" (*id.*, quoting *Union Ins. Exchange, Inc. v Gaul*, 393 F2d 151, 155 [7th Cir 1968]). The insurers in *S.E.C.* were on notice of the insured's alleged misrepresentations for more than one year but chose not to rescind the policies at issue promptly.

Moreover, an insurer that accepts premiums after learning of facts that it believes entitles it to rescind the policy has waived the right to rescind (*see Security Mut. Life Ins. Co. of N.Y. v Rodriguez*, 65 AD3d 1, 7-11 [2009]; *American General Life Ins. Co. v Salamon*, 2011 WL 976411, *3, 2011 US Dist LEXIS 27118,

*9-10 [ED NY 2011, Matsumoto, J.]). An insurer's attempt to reserve its rights while accepting premiums is unenforceable for lack of mutuality (*see Continental Ins. Co. v Helmsley Enters.*, 211 AD2d 589 [1995]). This rule applies even where the insurer claims it accepted premiums after commencing a rescission action to "protect" the insured pending a determination of the action, as is the case here (*see US Life Ins. Co. v Grunhut*, 83 AD3d 528, 529 [2011], citing *Security Mut. Life Ins. Co. of N.Y.*, 65 AD3d at 7-11).

In *Grunhut*, we specifically rejected the insurer's argument that it was protecting the rights of all parties when it continued to accept premiums for months after commencing the rescission action (83 AD3d at 529). Similarly, in *Rodriguez*, we found that by accepting premiums for several months following the commencement of its rescission action, the insurer waived its right to rescind the policy (65 AD3d at 8). In *Salamon*, virtually on point with the case before us, the court found the insurer's argument that it lacked intent to rescind the policy unpersuasive, finding that "[i]ntent is established if the insurer had 'sufficient information' regarding grounds for rescission but chose not to exercise its right to rescind" (2011 WL 976411 at *3, 2011 US Dist LEXIS 27118 at *9). The *Salamon*

court further found compelling the grave inconsistencies in the insurer's conduct, similar to those here, where the insurer had sent a rescission letter that specifically stated that it did not intend to waive any rights and where the insurer sent grace and lapse notices to the insured while maintaining the policy in active status (2011 WL 976411 at *6, 2011 US Dist LEXIS 27118 at *10-11).

Here, plaintiff learned, more than one year prior to commencing this action, that the insured owned no real estate and resided in a neighborhood that had an average median income of $29,625, despite the insured's representations in her life insurance application that she had a net worth of $35-40 million and a household income of $400,000-500,000. Thus, we find that, as early as March 2007, plaintiff had sufficient knowledge of potential material misrepresentations warranting rescission of the policy. However, plaintiff continued to accept premiums and

both sought and accepted a further premium payment following the commencement of this action. Therefore, the insurer's conduct constituted a ratification of the policy and a waiver of its right to rescind (*see S.E.C.*, 147 F Supp 2d at 256-57).

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Freedman, JJ.

4717-
4717A-
4717B &
M-5121

Index 16893/94
17408/94
16954/96

Gloria Doomes, etc.,
Plaintiff-Respondent,

-against-

Best Transit Corp., et al.,
Defendants,

Warrick Industries, Inc., etc.,
Defendant-Appellant.

- - - - -

Ana Jiminian, etc.,
Plaintiff-Respondent,

-against-

Best Transit Corp., et al.,
Defendants,

Warrick Industries, Inc., etc.,
Defendant-Appellant.

- - - - -

Kelli Rivera,
Plaintiff-Respondent,

-against-

Best Transit Corp., et al.,
Defendants,

Warrick Industries, Inc., etc.,
Defendant-Appellant.

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Shaub Ahmuty Citrin & Spratt LLP, Lake Success (Robert M. Ortiz of counsel), for appellant.

Pollack Pollack Isaac & De Cicco, New York (Brian J. Isaac of

counsel), and Kahn Gordon Timko & Rodrigues, P.C., New York (Nicholas I. Timko of counsel), for Gloria Doomes, respondent.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for Ana Jiminian, respondent.

Shramko & DeLuca, LLP, Hudson (Jonathan D. Shramko of counsel), for Kelli Rivera, respondent.

Upon remittitur from the Court of Appeals (17 NY3d 504 [2009]) for consideration of issues raised but not determined in this Court, judgments, Supreme Court, Bronx County (Stanley Green, J.), entered October 25, August 2 and June 20, 2007, after a consolidated trial, insofar as appealed from, awarding damages for past and future pain and suffering as against defendant Warwick Industries, unanimously reversed, on the law, without costs, the judgments vacated, and the matter remanded for a new trial in accordance with this decision.

Plaintiffs were injured when the driver of the bus, operated by defendant Best Transit and manufactured by Warrick, fell asleep while traveling between 60 and 70 miles an hour, causing the vehicle to go down an embankment and roll over several times. The complaint charged, inter alia, that by altering the vehicle's weight distribution and failing to install seat belts in the passenger seating positions, Warrick was negligent in the design, manufacture and construction of the bus and violated the implied

warranty that the vehicle was fit for its intended purpose.

After the companion actions were resolved by stipulation, these actions were consolidated for trial. The jury was asked to determine the relative liability of the bus operator and Warrick in three distinct respects: The verdict sheet asked the panel to assign (1) "the percentage of fault for the accident" (the jury assigned the bus operator 60% and Warrick 40%), (2) "the percentage of fault for the absence of seatbelts" (bus operator 20%, Warrick 80%) and (3) "the percentage of injuries that were caused by the absence of seatbelts" (100%). As a result of the jury's answer to the latter interrogatory, judgments were entered against Warrick for the full amount of the verdict.

The verdict sheet presented to the jury was confusing, and the panel's answers to the interrogatories were inconsistent and contrary to the evidence. It is impossible to reconcile the conflicting allocations of fault. The attribution of 100% responsibility for the injuries sustained to the absence of seatbelts is irrational since the jury attributed 60% of the fault for causing this accident to the driver. It is apparent that the lack of seat belts did not cause the accident. The evidence establishes that the sole precipitating event was the driver's loss of control after falling asleep behind the wheel,

without which the need for seatbelts would not have arisen and their absence would have been rendered academic. Moreover, it is inconceivable that the availability of passenger seatbelts would have resulted in the complete absence of injury, given the severity of the accident, in which the bus went off the road, slid down an embankment before hitting a rock, and then rolled over several times, all attributable to the negligent operation of the vehicle by the bus driver.

Because the absence of seat belts was not a precipitating factor, the 40% fault assessment against Warrick for causing the accident is no longer valid. The jury's assignment of 40% of fault to Warrick can only be attributed to plaintiff's contention that the manufacturer's extension of the vehicle's chassis had redistributed the weight of the vehicle, resulting in the driver's inability to regain control of the bus upon awakening after falling asleep behind the wheel. This theory of liability has since been rejected by both this Court and the Court of Appeals. Under the surviving theory of recovery, responsibility for causing the accident is inexorably attributable to the bus operator. Furthermore, as we have had occasion to point out in the past, the pertinent question to be decided by the jury is not the relative culpability of defendants in causing the *accident*

but their relative culpability in causing the *injuries* complained of (*Rodriguez v Budget Rent-A-Car Sys., Inc.*, 44 AD3d 216, 221 [2007]; *Bustamante v Westinghouse El. Co.*, 195 AD2d 318, 319 [1993]).

A new trial is required to obtain a proper allocation of fault for the injuries sustained as a consequence of the lack of seat belts (as opposed to the negligent operation of the bus) and apportionment of liability under CPLR article 16. In view of this disposition, it is unnecessary to reach Warwick's other arguments.

M-5121 - *Doomes v Best Transit*

Motion for leave to file a supplemental brief and related relief denied.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Andrias, J.P., Friedman, Catterson, Moskowitz, Román, JJ.

4719 Juanita Carmona, Index 25879/03
Plaintiff-Appellant,

George Carmona,
Plaintiff,

-against-

Kevin Ross Mathisson, M.D., et al.,
Defendants-Respondents,

Maple Eye Associates LLP, et al.,
Defendants.

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The Jacob D. Fuchsberg Law Firm, LLP, New York (James M. Lane of counsel), for appellant.

Bartlett, McDonough & Monahan, White Plains (Edward J. Guardaro, Jr. of counsel), for respondents.

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Order, Supreme Court, Bronx County (Dominic Massaro, J.), entered September 4, 2009, which denied plaintiff's motion for a judgment notwithstanding the verdict on liability and a trial on damages, or, in the alternative, to set aside the verdict as against the weight of the evidence, unanimously reversed, on the law, without costs, the verdict set aside, and the matter remanded for a new trial consistent with this decision.

Plaintiff seeks to recover damages for injuries she sustained during cataract surgery performed by defendant Mathisson at defendant Montefiore Medical Center, using an Alcon

Series 20000 Legacy phacoemulsification machine. We previously granted summary judgment to Alcon, the manufacturer of the machine, dismissing plaintiff's claims for strict liability and negligent design and manufacture (54 AD3d 633 [2008]) (*Carmona I*). In so ruling, we found that Alcon sustained its prima facie burden on the motion by submitting an affidavit from its expert, an engineer familiar with the design and manufacture of the machine, who "opined that the product was not defectively designed or manufactured, and that a product defect did not cause [plaintiff's] injuries, positing other possible causes related to human error" (*id.* at 634). We further found that in opposing the motion, plaintiff "failed to exclude all alternative causes for the injury in response" (*id.*).

The action proceeded to trial against the medical defendants and the trial court permitted defendants to elicit testimony that the Alcon machine malfunctioned or contained a design defect. In addition, the court included Alcon on the verdict sheet for the purpose of apportioning liability. We find that this was error.

"'An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of [the] question absent a

showing of subsequent evidence or change of law'" (*Kenney v City of New York*, 74 AD3d 630, 630-631 [2010], quoting *J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809 [2007]). Under the doctrine, parties or their privies are "preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 40 AD3d 1177, 1179 [2007]; *see also Matter of Atlantic Mut. Ins. Co. v Lauria*, 291 AD2d 492, 493 [2002]). Applying these principles, given our determination in *Carmona I* dismissing the products liability claims against Alcon, the trial court erred when it allowed the medical defendants to introduce evidence regarding a design or manufacturing defect in the Alcon Series 20000 Legacy phacoemulsification machine, and when it included Alcon on the verdict sheet for apportionment purposes.

We note, however, that our determination in *Carmona I* does not preclude the medical defendants from presenting a defense based on a claim of unexplained malfunction. In *Carmona I*, we found that Alcon's submissions satisfied its burden of establishing that the machine complied with applicable design and manufacturing standards and that plaintiff failed to exclude alternative causes for the injury. Nothing in our decision

suggests that the machine could not have malfunctioned for a reason other than Alcon's negligent design or manufacture. For example, a defense expert testified at trial that "machines malfunction occasionally. No way to tell in advance, unfortunately." Given such testimony, a jury may determine that the Alcon phacoemulsification machine malfunctioned even in the absence of any design or manufacturing defect.

The errors in allowing testimony as to a manufacturing and design defect and in including Alcon on the verdict sheet were not harmless. Defense counsel argued in summation that "[t]his is an imperfect technology. Sooner or later, somebody is going to get burned by the very principle of the fact that this headpiece gets hot . . . An alarm does not sound until it is completely obstructed which means by then it is too hot . . . a corneal burn takes place . . ." Defense counsel also cited the testimony of Dr. David, an engineer, for the proposition that "the machine begins to get dangerous before the alarm goes off. That's an inherent problem with the machine." Counsel further stated, "I made an argument that the technology in this case is not perfect, that these machines are always being changed to try to make them safer for patients. There are a hundred FDA reports and it is all because of claims that these machines were not

functioning properly at a time that a patient got injured." These arguments clearly point to a defective design or manufacture defense, not an unexplained malfunction.

Further, in its charge, the Court instructed that if you find the medical defendants at fault, "you are then to decide what, if any, or if at all fault lies with Alcon. . . ." The Court continued:

> "Alcon Laboratories is not a defendant in this case and I so charge you. You do not speculate why or draw any conclusion from that fact . . .
>
> "Nevertheless, you may, you're not required to do so but you may consider whether if at all Alcon Laboratories also bears fault here.
>
> "In making the decision you will weigh the degree of fault, if any, of each of the three parties. Once you have considered all of the facts and circumstances you will decide what is fair as a division of that responsib[ility] of each party if you so think it is warranted for causing the injury at hand."

Given the foregoing, there is no way of determining the extent to which the jury was influenced by testimony regarding an alleged design defect or the inclusion of Alcon on the verdict sheet, even if the question was not reached.

Accordingly, the verdict in the medical defendants' favor should be vacated and the matter remanded for a new trial, at which defendants, with respect to the Alcon Series 20000 Legacy

phacoemulsification machine, should be allowed to introduce evidence as to a single instance of unexplained malfunction, but not as to a design or manufacturing defect. Nor should Alcon be included on the verdict sheet for the purpose of apportioning liability.

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

ENTERED: FEBRUARY 14, 2012

CLERK

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

5759- Index 601281/07
5760 Michael Lemle, etc.,
Plaintiff-Appellant,

-against-

Florence Lemle, et al.,
Defendants-Respondents.

- - - - -

Michael Lemle, etc.,
Plaintiff-Respondent-Appellant,

-against-

Florence Lemle, et al.,
Defendants-Appellants-Respondents,

132 West 31st Street Realty Corp.,
Defendant.

_____

Michael G. Lemle, appellant/respondent-appellant pro se.

Levine Lee LLP, New York (Seth L. Levine of counsel), for Florence Lemle, appellant-respondent/respondent.

Friedman Law Group, LLP, New York (Tracey Kitzman of counsel), for Douglas Lemle, appellant-respondent/respondent.

Law Offices of Roger J. Bernstein, New York (Roger J. Bernstein of counsel), for Deanne Lemle Bosnak, appellant-respondent/respondent.

Cohen & Gresser LLP, New York (Brett D. Jaffe of counsel), for 132 West 31st Street Realty Corp., respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 20, 2009, which, to the extent appealed from

as limited by the briefs, granted the individual defendants' motion to dismiss the first amended complaint and the corporate defendant's motion to dismiss the causes of action for common-law dissolution and appointment of a temporary receiver, denied plaintiff's motion for a preliminary injunction prohibiting the individual defendants from using corporate funds to pay their litigation expenses, and granted the individual defendants' cross motion seeking advancement of such expenses, unanimously modified, on the law, to deny defendants' motions to dismiss the causes of action for conversion, breach of fiduciary duty and dissolution, and otherwise affirmed, without costs. Order, same court and Justice, entered July 13, 2010, which, to the extent appealed from as limited by the briefs, granted the individual defendants' motion to dismiss the permanent injunction cause of action in the second amended complaint and denied their motion to dismiss the fraud cause of action, and, upon granting only so much of plaintiff's motion for reargument and renewal as sought reargument of the individual defendants' motion to dismiss the accounting claims in the first amended complaint, denied the individual defendants' motion to dismiss those claims, unanimously affirmed, without costs.

Defendant 132 West 31st Street Realty Corp. is a corporation

owned and managed by the Lemle family. Plaintiff Michael Lemle and his three siblings, defendants Florence Lemle, Douglas Lemle and Deanne Lemle Bosnak, are shareholders, directors and officers of the corporation. Plaintiff and his siblings each owns approximately 4.6% of the corporation's outstanding shares. Nonparty Edna Lemle, the deceased mother of plaintiff and his siblings, also served as a director and was the majority shareholder, holding beneficial ownership of approximately 80% of the corporation's stock.

According to plaintiff, the corporation's principal asset is an underlease for an office building located in Manhattan. Plaintiff contends that although the corporation once actively managed the building, the building is now managed by an independent company, and the corporation is essentially a holding company that receives passive income from the underlease. The corporation's only other assets are securities, gold, and real property, and, according to plaintiff, the income derived from these assets is passive.

Plaintiff and his siblings each receives an annual director's fee of $40,000 and an annual officer's salary of $50,000. Florence Lemle, the corporation's chief financial officer and acting chief executive officer, receives an

additional salary of $125,000. In addition, the corporation has extended loans to plaintiff and his siblings, in various amounts and subject to various terms.

Over time, controversies arose between plaintiff and his siblings with respect to the loan balances, interest rates, due dates and other terms. In June 2004, plaintiff and his siblings each entered into a loan modification agreement with the corporation. In those agreements, the parties agreed that each of the loan balances, "as they will ultimately be determined," will be payable "on the later of" the death of Edna Lemle and distribution of her estate or December 30, 2012.[1]

In 2007, plaintiff brought this action, individually and derivatively as a shareholder, alleging that his siblings have converted millions of dollars from the corporation in breach of their fiduciary duties. Plaintiff alleges, among other things, that they have falsified their corporate loan accounts and other corporate records to eliminate millions of dollars of principal and interest owed by them to the corporation. In addition, plaintiff claims that his siblings have wrongfully transferred corporate assets to themselves and others by way of excessive

[1] After the agreements were signed, Edna Lemle died.

compensation and benefits, reimbursement for inappropriate personal expenses, and salaries or bonuses paid to individuals who performed no work for the corporation.

In the first amended complaint, plaintiff asserted derivative claims against his siblings for breach of fiduciary duty, conversion, fraud, and an accounting. In his individual capacity, plaintiff asserted claims against the corporation for common-law dissolution and the appointment of a temporary receiver, and sought injunctive relief against his siblings. The siblings and the corporation each moved to dismiss pursuant to CPLR 3211(a). In addition, plaintiff sought a preliminary injunction prohibiting the individual defendants from using corporate funds to pay their litigation expenses, and the individual defendants cross-moved pursuant to Business Corporation Law § 724(c) for advancement of those expenses. In a decision and order entered January 20, 2009, the motion court dismissed the complaint in its entirety, but granted leave to replead the fraud and injunction causes of action. The court denied plaintiff's request for a preliminary injunction and granted the individual defendants' cross motion for advancement of their litigation expenses.

The motion court should not have dismissed the conversion

and breach of fiduciary duty claims. Conversion is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights (*Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288-289 [2007]). "Where the property [alleged to have been converted] is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1995]). Thus, conversion occurs when funds designated for a particular purpose are used for an unauthorized purpose (*see Meese v Miller*, 79 AD2d 237, 243 [1981]).

Here, reading the complaint in a light most favorable to plaintiff, the conversion claim is sufficiently stated by, inter alia, allegations that plaintiff's siblings (1) falsified loan documents so as to eliminate millions of dollars in principal and interest they owed to the corporation; (2) used corporate funds to pay for personal vacation, shopping and other non-business-related expenses; and (3) used corporate funds to pay excessive compensation and benefits to themselves and other individuals who did little or no work for the corporation. Likewise, these allegations of self-dealing are sufficient to state a cause of action that plaintiff's siblings breached their fiduciary duties

to the corporation.

At this early stage of the litigation, it cannot be said that those parts of the complaint alleging excessive compensation are barred as a matter of law by the business judgment rule. The business judgment rule prevents courts from inquiring into "actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979]. However, "pre-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where those pleadings suggest that the directors did not act in good faith" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, ___ [2011]).

The complaint alleges that (1) the individual defendants made statements suggesting that there was no legitimate basis for the inflated compensation; (2) when plaintiff proposed an outside auditor, his siblings objected, saying that they would be unable to answer questions about what they did for the company to earn their compensation; and (3) salary and benefits were paid to individuals who did no work at all for the corporation. Given the totality of the allegations of corporate theft and misconduct by the individual defendants, the complaint sufficient states for

pleading purposes that the individual defendants acted in bad faith in setting the challenged compensation (*see Marx v Akers*, 88 NY2d 189, 203-204 [1996]).

The individual defendants contend that the loan modification agreements render plaintiff's claims about the false loan accounts nonjusticiable. Specifically, they argue that because the agreements defer payment of the loans to a future date, the claims are not ripe. We disagree. Although it is true that courts are not empowered to determine hypothetical or remote questions (*Ashley Bldrs. Corp. v Town of Brookhaven*, 39 AD3d 442 [2007]), here, as explicitly recognized in the modification agreements, a present controversy exists. Plaintiff's claims that his siblings altered corporate records to reduce their indebtedness to the corporation do not become nonjusticiable merely because the parties agreed to defer repayment.

Notably, the parties deferred only the date of repayment, not the resolution of all disputes concerning the proper amounts of the loans. The agreements place no restrictions on plaintiff's right to bring an action based on his siblings' alleged wrongful conduct. Although the agreements contemplate repayment of the loan balances "as they will ultimately be determined," nothing in that language, or any other part of the

agreements, precludes the determination of the correct balances in a court action such as this one.

The cause of action seeking the appointment of a temporary receiver was correctly dismissed. "The appointment of a receiver is not a form of ultimate relief that can be awarded in a plenary action, but rather, is limited as a provisional remedy (*see* CPLR 6401[a]) or as an aid in post-judgment enforcement (*see* CPLR 5228)" (*Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680-681 [2005]).

After the court granted leave to replead, plaintiff filed a second amended complaint reasserting a fraud cause of action on behalf of the corporation, and seeking on his own behalf a permanent injunction. The individual defendants again moved to dismiss the complaint, and plaintiff sought reargument and renewal of the earlier motions to dismiss with respect to his other causes of action. In a decision and order entered July 13, 2010, the court dismissed the injunction claim, but denied the motion to dismiss the fraud cause of action as premature.[2]

Plaintiff asserts a derivative claim on behalf of the

[2] The court also granted reargument with respect to the accounting causes of action, and upon reargument, denied the motion to dismiss those claims. The individual defendants do not challenge that ruling.

corporation alleging that the individual defendants committed a fraud against the corporation. To establish fraud, a plaintiff must show a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The allegations that the individual defendants falsified their corporate loan accounts are sufficient to establish a knowing misrepresentation made to the corporation. However, an essential element of fraud is justifiable reliance upon the representations made (*Ross v Gidwani*, 47 AD3d 912 [2008]). The second amended complaint fails to set forth specific facts alleging that the corporation acted, or failed to act, in reliance on the misrepresentations. Thus, as presently pleaded, the fraud cause of action is not sufficiently stated.

Nevertheless, we agree with the motion court that dismissal of the fraud claim at this stage would be inappropriate. CPLR 3211(d) provides a court with discretion to deny a motion to dismiss if it appears that "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3211[d]; *see Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]). Here, plaintiff has set forth a reasonable basis to believe that with additional

discovery, especially access to backup documents concerning adjustments made to the loan accounts, he would be able to develop sufficient facts to establish the reliance element of this fraud claim asserted derivatively on behalf of the corporation.

In the second amended complaint, plaintiff alleges that he has not been provided with full access to corporate books and records, including records of the corporate accountant, documents supporting various adjustments to the loan accounts, and backup documentation for the general ledgers. Plaintiff maintains that he has made unsuccessful requests for these documents which, according to plaintiff, are in the exclusive possession and control of the individual defendants. Plaintiff also submitted a report of an accountant stating that he is unable to conduct an audit of the corporate books in the absence of such documentation. In his report, plaintiff's accountant states that, based on the available records, it appears that the corporation "simply removed" $2.2 million of indebtedness owed by Douglas Lemle alone. The accountant points to numerous other discrepancies in the loan accounts and other corporate records. In light of these specific facts, which are supported by the report of plaintiff's accountant, dismissal of the fraud claim

was not warranted (*see Marcus Dairy v Jacene Realty Corp.*, 245 AD2d 493 [1997]; *Pappas v Pilevsky*, 225 AD2d 394 [1996]).

Likewise, plaintiff's cause of action for common-law dissolution, asserted in the first amended complaint, should not have been dismissed. There is a reasonable basis to believe that further discovery may reveal evidence of egregious conduct necessary to sustain the claim (*see Fedele v Seybert*, 250 AD2d 519, 521-522 [1998]; *see generally Leibert v Clapp*, 13 NY2d 313 [1963]). Denial of the motion to dismiss the fraud and dissolution claims, however, is without prejudice to renewal upon the completion of discovery (*see Halmar Corp. v Hudson Founds., Inc.*, 212 AD2d 505, 506 [1995]; *Cerchia v V.A. Mesa, Inc.*, 191 AD2d 377 [1993]).

Plaintiff's cause of action seeking a permanent injunction was properly dismissed. To plead a cause of action for a permanent injunction, a plaintiff must allege, inter alia, "a violation of a right presently occurring, or threatened and imminent" (*Elow v Svenningsen*, 58 AD3d 674, 675 [2009] [internal quotation marks omitted]). The complaint fails to allege any specific actions taken by the individual defendants to remove plaintiff as an officer or director or otherwise dilute his interest in the corporation. Furthermore, there is no showing

that plaintiff does not have an adequate remedy at law (*see Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596 [2011].

On October 6, 2010, after the entry of both orders on appeal, the motion court directed an accounting of the corporation. The individual defendants argue that the court-ordered accounting moots all of plaintiff's claims relating to the loan balances. Because neither the accounting order, nor the facts and circumstances upon which it was issued, are part of the record on appeal, we cannot consider it (*see Ramirez v New York City Hous. Auth.*, 57 AD3d 231 [2008]). In any event, plaintiff is entitled to plead in the alternative (*see* CPLR 3014, 3017[a]; *Volt Sys. Dev. Corp. v Raytheon Co.*, 155 AD2d 309 [1989]) and pursue his accounting claims and his tort claims simultaneously.

The motion court properly granted the individual defendants' motion for advancement of their reasonable litigation expenses.

The individual defendants have "raised genuine issues of fact or law" (Business Corporation Law § 724[c]) sufficient to be entitled to advancement of their expenses (*see 136 E. 56th St. Owners v Darnet Realty Assoc.*, 248 AD2d 327 [1998]).

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

ENTERED: FEBRUARY 14, 2012

CLERK

Andrias, J.P., Saxe, Sweeny, Acosta, Manzanet-Daniels, JJ.

6279-
6280 Index 350528/06

Judy Herschorn,
Plaintiff-Respondent-Appellant,

-against-

Brian Herschorn,
Defendant-Appellant-Respondent.

_____

Newman & Denney P.C., New York (Louis I. Newman of counsel), for appellant-respondent.

Garr & White, P.C., New York (Ira E. Garr and Jordana Barish of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered March 18, 2011, which, after a hearing, denied defendant's motion for an order declaring him to be the primary custodial parent of the parties' two children for child support purposes, directed a downward modification of defendant's child support obligation in the amount of $500 per child per month, granted plaintiff's motion for an upward modification of the award of maintenance to the extent of extending the award of $2,500 per month for five years, and denied plaintiff's application for an award of counsel fees, unanimously affirmed, without costs. Order, same court and Justice, entered March 22, 2011, which granted plaintiff's application for a judgment in the

amount of $2,291.43, unanimously affirmed, without costs.

Although the children have chosen to spend much of their time with defendant since the parties' divorce, the record shows that their feelings toward plaintiff were influenced and fostered by defendant's expressed hostility toward her (*see Matter of Muller v Muller*, 221 AD2d 635 [1995]), as well as by his acquiring plaintiff's share of the former marital home, further inducing them to stay with him rather than with plaintiff (*see Forrest v Forrest*, 212 AD2d 475 [1995]). The court properly determined that a change in custodial designation was not appropriate (*see Powers v Powers*, 37 AD3d 316 [2007]). No change in custody could, in any event, be ordered as to the older child, who has reached the age of majority (*see Toppel v Toppel*, 67 AD2d 628 [1979]). The court's reduction of defendant's child support obligation by $500 to reflect the practical reality, while denying defendant's application to terminate it altogether, was appropriate (Domestic Relations Law § 236[B][9][b]; *Anonymous v Anonymous*, 286 AD2d 585 [2001]).

Plaintiff demonstrated a substantial change in circumstances warranting an upward modification in maintenance. Contrary to expectations that she would be able to earn an income and re-establish her business now that the children were older, the

business has drained her resources and generated a loss. The court's extension of her $2,500 monthly maintenance for an additional five-year period is appropriate under the circumstances (*see Chalif v Chalif*, 298 AD2d 348 [2002]; *Silverman v Silverman*, 304 AD2d 41, 51 [2003]).

In addition, the court properly determined that plaintiff had no obligation with respect to certain costs associated with an additional mortgage taken on the former marital residence to facilitate defendant's acquisition of plaintiff's interest. These costs were incurred by defendant, and plaintiff did not agree to be responsible for them (*see generally Christian v Christian*, 42 NY2d 63 [1977]).

We decline to alter the motion court's discretionary denial of counsel's fees (*see Kahn v Oshin-Kahn*, 43 AD3d 253, 256 [2007]). Finally, we affirm the court's grant to plaintiff of a

judgment in the amount of $2,291.43, representing sums defendant improperly deducted from support to cover the increase in apartment maintenance costs caused by his unilateral increase in the mortgage.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6542 Joseph Lipari, Index 106047/07
Plaintiff-Respondent-Appellant, 590774/07

-against-

AT Spring, LLC, et al.,
Defendants-Respondents.

- - - - -

AT Spring, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Imperial Woodworking Company,
Third-Party Defendant-
Appellant-Respondent.

_____

Goldberg Segalla, LLP, White Plains (William T. O'Connell of counsel), for appellant-respondent.

Edelman & Edelman, P.C., New York (David M. Schuller of counsel), for respondent-appellant.

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

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered January 5, 2011, which, to the extent appealed from as limited by the briefs, denied third-party defendant Imperial Woodworking Company's motion for summary judgment dismissing the third-party contractual indemnification claim, granted defendant Shawmut Woodworking & Supply, Inc.'s motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes

of action as against it, and denied plaintiff's motion for summary judgment as to liability on his Labor Law § 240(1) cause of action, unanimously modified, on the law, to deny Shawmut's motion and to grant plaintiff's motion for partial summary judgment, and otherwise affirmed, without costs.

The tenant, Longchamp Soho LLC, retained Shawmut as the construction manager/general contractor to renovate the premises for use as a retail store with office space. Shawmut subcontracted with Imperial to furnish and install the interior woodwork. Imperial subcontracted with nonparty Wood Pro Installers, Inc., which employed plaintiff, who was injured while installing decorative wooden beams and panels that were suspended from a permanent second-floor ceiling.

At his examination before trial, plaintiff testified that he was trying to close the seam between two beams with a clamp. He asked his foreman for a Bakers Scaffold, but was told that the scaffolds were in use and that he should use an eight foot A-frame ladder, which plaintiff placed against a wall in a closed position because that was the only way he could use it to reach the area where the seam was located. While turning the clamp, the ladder, which was not held or secured in any way, moved. Plaintiff tried to grab onto the ceiling, but fell sideways with

the ladder. A coworker, Frank Higgins, witnessed the accident and submitted an affidavit which corroborated that plaintiff fell when the ladder slid to the side. Plaintiff's partner on the job, Roy Ramski, testified at his examination before trial that the unsecured ladder had to be used in the closed position due to spatial limitations. He further testified that he was working in the loft area above the dropped ceiling while plaintiff was working on the ladder.

Shawmut's assistant superintendent, David Margulies, drafted an incident report, based on his conversations with plaintiff and other workers, which stated that plaintiff was climbing the ladder to access the cavity between the upper ceiling and the dropped ceiling when he leaned on a section of Masonite that cantilevered approximately four inches over the solid surface. The Masonite did not hold plaintiff, and he lost his balance and fell to the floor. In an Accident Report and Treatment Form, prepared nine to ten days after the accident, plaintiff stated: "Fell off ladder about five feet high from floor. Masonite was placed by someone else on top of c[ei]ling I was working off and over hanged the [ceiling.] I put my hand on it and lost balance and fell."

Margulies did not witness the accident and did not take

contemporaneous notes when he interviewed the witnesses. Although he observed the ladder in the upright position when he arrived at the scene, he did not know if it was open when plaintiff fell or whether the ladder had toppled over. Ramski testified that after hearing a loud thump, he climbed down the ladder and saw plaintiff lying on the floor, with plywood nearby.

Plaintiff's foreman, James Caufield, testified at his examination before trial that plaintiff told him that he was on an unsecured Masonite panel in the loft area of the ceiling, which shifted so that it hung 16-18 inches over the wall. As plaintiff reached out to get onto the ladder, the Masonite gave way and plaintiff fell. Caufield did not recall being asked by plaintiff for a scaffold and testified that even if the request had been made, there would not have been enough room to use one.

Plaintiff is entitled to summary judgment as to liability on his Labor Law § 240(1) claim. The statute was enacted to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site (*see Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490-491 [1995]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [2007], *lv denied* 10 NY3d 710 [2008]) and requires property owners and contractors to furnish

or cause to be furnished safety devices, such as ladders and scaffolds, which are "so constructed, placed and operated as to give proper protection" to construction workers (Labor Law § 240[1]; *see also Klein v City of New York*, 89 NY2d 833, 834-835 [1996]). Although there are different versions of how plaintiff was injured, the accident occurred because plaintiff was not given proper protection to prevent his fall (*see Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 190-191 [2011]). A Labor Law § 240(1) violation proximately caused the accident whether plaintiff's fall was caused by an unsecured A-frame ladder that slipped (*see Siegel v RRG Fort Greene, Inc.*, 68 AD3d 675 [2009]; *Picano v Rockefeller Ctr. N., Inc.*, 68 AD3d 425 [2009]) or an unsecured Masonite-covered office ceiling, used as an elevated work platform, that shifted (*see Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363 [2007]; *Becerra v City of New York*, 261 AD2d 188, 190 [1999]), or whether it happened because plaintiff lost his balance when the unsecured Masonite gave way when he leaned on it as he climbed the unsecured ladder (*see Vukovich v 1345 Fee, LLC*, 61 AD3d 533 [2009]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [2002]; *Yu Xiu Deng v A.J. Contracting Co., Inc.*, 255 AD2d 202 [1998]). This is not a case where plaintiff simply lost

his balance and fell from a secured ladder.

Defendants' submissions did not suffice to raise a fact question as to whether plaintiff's own acts or omissions were the sole cause of the accident (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9-12 [2011]; *Cevallos v Morning Dun Realty Corp.*, 78 AD3d 547, 548 [2010]).

As there is no evidence that the owners or the lessee of the property either supervised or controlled plaintiff's work or had notice of any alleged dangerous condition at the work site, the Labor Law § 200 and common-law negligence claims should be dismissed as against them (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493, 495 [2010]). However, a triable issue of fact exists whether it was Shawmut that created the condition that allegedly caused or contributed to plaintiff's fall.

The subcontract between Shawmut and Imperial provides for indemnification by the latter from "any and all claims . . . arising out of or resulting from any work of and caused . . . by any negligent act or omission of Subcontractor or those employed by it or working under those employed by it at any level." In light of "the language and purpose of the entire agreement and

the surrounding facts and circumstances," this provision clearly includes claims caused by the negligence of Imperial's sub-subcontractor, Wood Pro (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). Thus, the claim for contractual indemnification against Imperial should not be dismissed.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6781 The People of the State of New York, Ind. 1778/09
Respondent,

-against-

Moises Betancourt,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered January 20, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of two years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see*

People v Danielson, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of minor inconsistencies in testimony.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6782 Ronnie Harper, an infant, by his Mother and Natural Guardian, Angela Coleman, et al., Plaintiffs-Respondents, Index 18208/99

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for appellants.

Dubow, Smith & Marothy, Bronx (Steven J. Mines of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered March 31, 2011, which, in an action for personal injuries sustained when infant plaintiff was allegedly wrongfully arrested and detained, denied defendants' motion to dismiss the complaint, and granted plaintiffs' cross motion to deem the notice of claim timely filed nunc pro tunc, unanimously reversed, on the law, without costs, defendants' motion granted, and plaintiffs' cross motion denied. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

General Municipal law § 50-e(5) only vests the court with the discretion to deem a notice of claim timely filed if the motion seeking such relief is made before the statute of

limitations expires (*Pierson v City of New York*, 56 NY2d 950, 954-955 [1982]; *McKie v LaGuardia Community Coll./CUNY*, 85 AD3d 453 [2011]). Here, plaintiffs' claims accrued on June 3, 1998, and the notice of claim was filed on September 2, 1998, one day after the 90 days allotted by General Municipal Law § 50-e(1)(a). Moreover, the statute of limitations for tort claims against a municipal entity is one year and 90 days after the event occurred (*see* General Municipal Law § 50-i [1]). Accordingly, plaintiffs' cross motion, dated August 30, 2010, should have been denied since it was brought well after the statute of limitations for their claims had expired (*see McKie* at 454; *Matter of Goffredo v City of New York*, 33 AD3d 346, 347 [2006]).

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6783-
6784 In re Hezekiah L.,
Petitioner-Respondent,

-against-

Pamela A.L.,
Respondent-Appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Elisa Barnes, New York, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Karin Wolfe of counsel), attorney for the child.

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about January 4, 2011, which awarded permanent custody of the subject child to petitioner, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about November 30, 2010, which vacated an order of guardianship to respondent, and granted petitioner temporary custody of the child, unanimously dismissed, without costs, as nonappealable, and, in any event, as subsumed in the appeal from the January 4, 2011 order.

In this child custody matter, respondent, the child's paternal aunt, was adjudicated the child's guardian on consent of

the parents and had custody of the child for approximately three years prior to petitioner father filing a petition to vacate the order of guardianship and seeking custody of the child. In opposing the petition, respondent failed to establish extraordinary circumstances that "drastically affect" the child's welfare, sufficient to deny petitioner, the biological father, custody of his child (see *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544, 549 [1976]). Although the child lived with respondent for six years, the father maintained contact with the child except when prevented from doing so by respondent, visited the child on a regular basis and provided material support for the child.

Respondent's contention, raised for the first time on appeal, that she was prejudiced by the Family Court's refusal to consider the opinion of the forensic evaluator in connection with the extraordinary circumstances determination is not preserved for appellate review. We note, however, that the court properly exercised its discretion in this regard since the report is relevant only to the best interests determination, which the court never reached since respondent did not establish extraordinary circumstances (*Dickson v Lascaris*, 53 NY2d 204, 208 [1981]; *Matter of Bennett*, 40 NY2d at 548). In any event, the

report is unreliable since respondent concealed from the evaluator repeated incidents of domestic violence in her home.

The court properly exercised its discretion in denying respondent's request to adjourn the hearing upon her failure to appear in person, since the proceedings were already protracted, respondent failed to appear on previous occasions despite court orders, and she had the opportunity to present evidence on the subsequent days of the hearing.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6785 In re Pinchas Knopfler, Index 100637/11
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for appellant.

William E. Leavitt, New York, for respondent.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 19, 2011, which granted the petition to reinstate petitioner's Section 8 housing choice voucher and directed respondent New York City Housing Authority (NYCHA) to restore petitioner's priority for a voucher, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Petitioner's assertion that an unnamed NYCHA employee assured him that moving out of his public housing apartment would have no effect on his priority for a voucher cannot estop the agency from revoking petitioner's priority. Indeed, no discretion was involved in NYCHA's determination that petitioner lost his priority when he vacated the apartment, as this

determination was mandated by the agency's policies (*see Matter of Muhammad v New York City Hous. Auth.*, 81 AD3d 526, 527 [2011]; *see also Matter of Cahill (Rowan Group, Inc.—Commissioner of Labor)*, 79 AD3d 1514, 1514-1515 [2010]).

We have considered petitioner's arguments, including that the matter should be remanded for a hearing or trial and that the agency denied him of due process, and find them unavailing.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6786 The People of the State of New York, Ind. 4655/07
Respondent,

-against-

Rodney Munnerlyn,
Defendant-Appellant.

_____

Bernard V. Kleinman, White Plains, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered March 9, 2009, convicting defendant, after a jury trial, of two counts each of robbery in the first degree and criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's request to present expert testimony on eyewitness identification. The threshold inquiry in considering such an application is "deciding whether the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime" (*People v Santiago*, 17 NY3d 661, 669 [2011]). Here, there were two strong eyewitness identifications, as well as many items of

circumstantial evidence that, when viewed as a whole, provided substantial corroboration.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6787 In re Yung Brothers Real Estate Co., Inc., et al., Petitioners, Index 111986/09

-against-

Robert D. Limandri, etc., et al., Respondents.

Novack Burnbaum Crystal LLP, New York (Howard C. Crystal of counsel), for petitioners.

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

Determination of respondent New York City Department of Buildings, dated August 11, 2009, which ordered petitioners to remove an outdoor advertising sign from their premises, 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 [Walter B. Tolub, J.], entered December 31, 2009), dismissed, without costs.

The ALJ correctly found that, to demonstrate their right to maintain the nonconforming advertising sign on their premises, petitioners were required to show that there was an advertising sign on the premises at the time the ordinance prohibiting advertising signs took effect (*see Matter of Syracuse Aggregate*

Corp. v Weise, 51 NY2d 278, 284 [1980]). The ALJ's determination that petitioners failed to make this showing is supported by substantial evidence.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6788 Linda Strauss, Index 12131/08
Plaintiff-Respondent,

-against-

Babak Saadatmand,
Defendant-Appellant.

_____

Babak Saadatmand, appellant pro se.

Linda S. Strauss, respondent pro se.

_____

Order, Supreme Court, Bronx County (La Tia Martin, J.), entered September 2, 2011, which, to the extent appealed, granted plaintiff's application to enroll the child in a pre-kindergarten in New Jersey, and denied defendant's application to modify the parties' parental access schedule, unanimously affirmed, without costs.

The IAS court's decision directing that the child be enrolled in a pre-kindergarten in New Jersey was a proper exercise of discretion and the record evidence supports the conclusion that such arrangement is in the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The child is primarily residing with the plaintiff in New Jersey and had attended a pre-school in New Jersey the previous year. In addition, plaintiff's mother and sisters are available to pick up

and drop off the child at the school in New Jersey. The child's stability is also served by allowing the child to attend a school close to home.

The IAS court properly exercised its discretion in declining to disturb the parental access schedule, which had been in effect for nearly two years at the time of the ruling. There was no showing of a change of circumstances such that modification was necessary to protect the best interests of the child (*see Matter of Sparacio v Fitzgerald*, 73 AD3d 790 [2010]). We also note that at the time of the ruling the parties were progressing towards a conclusion of the custody trial and a final order on custody was anticipated.

We have considered the parties' remaining arguments, including their requests for sanctions, and find them unavailing.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6789-
6790 John Burton, et al., Index 17566/07
Plaintiffs-Appellants-Respondents, 86180/07
84101/09

-against-

CW Equities, LLC,
Defendant-Respondent-Appellant,

T.F.N. Development Corp. doing
business as East Coast Construction Group,
Defendant-Respondent.

[And Third-Party Actions]

_____

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

Baxter Smith & Shapiro, P.C., Hicksville (Dennis S. Heffernan of counsel), for respondent-appellant.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered October 22, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment as to liability on their Labor Law § 240(1) claim, and denied defendant CW Equities, LLC's motion for summary judgment dismissing the complaint as against it and for conditional summary judgment on its cross claim for indemnification against defendant T.F.N. Development Corp., unanimously modified, on the

law, to grant plaintiffs' motion, and otherwise affirmed, without costs.

Contrary to defendants' contention, the fact that the concrete walkway from which plaintiff John Burton fell was a permanent structure does not remove it from the coverage of Labor Law § 240(1). The walkway provided access to the rear yard of the building under construction, extending over an approximately 15-foot-deep vaulted area below grade level. However, it had no guard rails or other barriers. Thus, "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*see Runner v New York Stock Exch., Inc.*, 13 NY2d 599, 603 [2009]).

Since plaintiff's injury did not arise from the method he used to perform his work, but from a dangerous condition of the workplace, it is not dispositive of his Labor Law § 200 claim that CW Equities did not control the work at the building site (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555 [2009]; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [2008]). Whether CW Equities had the requisite notice of the dangerous condition is an issue of fact raised by its principal's testimony that he visited the site approximately every other day (*see*

Gordon v American Museum of Natural History, 67 NY2d 836 [1986]). Similarly, as to plaintiff's common-law negligence claim, the record presents an issue of fact whether the dangerous condition should have been apparent upon visual inspection (*see Urban*, 62 AD3d at 555).

Although in his bill of particulars plaintiff did not allege a violation of Industrial Code (22 NYCRR) § 23-1.7(b)(1) as a predicate for their Labor Law § 241(6) claim, he identified it in opposition to CW Equities' motion, and CW Equities claims no prejudice from the late invocation of the provision (*see Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560, 560-561 [2010]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 233 [2000]).

The above-discussed issues of fact as to negligence on CW Equities' part preclude summary judgment on its claim for

indemnification (*see Vukovich v 1345 Fee, LLC*, 61 AD3d 533, 534 [2009] [contractual]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011] [common-law]).

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6791 The People of the State of New York, Ind. 1384/10
Respondent,

-against-

Alexander Gonzalez, also known
as Kliti Mohammed,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Linklaters LLP, New York (Elaine K. Lou of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jonathan V. Brewer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered July 22, 2010, convicting defendant, after a jury trial, of grand larceny in the third degree and criminal possession of stolen property in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 3 to 6 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490 [1987]). There was ample evidence that, at the time and place of the theft (*see* Penal Law § 155.20[1]), the value of the stolen property exceeded the $3,000 threshold for third-degree grand larceny and criminal possession of stolen property. This included the testimony of a store

security guard, and a receipt indicating the price tags on the items (*see People v Irrizari*, 5 NY2d 142 [1959]; *People v McLeod*, 43 AD3d 796 [2007], *lv denied* 9 NY3d 1007 [2007]; *People v Trilli*, 27 AD3d 349 [2006], *lv denied* 6 NY3d 899 [2006]). The possibility that the store might have offered the same merchandise at a lower price on some hypothetical occasion does not warrant a different conclusion.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6792 In re Gloria Ortiz,
Petitioner-Appellant,

-against-

Silvino Colon,
Respondent-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

_____

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about December 17, 2010, which, following a fact-finding hearing, in this proceeding brought pursuant to article 8 of the Family Court Act, dismissed the petition seeking an order of protection, unanimously affirmed, without costs.

Dismissal of the petition was appropriate since petitioner failed to establish by a preponderance of the evidence that respondent committed acts that would constitute harassment in the

second degree (Penal Law § 240.26[2]; Family Court Act § 832). There exists no basis to disturb the credibility determinations of the Family Court (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [2009]).

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6794-
6795 Index 603178/09

NYRU, Inc.,
Plaintiff-Appellant-Respondent,

-against-

Forge Restaurant, LLC,
Defendant-Respondent-Appellant.

_____

Lawrence B. Goodman, New York, for appellant-respondent.

Patrick Kevin Brosnahan, Jr., Babylon, for respondent-appellant.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered April 15, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the second cause of action, granted plaintiff's motion for leave to amend the complaint nunc pro tunc to correct defendant's name, and denied defendant's cross motion to dismiss the second cause of action, unanimously affirmed, with costs.

Defendant waived the defense of lack of personal jurisdiction by failing to plead it in its answer and by failing to move to dismiss the complaint on that ground within 60 days after serving its answer (*see* CPLR 3211[a][8], [e]; *Wiebusch v Bethany Mem. Reform Church*, 9 AD3d 315 [2004]). The motion court

properly granted plaintiff leave to amend the complaint to correct defendant's name, since process was served on an employee of defendant, defendant participated in discovery, and no prejudice to defendant from the amendment was demonstrated (*see* CPLR 305[c]; *Rivera v Beer Garden, Inc.*, 51 AD3d 479 [2008]; *Rodriguez v Dixie N.Y.C., Inc.*, 26 AD3d 199 [2006]).

Written correspondence between the parties (signed by the party to be charged), payments made by defendant that are difficult to explain except by reference to the terms of the disputed consulting agreement, and defendant's ledgers showing monthly payments made, present issues of fact whether the parties entered into a consulting agreement (*see Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397 [1977]) and whether the agreement was removed from the operation of the Statute of Frauds (*see* General Obligations Law §§ 5-701[a][1]; 5-703[2]; *Crabtree v*

Elizabeth Arden Sales Corp., 305 NY 48, 55 [1953]; *Steele v Delverde S.R.L.*, 242 AD2d 414, 414 [1997]).

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6796 The People of the State of New York, Ind. 1521/00
Respondent,

-against-

Nathaniel Wilson, etc.,
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 (Frank Glaser of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Bruce Allen, J.), rendered August 25, 2010, as amended September 2, 2010, resentencing defendant, as a second violent felony offender, to concurrent terms of 8 years with 5 years' postrelease supervision, 8 years to life and 4½ to 9 years, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision for defendant's gang assault conviction was not barred by double jeopardy or due process considerations. On October 4, 2002, defendant was convicted of gang assault in the second degree and criminal possession of a controlled substance in the second and third degrees. At the time of the resentencing in 2010, defendant had been incarcerated for more than the eight-

year period of his determinate sentence for gang assault, but was still in custody because of his concurrent life sentence for second-degree drug possession.

Defendant contends that he acquired a legitimate expectation of finality in his sentence by completing the determinate portion of the sentence. A defendant has no legitimate expectation of finality in an illegal sentence while it is being served; that expectation arises once the defendant has completed the sentence and been released (*People v Lingle*, 16 NY3d 621, 630-31 [2011]). In this case, although defendant had served longer than eight years at the time resentencing proceedings were commenced, he had neither completed his sentence, as calculated under Penal Law §70.30(1)(a), nor been released. Under that statute, the maximum terms of the determinate sentence and the indeterminate sentence merge, and are satisfied by discharge of the term that has the longest unexpired time to run (*see People v Buss*, 11 NY3d 553,

557-558 [2009]; *People v Ramirez*, 89 NY2d 444, 450 [1996]). Accordingly, the resentencing was lawful in all respects because defendant is still serving the single merged sentence (*see People v Brinson*, __AD3d__, 933 NYS2d 728 [2011]).

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6797 New York Nightlife, LLC, Index 603740/07
Plaintiff-Appellant,

-against-

Wagner Davis P.C.,
Defendant,

Brian Owens,
Defendant-Respondent.

_____

Law Offices of Edward A. Mermelstein & Associates, New York (Edward A. Mermelstein of counsel), for appellant.

Law Offices of Mangan Ginsberg LLP, New York (Michael P. Mangan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered January 26, 2010, which denied plaintiff's motion to vacate the dismissal of the action for failure to proceed to trial, unanimously affirmed, without costs.

In this contract action, plaintiff's principal, a Russian citizen with a residence in New York, who had been subpoenaed by defendants, failed to appear for trial and the court dismissed the action (*see* CPLR 3215[a]; 22 NYCRR 202.27). Even assuming that a reasonable excuse for the principal's failure to appear was provided, based on his unsubstantiated need to return to Russia to secure an extension of his visa, plaintiff failed to

show that it has a meritorious cause of action (*Biton v Turco*, 88 AD3d 519 [2011]; *Carroll v Nostra Realty Corp.*, 54 AD3d 623 [2008], *lv dismissed* 12 NY3d 792 [2009]). Thus, the court providently exercised its discretion in denying the motion to vacate the default.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6798 Ari Kramer, etc., Index 101978/05
Plaintiff-Appellant,

-against-

Ioannis Danalis,
Defendant-Respondent.

_____

Haynes & Boone, LLP, New York (Kenneth J. Rubinstein of counsel), for appellant.

Schillinger & Finsterwald, LLP, White Plains (Peter Schillinger of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 16, 2011, which granted defendant's motion for summary judgment dismissing the causes of action for breach of fiduciary duty, conversion, constructive trust, unjust enrichment and breach of contract, unanimously reversed, on the law, with costs, and the motion denied.

The general assertions by defendant's and Irving Bush's accountant that, in his review of the general ledgers and banking records, he observed no financial irregularities or unfair conduct by defendant, is insufficient to demonstrate defendant's entitlement to judgment dismissing the specific claims alleged. Thus, plaintiff's obligation to raise an issue of fact in opposition never arose.

We note that the law of the case doctrine has no bearing on the allegations of self-dealing, which are separate from the claim resolved on the prior appeal by our finding that there was no issue of fact as to the existence of a confidential or fiduciary relationship with regard to a 2002 agreement (66 AD3d 539 [2009]). We also note that discovery has not yet been completed.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6800 Gheorghe Nechifor, Index 108080/09
Plaintiff-Respondent,

-against-

RH Atlantic-Pacific LLC, et al.,
Defendants-Appellants.

_____

Malapero & Prisco LLP, New York (Frank J. Lombardo of counsel), for appellants.

The Perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered June 28, 2011, which granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, granted his motion to amend the complaint to increase the ad damnum clause from $5 million to $10 million, and denied defendants' cross motion for summary judgment dismissing the section 240(1) cause of action, unanimously affirmed, without costs.

Plaintiff fell approximately 12 feet as he attempted to descend from the top of a scaffold by climbing down the side frame of the scaffold. Plaintiff made a prima facie showing of defendants' liability under section 240(1) by showing that defendants failed to provide the ladder that was supposed to be

attached to the scaffold, and that such failure was a proximate cause of the accident (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9–10 [2011]).

In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff's own acts or omissions constituted the sole proximate cause of the accident. Even assuming that plaintiff knew that a ladder or other appropriate safety devices were readily available to him, there is no evidence that plaintiff knew that he was expected to use the safety devices for the assigned task (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]).

The motion court providently exercised its discretion in granting the motion to increase the ad damnum clause (*see* CPLR 3025[b]). Defendants are not prejudiced by the proposed amendment (*see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d

18, 23 [1981]).

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: FEBRUARY 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6802N Morrison Cohen, LLP, Index 104100/09
Plaintiff-Appellant-Respondent,

-against-

David Fink,
Defendant-Respondent-Appellant.

_____

Morrison Cohen LLP, New York (Jerome Tarnoff of counsel), for appellant-respondent.

David Fink, Wainscott, respondent-appellant pro se.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 12, 2011, which modified an order, same court and Justice, entered on or about December 7, 2010, "to the extent that it . . . deemed that defendant has complied with the conditions of such order" (conditional vacatur order), and vacated a default judgment against defendant entered January 12, 2010, unanimously reversed, on the law, with costs, and the judgment reinstated.

Plaintiff is correct that the conditional vacatur order was based solely on CPLR 317 grounds. Thus, this Court's conclusion, in its February 2011 order (81 AD3d 467), that defendant failed to demonstrate a CPLR 317 claim for vacatur became law of the case, as "[a]n appellate court's resolution of an issue on a

prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . and operates to foreclose reexamination of the question absent a showing of subsequent evidence or change of law" (*Kenney v City of New York*, 74 AD3d 630, 630-31 [2010][internal quotation marks and citations omitted]). Accordingly, Supreme Court's December 7, 2010 conditional vacatur order was nullified, and the subsequent Supreme Court order on April 8, 2011 and the order appealed from - effectively reinstating the December 2010 vacatur - contravened the law of the case.

Defendant's argument, that the order appealed from was also an exercise of the motion court's discretion based on CPLR 5015(a)(1) (excusable default) and the court's inherent authority (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]), is equally unavailing. Even if we assume that, in the order appealed from, the court held that vacatur was required based on CPLR 5015(a)(1), such holding would itself violate the law of the case, as, in its December 7, 2010 order, the court implicitly, if not explicitly, rejected defendant's CPLR 5015 arguments based on

lack of proper service, and that order was affirmed by this Court.

We have reviewed the parties' remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6803 The People of the State of New York, Ind. 653/06
Respondent,

-against-

Richard Padilla,
Defendant-Appellant.

_____

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

Richard Padilla, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about February 1, 2007,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: FEBRUARY 14, 2012

CLERK

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

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6804 1735 University Avenue Associates LLC, Index 6610/07
Plaintiff-Appellant,

-against-

Andrews Development Corp.,
Defendant-Respondent.

_____

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of counsel), for appellant.

Kral Clerkin Redmond Ryan Perry & Van Etten, LLP, Melville (James V. Derenze of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered April 27, 2011, which, insofar as appealed from, granted defendant's motion for reargument of its cross motion for summary judgment and, upon reargument, granted the cross motion to the extent of dismissing the allegations that refer to defendant's failure to abate the flow of water, including storm water and effluent, from its property onto plaintiff's property and flooding or damaging it, unanimously affirmed, without costs.

The motion court did not improvidently exercise its discretion in granting reargument and determining that it had overlooked or misapprehended the relevant facts in arriving at its prior decision denying defendant's cross motion for summary

judgment in its entirety (*see* CPLR 2221[d]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]). Dismissal of plaintiff's allegations regarding defendant's alleged failure to abate the flow of water was proper since, as plaintiff concedes, the cause of the water run-off from defendant's property to plaintiff's property is not the result of an improvement to defendant's property, but rather is caused by the natural configuration of the land. In opposition to the motion, plaintiff failed to establish that the surface water was diverted by defendants through artificial means (*see Kossoff v Rathgeb-Walsh*, 3 NY2d 583, 589-590 [1958]; *Congregation B'nai Jehuda v Hiyee Realty Corp.*, 35 AD3d 311, 312 [2006]).

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6805 Lizzette Rivera, Index 109199/05
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant,

Manhattan and Bronx Surface Transit
Operating Authority, et al.,
Defendants.

_____

Jeffrey Samel & Partners, New York (David Samel of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Paul E. Feinman, J.), entered February 23, 2010, inter alia, awarding plaintiff, upon a jury verdict on damages, unapportioned principal amounts of $710,000 for past pain and suffering and $1 million for future pain and suffering for 40 years, unanimously modified, on the facts, to vacate the awards for past and future pain and suffering and order a new trial as to such damages, unless plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to a reduction in the unapportioned damages for past and future pain and suffering to $600,000 and $600,000, respectively, and to entry of an amended judgment in

accordance therewith, and otherwise affirmed, without costs.

Defendant's argument that plaintiff's counsel's reference, in summation, to the apportionment of liability warranted a mistrial is unpreserved (*see Lucian v Schwartz*, 55 AD3d 687, 689 [2008], *lv denied* 12 NY3d 703 [2009]). In any event, the jury is presumed to have understood and followed the court's extensive curative instructions (*see Martelly v New York City Health & Hosps. Corp.*, 276 AD2d 373 [2000]).

The trial court's procedure of randomly drawing an alternate juror to substitute for a discharged juror, rather than substituting an alternate juror sequentially according to the designation of alternate jurors, was permissible (*see* CPLR 4106; *Xi Yu v New York Univ. Med. Ctr.*, 4 Misc 3d 602 [2004]).

Plaintiff sustained a tri-malleolar ankle fracture, with dislocation, which required three surgeries and caused tendon and cartilage damage. She continues to have complaints of limitation and pain in her affected ankle and her orthopedic surgeon testified that she had an increased risk of arthritis. The awards for past and future pain and suffering deviate materially

from what would be reasonable compensation to the extent indicated (CPLR 5501[c]; *see e.g. Alicea v City of New York*, 85 AD3d 585 [2011]; *Lowenstein v Normandy Group, LLC*, 51 AD3d 517 [2008]).

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Acosta, Catterson, Richter, Abdus-Salaam, JJ.

6806 In re Nadine L. and Another,

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

Joseph L.,
Respondent-Appellant,

Edwin Gould Services for
Children and Families,
Petitioner-Respondent.

_____

Ira M. Pesserilo, New York, for appellant.

John R. Eyerman, New York, for respondent.

Andrew J. Baer, New York, attorney for the child Nadine L.

Steven N. Feinman, White Plains, attorney for the child Natalie L.

_____

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about September 12, 2008, which, upon a fact-finding of permanent neglect, terminated respondent father's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The

record establishes that the agency made diligent efforts to encourage and strengthen respondent's relationship with his children by referring him to parenting skills training and mental health therapy and by scheduling regular visitation (*see Matter of Sheila G.*, 61 NY2d 368, 384-385 [1984]; *Matter of Fernando Alexander B. [Simone Anita W.]*, 85 AD3d 658, 659 [2011]).

Respondent claims that financial hardship is the real impediment to discharge of the children to him. However, since the time he voluntarily placed the children, he has maintained gainful reliable employment with a salary in excess of $60,000. He has also lived alone in the same two-bedroom apartment since the year the children were born. The record does not contain any evidence of his supposed debts or other financial hardships during that relevant period of time (*compare Matter of Jamie M.*, 63 NY2d 388 [1984]).

A preponderance of the evidence demonstrates that it is in the best interests of the children to terminate respondent's parental rights so as to free them for possible adoption by their foster mother, with whom they have lived for nearly the entirety of their sixteen years (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Respondent opposed termination of his parental rights throughout the proceedings; at no time did he

actually request that they be given to his care. At the dispositional hearing, he indicated that he "might" be ready for their return in a little less than a year. Continuing the children in the foster care system indefinitely, awaiting a possible change in the father's parental attitudes, would not be in their best interests (*see Matter of Joyce T.*, 65 NY2d 39, 49-50 [1985]).

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6807-
6807A-
6807B

Index 116844/06

Dale Kleinser,
Plaintiff-Appellant,

-against-

Mark Astarita, et al.,
Defendants-Respondents.

_____

Dale E. Kleinser, appellant pro se.

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Barry Jacobs of counsel), for respondents.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered July 1, 2010, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 22, 2009, unanimously dismissed, without costs, as untimely. Appeal from order, same court and Justice, entered November 6, 2009, unanimously dismissed, without costs, as taken from a nonappealable paper.

We need not decide the statute of limitations issue, because even if timely commenced, plaintiff failed to raise an issue of fact as to his claims of legal malpractice and breach of contract. Plaintiff's contention that defendants did not place

before the trial court in the underlying action the evidence of his ownership interest in the "47BH Account" is unsupported in the record. The trial court in the underlying action expressly found that plaintiff had a 1/3 interest in the 47BH Account. Moreover, the court explained, in detail, that that 1/3 interest entitled plaintiff to recover only $37,108, not the much greater sums he sought. Plaintiff does not argue that the court's calculation of damages was erroneous or a result of defendants' negligence. Hence, he failed to show that any negligence on defendants' part proximately caused him to recover less than he was otherwise entitled to (*see Brooks v Lewin*, 21 AD3d 731, 734 [2005], *lv denied* 6 NY3d 713 [2006]). To the extent plaintiff argues that defendants did not sufficiently emphasize his ownership in the 47BH account, the argument is unavailing, since an insufficient emphasis would be, "at most, a mere error in professional judgment not rising to the level of legal malpractice" (*see Geller v Harris*, 258 AD2d 421, 421 [1999]; *Rubinberg v Walker*, 252 AD2d 466, 467 [1998]).

As to his breach of contract claims, plaintiff failed to present evidence establishing the term of his alleged oral agreement with defendant Martin Kaplan whereby Kaplan agreed that defendant Gusrae Kaplan & Bruno would prosecute all appeals from the

underlying judgment for no more than $50,000.

The appeal from the June 22, 2009 order was untimely (CPLR 5513[a]). Contrary to plaintiff's argument that the order is brought up for review by an appeal from a judgment (CPLR 5501[a][1]), no judgment has been entered in this action. The November 6, 2009 order, which denied plaintiff's motion for reargument, is not appealable (*Pizarro v Evergreen Estates Hous.*, 5 AD3d 143, 143-144 [2004]).

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: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6808 In re Bahram Benaresh, Index 112629/10
Petitioner,

-against-

New York City Loft Board, et al.,
Respondents.

_____

Belkin Burden Wenig & Goldman, LLP, New York (Joseph Burden of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for New York City Loft Board, respondent.

Hartman, Ule, Rose & Ratner, LLP, New York (David Ratner of counsel), for Annie Nocenti, respondent.

_____

Determination of respondent New York City Loft Board, dated May 20, 2010, which, after a fact-finding hearing, set the legal base rent under the 1982 Loft Law of a loft unit owned by petitioner and occupied by respondent Annie Nocenti, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Anil C. Singh, J.], entered February 2, 2011), dismissed, without costs.

Respondent's order setting the current base rent of the loft unit pursuant to Multiple Dwelling Law § 286(2) and 29 RCNY § 2-06 was supported by substantial evidence, including a copy of the

lease showing the rent most recently paid and accepted by the owner at the time of the enactment of the Loft Law (*see Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). The petitioner, who commenced this rent dispute application, and who had the burden of proof, failed to demonstrate that the Loft Board's order reducing the tenant's rent was not valid because of the tenant's laches, waiver or estoppel. Nor does the statute of limitations of CPLR 213-a apply to units subject to Loft Board rent regulation (*see Matter of Nur Ashki Jerrahi Community v New York City Loft Bd.*, 80 AD3d 323 [2010]).

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6809 The People of the State of New York, Ind. 3911/09
Respondent,

-against-

Kareem Miller,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Fitzpatrick, Cella, Harper & Scinto, New York (Kimberley A. Gavin of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J., at suppression motion; Analisa Torres, at jury trial and sentencing), rendered February 25, 2010, as amended March 17, 2010, 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 seven years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports a reasonable inference that defendant intended to sell the drugs he

possessed (*see e.g. People v Daley*, 281 AD2d 244 [2001], *lv denied* 96 NY2d 827 [2001]). In addition to 17 individual packages of cocaine, defendant possessed $639 in cash, including a large number of $1 bills.

The motion court properly denied defendant's suppression motion without granting a hearing. At defendant's arraignment, the court read into the record a case summary in which the People provided a detailed account of the events leading to defendant's arrest. Defendant's initial and supplemental motions failed to address the People's allegations that defendant engaged in specific conduct that justified the police actions. Accordingly, there was no factual dispute requiring a hearing (*see People v Burton*, 6 NY3d 584, 589-590 [2006]; *People v Jones*, 95 NY2d 721, 729 [2001]).

The court properly exercised its discretion in denying defendant's application to preclude physical evidence on the ground of late disclosure (*see People v Kelly*, 62 NY2d 516 [1984]). Defendant did not establish that he was prejudiced by the People's eve-of-trial disclosure of a voucher form relating to the $639 in cash recovered from defendant. The record establishes that, from the inception of the case, defense counsel anticipated that the People intended to introduce money recovered

from defendant. There is no reason to believe that defendant was either surprised or in any way prejudiced by the late disclosure of the precise amount or denominations of the money.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6811 Hudson Insurance Co., Index 602106/09
Plaintiff-Respondent,

-against-

AK Construction Co., LLC,
Defendant-Appellant,

Panasia Estates, Inc., et al.,
Defendants.

_____

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (Robert M. Milner of counsel), for appellant.

White Fleischner & Fino, LLP, New York (Gil M. Coogler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 19, 2010, which, to the extent appealed from as limited by the briefs, denied defendant AK Construction Co. LLC's motion to dismiss the complaint as against it, unanimously affirmed, with costs.

Contrary to defendant's contention, there is no rule that a subrogation claim can be brought only by impleader under CPLR 1007 (*see e.g. Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172 [2004]). The claim may be brought either as an impleader or by separate plenary action. Indeed, the language of CPLR 1007 is permissive, rather than mandatory, and nowhere

suggests that an impleader action is the only vehicle available to an insurer so situated (*see Krause v American Guar. & Liab. Ins. Co.*, 22 NY2d 147, 152-153 [1968]).

Plaintiff was not bound to wait until its liability was established in the underlying coverage action to bring this lawsuit (*see Allianz,* 13 AD3d at 175). This is true even though this is an action for declaratory relief and not "third-party practice" under CPLR 1007.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6812 In re Romeo Baloy, etc., Index 110568/09
Petitioner-Appellant,

-against-

Raymond Kelly, etc.,
Respondent-Respondent.

_____

Jerold E. Levine, Valley Stream, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Emily Jane Goodman, J.), entered July 23, 2010, which denied the petition seeking, among other things, to annul respondent's determination to refuse to issue a "good guy" letter authorizing petitioner to carry firearms upon retirement, and granted respondent's cross motion to dismiss as time-barred this proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

When petitioner retired on July 28, 2006, he had not obtained the good guy letter that is required to obtain the subject pistol license. In August 2006, the New York City Police Department (NYPD) advised petitioner's wife in writing that his application for the license would be denied because, at the time of petitioner's retirement, he was on restrictive duty and

ineligible to possess firearms. This letter was a "final and binding" determination and petitioner knew or should have known that he was "aggrieved" by it; accordingly, the four-month statute of limitations began to run, at the latest, upon receipt of the letter (CPLR 217[1]; *see also Matter of O'Neill v Schechter*, 5 NY2d 548, 554 [1959]). The court correctly found that the letter dated April 24, 2009 from petitioner's attorney was a request for reconsideration of the agency's determination, and thus did not extend the statute of limitations (*see Matter of Eldaghar v New York City Hous. Auth.*, 34 AD3d 326, 327 [2006], *lv denied* 8 NY3d 804 [2007]). Further, because the letter dated May 6, 2009 from the NYPD reiterated that petitioner did not obtain a good guy letter upon retirement because of his restricted duty status, it was not a "new determination" that would suffice to revive the statute of limitations (*id.*).

The possibility of obtaining administrative relief had been exhausted when petitioner retired without a change in his restricted duty status (*see Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375 [1975]).

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6813 The People of the State of New York, Respondent, Ind. 4053/09

-against-

Maxine Norfleet, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered July 14, 2010, convicting defendant, after a jury trial, of two counts of robbery in the second degree, and sentencing her to concurrent terms of 12 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to concurrent terms of 9 years, and otherwise affirmed.

Defendant challenges the sufficiency of the evidence supporting the physical injury element of one of her robbery convictions (*see* Penal Law § 160.10[2][a]). That claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We also find that the verdict was not against the weight

of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its assessment of the victim's characterization of her injuries (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

The evidence established that defendant and her accomplices assaulted the victim for several minutes in order to take her jewelry. The victim testified that she sustained scrapes, scratches, and bruises, causing significant pain. In addition, the victim sought medical treatment and received prescription-strength pain medication. Accordingly, the jury's verdict was amply supported by the evidence (*see* Penal Law § 10.00[9]; *People v Chiddick*, 8 NY3d 445, 447 [2007]).

We find the sentence excessive to the extent indicated.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6816 In re Gene DeMartino, etc., Index 105059/08
Petitioner-Respondent,

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for appellants.

Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered August 10, 2010, annulling and vacating respondents' determination refusing to pay Anthony Mezzacappa and Orrett (Lennie) Haughton (collectively, the grievants) at the Supervisor Highway Repair (SHR) rates fixed by the New York City Comptroller, and awarding Mezzacappa the total sum of $137,481 and Haughton the total sum of $13,790, unanimously reversed, on the law, without costs, the judgment vacated, the petition denied and the proceeding brought pursuant to CPLR articles 75 and 78 dismissed.

Petitioner commenced this hybrid proceeding on April 4, 2008, to confirm a May 24, 2005 arbitration award and to annul respondents' determination refusing to pay the grievants at the

SHR rates fixed by the city comptroller. The limitations period for actions upon arbitration awards is one year (CPLR 215[5]). Thus, the proceeding is untimely to the extent it is brought under article 75. We reject petitioner's argument that respondents are barred by the doctrine of equitable estoppel from asserting the defense of the statute of limitations.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6817 The People of the State of New York, Ind. 3505/04
Respondent,

-against-

Eduardo Rivera,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about May 4, 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 e.g. People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]). Defendant had an extensive criminal history and a poor prison disciplinary record, and these factors outweighed any

mitigating factors. In particular, defendant had an opportunity to have the underlying drug conviction reduced to a misdemeanor by completing a drug treatment program; instead, he absconded from the program and committed a robbery.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6818 The People of the State of New York, Ind. 2924/10
Respondent,

-against-

Linyan Zou, also known as Kevin You,
also known as Tong Hui You,
Defendant-Appellant.

_____

Kevin Kerveng Tung, P.C., Flushing (Kevin K. Tung of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J. at severance motion; Daniel Conviser, J. at nonjury trial and sentencing), rendered February 8, 2011, convicting defendant of scheme to defraud in the first degree, grand larceny in the third degree (two counts), criminal impersonation in the second degree, criminal possession of a forged instrument in the second degree (two counts), and violation of Administrative Code of the City of New York § 20-771 (eight counts), and sentencing him to an aggregate term of three to nine years, unanimously affirmed.

The court's verdict was based on legally sufficient evidence. We have considered and rejected defendant's sufficiency arguments concerning the elements of each of the

crimes at issue. In particular, the evidence establishes that defendant operated a fraudulent immigration services business (Da Bure). Defendant obtained money in exchange for promised services that he knew he could not provide, and that he had no intention of providing. The evidence also established that, regardless of how the business was organized in corporate form, defendant was the central participant in the scheme and was criminally responsible for the fraudulent conduct. The People demonstrated the "common techniques, misrepresentations and omissions of material facts employed in all transactions" (*People v First Meridian Planning Corp.*, 86 NY2d 608, 616-617 [1995]). Here, defendant and codefendant Chen used the same basic pattern of conduct with each of the clients addressed by the indictment. This included advertising that emphasized that Da Bure could expedite the process, representations of special relationships in the Chinese consulate as well as the USCIS, and fraudulent promises of quick results (*see People v Deangelis,* 186 AD2d 397 [1992], *lv denied* 80 NY2d 1026 [1992]; *see also People v Burks,* 254 AD2d 738, 739 [1998]).

Defendant abandoned his present severance argument (*see People v Ortiz,* 165 AD2d 675 [1990], *lv denied* 76 NY2d 989

[1990]). In any event, the counts of the indictment were properly joined (*see* CPL 200.20[2][b]).

We perceive no basis for reducing the sentence. Defendant's constitutional challenge to his sentence is without merit.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6820 In re Jussi K. Kivisto, Index 104982/10
Petitioner-Appellant,

-against-

NYC Human Resources Administration, et al.,
Respondents-Respondents.

_____

Jussi K. Kivisto, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 7, 2010, denying a petition seeking to, among other things, annul the determination of respondent New York City Human Resources Administration (HRA), dated December 18, 2009, which denied petitioner's Freedom of Information Law (FOIL) request for certain documents concerning Medicaid payments made on behalf of a deceased public assistance recipient, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

HRA's determination denying petitioner's FOIL request was not affected by an error of law (*see Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [2011]). Indeed, the agency demonstrated that the requested

documents are confidential and exempt from disclosure by Social Services Law §§ 136, 367-b(4) and 369(4) (*see* Public Officers Law §§ 87[2][a], 89[5][e]; *see Matter of Rabinowitz v Hammons*, 228 AD2d 369, 369-370 [1996], *lv denied* 89 NY2d 802 [1996]). Petitioner's argument that the confidentiality of the information did not survive the deceased's death is unavailing. Given the foregoing determination, we need not decide whether the requested documents are exempt from disclosure under Public Officers Law § 87(2)(b), an argument that was never raised below.

We have reviewed petitioner's remaining contentions, including that any privacy interest has been waived by public disclosure, and find them unavailing.

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

ENTERED: FEBRUARY 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6821N Rhonda Perez, Index 5140/08
Plaintiff-Respondent,

-against-

John Nevarez,
Defendant-Appellant.

_____

John Nevarez, appellant pro se.

_____

Appeal from order, Supreme Court, Bronx County (La Tia W. Martin, J.), entered March 11, 2010, which denied defendant's motion to compel discovery, unanimously dismissed, without costs, as moot.

The appeal is moot because following the issuance of the order on appeal, the motion court issued an amended order granting defendant the relief he sought, namely directing plaintiff to comply with the demand for compulsory disclosure and notice for discovery and inspection, within 45 days of the amended order.

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

ENTERED: FEBRUARY 14, 2012

CLERK

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

5936- Index 402836/10
5936A In re Clarence Mayfield,
Petitioner-Appellant,

-against-

Andrea Evans, Chairwoman, New York
State Division of Parole,
Respondent-Respondent.

_____

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

Eric T. Schneiderman, Attorney General, New York (Simon Heller of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered March 15, 2011, reversed, on the law, without costs, and the matter remanded for further proceedings consistent herewith. Appeal from order, same court and Justice, entered June 28, 2011, dismissed, without costs, as academic.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
Rolando T. Acosta
Leland G. DeGrasse
Sallie Manzanet-Daniels, JJ.

5936-5936A
Index 402836/10

_____x

In re Clarence Mayfield,
Petitioner-Appellant,

-against-

Andrea Evans, Chairwoman, New York State Division of Parole,
Respondent-Respondent.
_____x

Petitioner appeals from an order and judgment (one paper) of the Supreme Court, New York County (Cynthia S. Kern, J.), entered March 15, 2011, which denied the petition and dismissed the CPLR article 78 proceeding challenging a final determination of the New York State Division of Parole, dated July 21, 2010, affirming the Parole Board's determination that petitioner violated his parole and imposing a time assessment, and from an order, same court and Justice, entered June 28, 2011, which upon reargument, essentially adhered to the original determination.

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

Eric T. Schneiderman, Attorney General, New York (Simon Heller and Benjamin N. Gutman of counsel), for respondent.

ACOSTA, J.

This appeal gives us the opportunity to address the statutory and constitutional validity of the New York State Division of Parole's bifurcated parole revocation process pursuant to 9 NYCRR § 8005.20(c)(6), the regulation establishing such a process for parolees who have been convicted of homicide, sex crimes or kidnapping. We hold that this regulation is a usurpation of legislative prerogative and therefore void. We thus remit this matter to the New York State Board of Parole (Parole Board) so that petitioner may receive a new hearing that is consistent with the strictures of Executive Law § 259-i(3)(f) as well as due process guarantees.

Background

In 1998 petitioner was convicted of manslaughter in the first degree and sentenced to an indeterminate term of 6 to 18 years. That sentence ran concurrently with his 1992 conviction for robbery in the first degree and his 1992 conviction for attempted murder in the second degree.

On October 16, 2008, petitioner was conditionally released to parole supervision. On January 29, 2009, the Division of Parole issued a parole violation warrant and charged petitioner with violating the conditions of his parole. Petitioner was taken into custody immediately and without incident. On April

17, 2009, the Division supplemented petitioner's parole violation report to add an additional charge.

From April 17, 2009 until May 6, 2009, petitioner's counsel negotiated with the Division Deputy Chief Edmund Del Rio and Administrative Law Judge (ALJ) Amy Porter as to an appropriate disposition. After an "intense investigation," the Division concluded that the initial charges were "unfounded." As to the additional charge made on April 17, 2009, Deputy Chief Del Rio offered to recommend an 18 month time assessment in exchange for petitioner's guilty plea.

On May 5, 2009, petitioner's revocation hearing was held. ALJ Porter, who presided over the hearing, agreed to honor the plea arrangement, and recommended to the Parole Board that petitioner next be considered for re-release in 18 months. The initial charges were dismissed, and petitioner pleaded guilty to the additional charge made on April 17, 2009. Additionally, petitioner was given the opportunity to present mitigating evidence regarding his violation of the additional charge.

ALJ Porter's written decision stated that a parole violation had occurred and recommended that petitioner be given an 18 month time assessment. The ALJ further prepared an "Analysis Sheet," which stated that charges 1-6 were "unfounded" and withdrawn. The ALJ did not note petitioner's mitigating evidence in either

her written decision or the Analysis Sheet.

Subsequently, pursuant to 9 NYCRR 8005.20(c)(6), a Parole Board Commissioner issued a decision fixing petitioner's date for consideration of re-release by the Parole Board at 36 months. The Commissioner's one sentence decision noted that petitioner had prior convictions for robbery as well as attempted murder, and that his parole violation occurred only 1½ months after his release.

Following the Commissioner's determination, petitioner filed an administrative appeal challenging the summary parole revocation procedure created by 9 NYCRR 8005.20(c)(6), as well as the 36-month time assessment. On July 21, 2010, the Division of Parole rejected petitioner's challenge to the time assessment on the grounds that (1) petitioner waived his rights by failing to object at the hearing before ALJ Porter, and (2) the Parole Board retained exclusive authority to impose punishment against parole violators.

In October 2010 petitioner filed an article 78 petition challenging the Division's determination. Petitioner argued that the decision made pursuant to 9 NYCRR § 8005.20 (c)(6) was arbitrary, violated Executive Law § 259-i(3)(f)(x), and denied him due process of law. Petitioner requested that the court annul 9 NYCRR 8005.20(c)(6) and/or direct respondent Chairwoman

of the Division to reduce the time assessment to 18 months. In its answer, respondent asserted that due process does not apply to parole revocation determinations once a violation has been found, and that the Executive Law permitted the summary procedure created in 9 NYCRR 8005.20(c)(6).

By order entered March 15, 2011, Supreme Court denied the petition and dismissed the proceeding, finding that (1) the regulation authorizing a single Parole Board commissioner to modify the ALJ's time-assessment recommendation does not violate Executive Law § 259-i(3); (2) the regulation does not violate petitioner's due process rights; and (3) the decision to extend petitioner's time assessment to 36 months was not arbitrary and capricious (*see Mayfield v Evans*, 2011 NY Slip Op 30552[U] [2011]).

Petitioner moved to reargue that part of the court's decision that rejected his argument that § 8005.20(c)(6) violates Executive Law § 259-i(3)(f). In its decision on reargument, Supreme Court again found that the regulation was not "out of harmony" with the statute, supplementing its reasoning with the observation that the statute allows the presiding officer only to "fix a date for consideration by the board," and that this language allows the Parole Board to impose an additional level of review "in the case of certain specified crimes" (*Mayfield v*

Evans, 2011 NY Slip Op 31744[U] [2011]). This appeal followed, and we reverse and remand for the reasons stated below.

Analysis

Generally, the process by which alleged parole violations are adjudicated is governed by Executive Law § 259-i(3)(f). The statutory procedure outlined therein provides that a parolee has the right to confront and cross-examine witnesses (unless there is good cause for the witnesses' nonattendance) and to present witnesses and evidence (§ 259-i(3)(f)[v]). At the close of the hearing, the presiding officer may sustain or dismiss any or all of the violation charges (*see* § 259-i[3][f][viii]). If any violation charges are sustained, the presiding officer must prepare a written statement indicating, among other things, the evidence relied upon and the reasons for the disposition (§ 259-i[3][f][xi]). For each violation found, the officer may, among other things, restore the violator to supervision or direct reincarceration and issue a "time assessment" — i.e., a date upon which a violator becomes eligible for consideration by the Board for re-release (*see* Executive Law § 259-i[3][f][x]).

However, in the case of parolees, such as petitioner, who have been convicted of homicide, sex crimes, kidnapping and related offenses, the time-assessment portion of the parole revocation procedure is governed by 9 NYCRR 8005.20(c)(6).

Pursuant to that regulation, the presiding officer's time assessment for parole violators convicted of these serious crimes is transformed into nothing more than a mere recommendation. The ultimate time assessment for this class of violators is determined by a single member of the Parole Board, and that individual is not bound by the recommendation of the presiding officer (*see People ex rel Larocco v Warden*, 82 AD3d 604, 605 [2011], *lv denied* 17 NY3d 703[2011]; *People ex rel. Coleman v Smith*, 75 AD2d 706, 707 [1980], *lv denied* 50 NY2d 804 [1980]), or any of the strictures of Executive Law § 259-i(3)(f).

Statutory Claim

The Court of Appeals has long held that "[t]he Legislature may authorize an administrative agency to fill in the *interstices* in the legislative product by prescribing rules and regulations *consistent* with the enabling legislation'" (*Matter of Allstate Ins. Co. v Rivera*, 12 NY3d 602, 608 [2009], quoting *Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 865 [2003], quoting *Matter of Nicholas v Kahn*, 47 NY2d 24, 31 [1979] [emphasis added]). In practice, this has meant that "an agency [charged with the enforcement of a statute has been empowered to] adopt regulations that go beyond the text of that legislation, provided they are not inconsistent with the statutory language or its underlying purposes" (*Matter of Allstate Ins. Co. v Rivera*,

12 NY3d 602, 608 [2009], quoting *Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254 [2004]). Nevertheless, such "an agency cannot promulgate rules or regulations that contravene the will of the Legislature" and the express terms of the authorizing statute (*Weiss v City of New York*, 95 NY2d 1, 4-5 [2000], citing *Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471, 480 [1978]; *cf. Bowen v Georgetown Univ. Hospital*, 488 US 204, 208 [1988]).

In ascertaining whether a regulation is consistent with the statute that it is based on, "this Court is faced with the interpretation of statutes and pure questions of law and no deference is accorded the agency's determination" (*Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills*, 4 NY3d 51, 59 [2004]; *cf. Weingarten v Board of Trustees of N.Y. City Teachers' Retirement Sys.*, 98 NY2d 575, 580 [2002]; *Matter of Gruber (New York City Dept. of Personnel - Sweeney)*, 89 NY2d 225, 231 [1996][]); *Matter of Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166, 173 [1988]. "[I]f [a] regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]; *cf. Weiss*, 95 NY2d at 5 [striking down

an administrative agency's regulation for expanding liability in a manner inconsistent with New York State Labor Law]; *Finger Lakes Racing Assn.*, 45 NY2d at 480-481 [striking down an administrative agency's regulation for being in "direct conflict" with the statute]). Any other result would impermissibly allow an administrative agency to invade the legislative province and usurp legislative authority (*see Matter of Gross v New York City Alcoholic Beverage Control Bd.*, 7 NY2d 531, 537-539 [1960]; *cf. Ernst & Ernst v Hochfelder*, 425 US 185, 213-214 [1976, Powell, J.] ["The rulemaking power granted to an administrative agency charged with the administration of a . . . statute is not the power to make law"]).

As previously observed, section 259-i(3)(f) of Executive Law governs revocation proceedings. Prior to 1991, the Executive Law, with respect to time assessments, stated:

> "If the presiding officer is satisfied that there is a preponderance of evidence that the alleged violator violated one or more conditions of release in an important respect, he shall so find. *When the presiding officer is a board member,* he may (A) direct the violator's reincarceration and fix a date for consideration by the board for re-release on parole or conditional release, as the case may be . . . *When the*

> *presiding officer is a hearing officer*, he may recommend to the board the dispositions [provided for in] this subparagraph" (former Executive Law § 259-i [3][f][x] [emphasis added]).

The pre-1991 time assessments made by a non-Parole Board member were only recommendations, subject to Parole Board approval.

In 1991 the legislature amended the statute and eliminated the distinction between time assessments made by a hearing officer who is a Parole Board Member, and time assessments made by a hearing officer who is not part of the Parole Board (*see* L 1991, ch 166, as amended). The current version of the Executive Law states, in relevant part:

> "(ii) *The revocation hearing shall be conducted by a presiding officer who may be a member or a hearing officer designated by the board* . . .
>
> (x) If the presiding officer is satisfied that there is a preponderance of evidence that the alleged violator violated one or more conditions of release in an important respect, he or she shall so find. *For each violation so found, the presiding officer may* (A) direct that the . . . parolee . . . be restored to supervision; (B) as an alternative to reincarceration, direct the . . . parolee . . . be placed in a parole transition facility . . . (C) . . . *direct the violator's reincarceration and fix a date for consideration by the board for rerelease on presumptive release, or parole or conditional release, as the case may be*" (Executive Law § 259-i[3][f] [emphasis added]).

Hence, under the current version of the Executive Law, a hearing officer who is not a Parole Board member may "fix" time

assessments without Board approval, regardless of the underlying conviction.

The Division of Parole regulations, as set forth in 9 NYCRR 8005.20 (c)(6), state:

> "A decision within these guidelines may be made by the presiding officer as a final and binding decision for all categories of violators, other than those serving sentences for [homicide, kidnaping, and sex crimes]. All decisions within these guidelines regarding alleged or adjudicated violators serving sentences for [these particular crimes] must be reviewed by a member or members of the Board of Parole and shall be decided as follows:
>
> "(i) *a single member of the board shall make the final decision that imposes a time assessment*" (emphasis added).

Thus, where a parole violator has been convicted of certain serious crimes, the Division has removed authority from a non-Parole Board member hearing officer to make time assessments.

Respondent argues that Parole Board regulations can easily be read in accord with Executive Law § 259-i(3)(f). First, it argues, the Executive Law provides that a hearing officer "may" enter one of several dispositions, and does not use the directive word "shall." Thus, respondent claims, the regulation does not contravene the plain wording of the statute, as the statute's use of "may" allows the presiding officer to fix a date, but does not require her to do so; and nothing in the statute explicitly prevents her from another unlisted option, such as offering a

recommendation consistent with 9 NYCRR 8005.20(c)(6). Respondent's argument is unpersuasive.

It is true that a regulation adopted by an agency, "in implementation of the statutory scheme it is empowered to enforce, is to be read, if possible, in a manner consistent with, rather than in opposition to, the governing statute" (*see People ex rel. Knowles v Smith*, 54 NY2d 259, 267 [1981]). However, a court cannot contort statutory language and elide legislative intent (*see Matter of Brusco v Braun*, 199 AD2d 27, 32 [1993], *affd* 84 NY2d 674 [1994]; *cf. Osborn v Bank of US*, 9 Wheat. 738, 866 [1824, Marshall, Ch. J.] ["(j)udicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law"]).[1]

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[1]Marshall's proclamation in *Osborn* echoed John Locke's sentiments given 134 years earlier, albeit in support of a constitutional revolution in 17th Century England, but which has provided foundational support for our form of government:

> "legislative [power] is not only the supreme power of the common-wealth, but sacred and unalterable in the hands where the community have once placed it; nor can any edict of any body else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law, which has not its sanction from that legislative which the public has chosen and appointed: for without this the law could not have that, which is absolutely necessary to its being a law, the consent of the society, over whom no body can have a power to make laws, but by their own consent, and by authority received from them." (Locke, The Second Treatise of Civil Government, Ch., XI, ¶ 134 [1690] [footnote omitted]).

Here, the use of the word "may" in the Executive Law indicates that the hearing officer "may" choose from the enumerated list, but it does not indicate that the officer "may" choose some other option not listed by the Legislature. An enumerated list warrants an irrefutable inference that omitted items were intentionally excluded (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 240 [mandating the application of the maxim *expressio unius est exclusio alterius* to the construction of statutes]; *see also New York City Council v City of New York*, 4 AD3d 85, 96 [2004], *lv denied* 4 NY3d 701 [2004]). If there were other options available to the hearing officer, they would have been so listed. Thus, the word "may" is ultimately directive, as it instructs the hearing officer to choose an option from a list that does not include merely recommending a time assessment for serious offenders, as contemplated by 9 NYCRR 8005.20(c)(6).

Respondent also argues that the language in the Executive Law actually makes all of the time assessment determinations advisory to the Parole Board, and is thus in accord with 8005.20(c)(6). The language respondent relies upon for this proposition is that, "in the case of . . . parolees," the presiding officer may "direct the violator's reincarceration and fix a date *for consideration by the board for re-release on presumptive release* . . . ." (Executive Law § 259-i

[3][f][x][C][emphasis added]). Thus, respondent argues, the statute itself contemplates that the hearing officer's time assessment is always subject to Parole Board approval, even in cases where the hearing officer is empowered to set the time assessment. However, the phrase "for consideration by the board for re-release" refers to the future parole proceeding at the end of the term of time assessed, and not the time assessment decision itself. The Executive Law makes it clear that this "consideration by the board for re-release" is an entirely different proceeding, conducted after the time assessment has elapsed and after a required personal interview (Executive Law § 259-i[3][f][x]; *see also* 9 NYCRR 8002.6).

We agree with petitioner that, by enacting 9 NYCRR 8005.20(c)(6), the Division of Parole had changed the procedure for parole proceedings concerning serious crimes back to its pre-1991 state, in direct contravention of the 1991 changes enacted by the Legislature. The Division regulations for serious crimes have the effect of overruling the Legislature's 1991 amendment, which does not require Parole Board approval of time assessments, regardless of the underlying conviction. It must be assumed that the Legislature intended its 1991 amendment to be followed (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 193; *see also People ex rel. Sheldon v Board of Appeals of City of*

N.Y., 234 NY 484, 495 [1923]["We must assume that the law-making body intended to effect a material change in the existing law, otherwise the legislation would be nugatory"]). We therefore hold that 9 NYCRR 8005.20(c)(6) is an invalid usurpation of legislative authority. The Division must bring its regulations into conformity with the Executive Law so that petitioners can receive the kind of hearing that the Legislature intended.

Due Process Claim

Since petitioner is entitled to a new hearing to determine the appropriate time assessment, we must address the constitutional issues in this case to ensure that petitioner receives a hearing that is consistent with due process.

The Supreme Court has held that a prisoner who seeks to obtain future parole has no right to due process, since an inmate's interest in parole "is no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process" (*Greenholtz v Inmates of Neb. Penal and Correctional Complex*, 442 US 1, 11 [1979]). In contrast to a prisoner who merely hopes to be afforded parole, however, a parolee who, after having been granted supervised release, is accused of violating the terms of parole, is accorded due process rights, and the State must afford the alleged violator a meaningful opportunity to be heard (*see Morrissey v*

Brewer, 408 US 471, 484 [1972, Burger, Ch. J.]; *People ex rel. Knowles v Smith*, 54 NY 2d 259, 264 [1981], *supra* ["[T]hough a parolee's liberty is a conditional one, it is a 'valuable' liberty and, as such, it is within the protection of the Fourteenth Amendment"][citation omitted]).

Since parole arises after a criminal conviction, the "full panoply of rights" are not due a defendant in an administrative parole proceeding (*Morrissey*, 408 US at 480). Because the parolee faces the loss of continued liberty, however, there must be an "informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior" (*id.* at 484; *Matter of Tremarco v New York State Bd. of Parole*, 87 AD2d 114, 119 [1982]["The requirement for prompt hearings in parole *revocation* cases grows out of a recognition that, once released, a parolee has a legitimate expectation of continued freedom"], appeal dismissed 58 NY2d 968 [1983]).

Respondent argues that the parole revocation process ends with the hearing officer's recommendation to revoke parole and issue a time assessment such that the violator is no longer a parolee at the point that the Parole Board member issues a time assessment. Effectively, respondent's position is that the

revocation stage requires due process while the time assessment stage does not. There are several reasons why respondent's claim that someone in petitioner's position has no due process rights is incorrect. First, it is not a foregone conclusion, at the point of the time assessment stage of the parole revocation hearing, that the violating parolee will be returned to physical custody and, once again, regain the status of a prisoner with no liberty interest in parole. Second, under *Morrissey,* due process attaches not only to the proof of violation stage of the revocation proceeding, but also to the time assessment stage (*see* 408 US at 488 ["The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation"]). Because *Morrissey* contemplates that a parolee who is determined to have violated parole must still be given an opportunity to argue that revocation is not warranted, this cuts in favor of finding that petitioner was still a parolee when the time assessment was made and thus entitled to due process (*id.; cf. Matter of Miller v New York State Dept. of Corrections and Community Supervision*, 2011 33 Misc 3d 761, 767 [2011] ["defendant's parole was not revoked until his final revocation hearing, comporting with the standards of *Morrissey* and [*People ex rel.*] *Menechino* [*v Warden*, *Green*

Haven State Prison, 27 NY2d 376 (1971)], concluded"][quotation omitted]). Lastly, the *Morrissey* Court not only considered time assessment to be the second step of a two-part process, it considered it the more complex step (408 US at 479-480). It is difficult, in light of the aforementioned language in *Morrissey* about due process (*id.* at 488-489), to conclude that the more complex step does not require due process while the simpler step does.

It is beyond dispute that "[t]he essence of [procedural] due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it" (*Mathews v Eldridge*, 424 US 319, 348 [1976] [internal quotation marks omitted]; *Matter of Quinton A.*, 49 NY2d 328, 334 n [1980]). By any measure, the sweeping grant of authority to a single board member whom petitioner could not address violated petitioner's right to due process of law. The process established in 9 NYCRR 8005.20(c)(6) inappropriately failed to (1) set forth content, procedures, or guidelines to circumscribe the board member's review of a presiding officer's recommendation; (2) establish any standard under which the board member would be authorized to modify a recommendation of the presiding officer who heard from both parties and weighed the relevant information in imposing the time assessment; (3) require

the board member to read, much less review, the record created at a revocation hearing and consider mitigating evidence; (4) require the board member to detail the reasons for the modification; and (5) afford petitioner and/or his counsel an opportunity to be heard by the board member in person or in writing. In short, the regulation at issue here inexcusably deprived petitioner of the opportunity to be heard (*see Morrissey*, 408 US at 488; *cf. People v David W.*, 95 NY2d 130 [2000][holding that the failure to provide the defendant an opportunity to contest an administrative classification that he was a sexually violent predator amounted to a due process violation]; *For the People Theatres of NY Inc. v City of New York*, 84 AD3d 48, 63 [2011][holding that it was improper for Supreme Court to disallow the plaintiffs from presenting their case against an ordinance that could have an adverse impact on their interests]). Moreover, the absence of a detailed decision inappropriately foreclosed the possibility of intelligent review of the Parole Board member's reasons for imposing a particular time assessment (*see Cappiello v New York State Bd. of Parole*, 6 Misc 3d 1010[A], 2004 NY Slip Op 51762[u], *6 [2004]; *Canales v Hammock*, 105 Misc 2d 71, 74 [1980]).

Petitioner may very well deserve the longer 36 month time assessment that the Board member imposed. While we would readily

defer to the Parole Board's determination in this case were we in a position to do so (*cf. Stuyvesant Town-Peter Cooper Vil. Tenant's Assn v Metropolitan Life Ins.*, 12 Misc 3d 1194 [A], 2006 NY Slip Op 51572[u][2006]), we are unable to take such action because the current procedure outlined in 9 NYCRR 8005.20(c)(6) failed to comport with the minimum state and federal constitutional requirements of due process (*see Morrisey*, 408 US at 488; *cf. David W.*, 95 NY 2d at 130; *For the People Theatres of N.Y. Inc.*, 84 AD3d at 63).

In short, petitioner was entitled to a time assessment hearing that was similar in nature to the one that other individuals received under Executive Law § 259-i(3)(f) (*see Morrissey*, 408 US at 488; *cf. David W.*, 95 NY2d at 130; *People Theatres of N.Y. Inc.*, 84 AD3d at 63). That is to say, petitioner had a right to a hearing (1) that was subject to procedures, or guidelines that would govern the board member's review in which (2) he could make his case to someone who would have full cognizance of all the evidence presented in the matter and would be able to consider whether there were any mitigating factors in his favor, and (3) he would be given the reasons justifying the finding of a parole violation and his particular time assessment (*id.*). Ultimately, "[w]hat is needed is an informal hearing structured to assure that . . . the exercise of

discretion will be informed by an accurate knowledge of the parolee's behavior" (*Morrissey*, 408 US at 484). Because the time assessment hearing here was unlawful, we remit this matter to the Parole Board to promptly provide the petitioner with a new hearing, where he will be afforded an opportunity to address the ultimate decision-maker as to an appropriate time assessment in a manner consistent with the Executive Law as well as the state and federal Constitutions (*cf. People ex rel. Gaskin v Smith*, 55 AD2d 1004 [1977]).

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Cynthia S. Kern, J.), entered March 15, 2011, which denied the petition and dismissed the CPLR article 78 proceeding challenging a final determination of the New York State Division of Parole, dated July 21, 2010, affirming the Parole Board's determination that petitioner violated his parole and imposing a time assessment of 36 months, should be reversed, on the law, without costs, and the matter remanded for further proceedings consistent herewith. The appeal from the order, same court and Justice, entered June 28, 2011, which, upon

reargument, essentially adhered to the original determination, should be dismissed, without costs, as academic.

All concur.

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

ENTERED: FEBRUARY 14, 2012

CLERK