SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 16, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6291-
6292 Eli Weinstein, et al., Index 602563/08
Plaintiffs-Appellants,

-against-

Michael Gindi,
Defendant-Respondent.

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The Law Offices of David Carlebach, Esq., New York (David Carlebach of counsel), for appellants.

Heller, Horowitz & Feit, P.C., New York (Martin Stein of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 29, 2009, in favor of defendant on his counterclaims and against plaintiff Eli Weinstein in the aggregate amount of $3,961,792.14, and dismissing the claims asserted by Weinstein, unanimously affirmed, without costs. Judgment, same court and J.H.O., entered June 2, 2010, dismissing the claims asserted by plaintiff Pine Projects LLC and bringing up for review an order, same court and J.H.O., entered June 2, 2010, which, inter alia, granted defendant's motion for summary judgment dismissing Pine Projects' complaint, unanimously

reversed, on the law, without costs, the motion denied and Pine Projects' claims reinstated.

The motion court providently exercised its discretion in striking plaintiff Weinstein's pleading and dismissing his claims based on his willful refusal to appear for deposition in this action (CPLR 3126; *Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [2010]). Weinstein commenced the action in New York County and was ordered to appear for deposition by August 5, 2009. Depositions of parties to an action are generally held in the county where the action is pending; if a party demonstrates that conducting his deposition in that county would cause undue hardship, the Supreme Court in its exercise of discretion can order the deposition to be held elsewhere (*Yu Hui Chen v Chen Li Zhi*, 81 AD3d 818, 818 [2011]; CPLR 3110).

Here, however, Weinstein was capable of coming to New York to be deposed without undue hardship. He simply refused to enter New York because a warrant for his arrest had been issued upon his contempt in an unrelated action. Thus, due to his self-imposed problems, Weinstein willfully disregarded the Court's order to appear in this State for deposition by August 5, 2009. The fact that Weinstein refused to enter New York because he feared being arrested does not establish a hardship warranting relocation of the deposition out of state, such as in *Yu Hui Chen*

(81 AD3d at 819), where plaintiff established that traveling from China to the United States caused an undue hardship, and *Wygocki v Milford Plaza Hotel* (38 AD3d 237 [2007]), where the 76-year-old plaintiff, resident of Northern Ireland, submitted a sworn letter from her doctor identifying her many physical ailments and advising that traveling to New York could cause her further serious health problems.

The October 29, 2009 judgment awarding defendant damages on his counterclaims properly included an award of $1.5 million that was based on a loan defendant made to Weinstein. Defendant, who was the only witness at the inquest, testified that the loan was never repaid, and that although Weinstein had written him a letter in which he agreed to assign an interest in a company to satisfy the loan, the assignment was never effectuated.

Defendant is not entitled to judgment as a matter of law against plaintiff Pine Projects' because he failed to include his answer with his motion for summary judgment as required by statute (*see* CPLR 3212[b]). It is well settled that the failure to attach all of the pleadings is a fatal procedural defect

requiring denial of a motion for summary judgment (*see e.g. Hamilton v City of New York*, 262 AD2d 283 [1999]; *Krasner v Transcontinental Equities*, 64 AD2d 551 [1978]).

In any event, even assuming that defendant had otherwise met his prima facie burden on the motion, Pine Projects' opposition was sufficient to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557 [1980]). In particular, Simcha Shain, a 50% owner of Pine Projects, testified that Pine Projects routinely used nominees for its projects, that all of the properties in the complaint were owned by Pine Projects, that defendant acted merely as nominee with respect to all of the properties in the complaint, including Pine Projects, and that Weinstein funded all of the projects. In addition, Shain's affidavit, submitted at the request of the court, was sufficient to rebut Weinstein's testimony and asset list submitted in another pending action.

Plaintiffs' argument that the motion court improperly denied their motion to renew and reargue the October 29, 2009

judgment is not properly before this Court as plaintiffs failed to file a notice of appeal relating to that judgment.

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

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

ENTERED: FEBRUARY 16, 2012

CLERK

Gonzalez, P.J., Saxe, Moskowitz, Acosta, Freedman, JJ.

6700 Lawrence Williams, et al., Index 305691/08
Plaintiffs-Respondents,

-against-

Andres Perez, et al.,
Defendants-Appellants.

_____

Mead, Hecht, Conklin & Gallagher, LLP, White Plains (Sharon A. Mosca of counsel), for appellants.

Edelman, Krasin & Jaye, PLLC, Carle Place (Jarad Lewis Siegel of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered March 3, 2011, which denied defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to the extent of dismissing the 90/180 day claim, and otherwise affirmed, without costs.

Defendants have established prima facie that plaintiff Lawrence Williams did not sustain a serious injury of a permanent nature. However, plaintiffs have submitted medical evidence in admissible form, including affirmations of two treating orthopedists, both of whom performed surgical procedures on plaintiff Lawrence Williams within the year following his accident and both of whom performed specific range of motion tests before and after the surgeries. This evidence raises

triable issues as to permanent significant or consequential limitations caused by the accident.

Defendants have submitted, inter alia, the affirmed reports of medical experts who, upon examination, found that plaintiff had full range of motion in his shoulders and cervical and lumbar spines and that the MRIs of his neck, back and left shoulder mainly showed degenerative changes (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [2011]). They also submitted plaintiff's testimony that his surgeries were successful, that he continued to lift weights, and that he returned to construction work.

However, in opposition, plaintiffs have raised a triable issue of fact concerning a significant limitation and a permanent consequential limitation with respect to plaintiff's right shoulder. Plaintiff underwent two surgical procedures that were medically related to his accident. The first involved a percutaneous disk ablation for post-traumatic disc disease and lumbar radiculopathy and the second involved arthroscopic surgery to his right shoulder. Contrary to the findings of defendants' experts that plaintiff showed normal range of motion both with regard to his back and shoulder, plaintiffs' experts, Doctors Sebastian Lattuga and Dov J. Berkowitz, both treating orthopedic surgeons, found significantly decreased ranges of motion, and opined that plaintiff continued to have back spasms and weakness

and a permanent consequential limitation of the use of his right shoulder. In duly affirmed statements, Dr. Berkowitz specifically attributed the shoulder limitation to the motor vehicle accident on December 10, 2007 and Dr. Lattuga attributed continued back spasms to the same accident. Although plaintiffs' experts did not expressly address defendants' expert's opinion that the injuries were the result of degenerative changes, by relating the injuries to the accident, plaintiffs' physicians raised triable issues of fact (*Perl v Meher,* 18 NY3d 208 [2011]; *Linton v Nawaz,* 62 AD3d 434 [2009], *affd* 14 NY3d 821, 822 [2010]; *Yuen v Arka Memory Cab Corp.,* 80 AD3d 481 [2011]).

The evidence that plaintiff missed less than 90 days of work in the 180 days immediately following the accident and indeed otherwise worked "light duty" is fatal to the 90/180-day claim (*see Tsamos v Diaz*, 81 AD3d 546 [2011]).

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

ENTERED: FEBRUARY 16, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5247 &
M-1873
M-1903 Anthony S. Sacco, Index 107568/07
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Raymond L. Mylott, Jr., New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 18, 2009, which denied plaintiff's motion for partial summary judgment on the issue of liability, and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the cross motion denied.

In this trip and fall action, the motion court erred in determining, as a matter of law, that the City had not been provided with prior written notice, pursuant to Administrative Code § 7-201(c)(2), of the defective condition upon which

plaintiff fell (*see Bruni v City of New York*, 2 NY3d 319, 326-327 [2004]). Plaintiff made an evidentiary showing that the City received an inspection report, dated November 2004, from its Parks Department, the agency responsible for repairing the subject walkway, showing that "it had knowledge of the condition and the danger it presented" (*id.*). The report serves as an "acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition" (§ 7-201[c][2]; *Bruni* at 326-327). Since the City had notice of a defect and failed to cure it, despite having an opportunity to do so, plaintiff's motion for partial summary judgment on the issue of liability should have been granted.

The motion court also erred in dismissing the complaint upon finding that plaintiff failed to identify precisely the site of his accident. Plaintiff described the location of his accident adequately in his affidavit and his bill of particulars, and submitted an expert engineer's affidavit attesting to the precise

measurement of the accident site.

M-1873 ***Anthony S. Sacco v The City of New York***
M-1903

Motions to enlarge record and to strike reply brief denied.

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

ENTERED: FEBRUARY 16, 2012

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6173 AllianceBernstein L.P., Index 100905/11
Plaintiff-Respondent,

-against-

William Clements,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Louis B. York, J.), entered on or about May 27, 2011,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 30, 2012,

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

ENTERED: FEBRUARY 16, 2012

CLERK

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6513 In re Dorian L.,

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

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

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

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about September 1, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of assault in the second degree, attempted assault in the second degree and criminal possession of a weapon in the fourth degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

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

doubt.

To the extent the court erred in denying appellant's request for a missing witness charge, the error was harmless, as there was overwhelming evidence of appellant's guilt *(see People v Fields*, 76 NY2d 761 [1990]; *People v Abelson,* 27 AD3d 301 [2006]). Appellant's remaining contention is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: FEBRUARY 16, 2012

CLERK

Saxe, J.P., Friedman, Freedman, Abdus-Salaam, JJ.

6738 HSBC Bank USA N.A., etc., Index 380999/07
Plaintiff-Respondent,

-against-

Janet Thomas, et al.,
Defendants,

Maurice Thomas, et al.,
Defendants-Appellants.

_____

Rodman and Campbell, P.C., Bronx (Hugh W. Campbell of counsel), for appellants.

Houser & Allison, APC, New York (Jill S. David of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 8, 2010, which denied defendants Maurice Thomas and Sharon Thomas's motion to vacate a default judgment and a judgment of foreclosure and sale, and to stay the Referee's sale of the subject property, unanimously affirmed, without costs.

The defendants in this foreclosure action include the mortgagor, Janet Thomas, and the property's former owners and current occupants, Maurice Thomas and Sharon Thomas. This appeal concerns the motion by Maurice and Sharon Thomas to vacate the judgment of foreclosure entered against them following their default on plaintiff's summary judgment motion.

While Janet Thomas defaulted by failing to answer the complaint, an answer was served on behalf of Maurice and Sharon Thomas, by attorney Ian Belinfanti. One of the defenses asserted in that answer was a lack of personal jurisdiction; however, inasmuch as no motion was made within 60 days based on improper service of process, that defense must be deemed waived (CPLR 3211[e]). Nevertheless, Maurice and Sharon Thomas contend that the interposed answer must be disregarded and their claim that they were never served must be addressed, because Ian Belinfanti was never retained or authorized to represent them.

We reject their argument. Their submissions fail to justify such a negation of the answer. In order to explain what occurred, they assert that Belinfanti was representing them in a separate dispute with Janet Thomas, and that when they received mail addressed to Janet Thomas, they forwarded it to Belinfanti for him to handle; they suggest that this mail must have been the summons and complaint, and imply that Belinfanti must have interpreted their forwarding it to him as a retention of his services in this foreclosure action. In the face of their acknowledgment that Belinfanti *was* representing them in the

dispute with Janet Thomas, their suggestions and speculation are simply insufficient to permit any possible finding that Belinfanti appeared and filed an answer on their behalf without authorization.

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

ENTERED: FEBRUARY 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6823 Angel Caraballo, Index 302115/08
Plaintiff-Respondent,

-against-

Maria Rivas-Barzola, et al.,
Defendants-Appellants.

_____

McGaw, Alventosa & Zajac, Jericho (Dawn C. DeSimone of counsel), for appellants.

Arnold E. DiJoseph, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered April 1, 2011, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants argue that the record presents only one version of the accident, i.e., that of defendant Ruiz, the operator of the minibus, which shows that they were not negligent. Ruiz testified that while the minibus was stopped at a red light, plaintiff crashed into it and fell to the street. However, plaintiff, who said he did not see the minibus and who was rendered unconscious by the accident, testified that he was walking on the sidewalk before the accident happened. This testimony is sufficient to raise an issue of fact whether Ruiz was negligent.

The motion court properly precluded the evidence of plaintiff's eyewitness to the accident because plaintiff failed to disclose in discovery the eyewitness's identity (*see e.g. Ravagnan v One Ninety Realty Co.*, 64 AD3d 481 [2009]).

Defendant Fuji argues that it was neither the owner nor the operator of the minibus and therefore cannot be vicariously liable for plaintiff's injuries (*see* Vehicle and Traffic Law § 388). However, Fuji concedes that it was the insurer of the vehicle. It does not explain how it could have insured a vehicle it neither owns nor operates. But "[o]wner" is defined to "include[] a person entitled to the use and possession of a vehicle" (Vehicle and Traffic Law § 128), and Ruiz testified that he operated the vehicle on the night of the accident under a license to carry passengers in New York issued to Fuji. Moreover, Ruiz testified that he was employed by Fuji at the time of the accident. This testimony raises an issue of fact whether Fuji was "entitled to the use and possession" of the vehicle.

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

ENTERED: FEBRUARY 16, 2012

CLERK

Freedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6824-
6824A- Mirta E. Ramirez, as Executrix of the Index 6448/06
6824B   Estate of Narciza Torres,
        Plaintiff-Appellant,

-against-

Alcedo Cruz, M.D., et al.,
Defendants-Respondents,

Fordham Medical Complex, et al.,
Defendants.

_____

Galasso, Langione, Catterson & LoFrumento, LLP, Garden City (James R. Langione of counsel), for appellant.

Schiavetti, Corgan, DiEdwards & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for Alcedo Cruz, M.D., respondent.

Bartlett, McDonough & Monaghan, LLP, White Plains (Adonaid C. Medina of counsel), for Francisco Bautista, M.D., respondent.

Westermann Sheehy Keenan Samaan & Aydelott, LLP, White Plains (Kenneth J. Burford of counsel), for Robert Plummer, M.D., respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered January 11, 2011, which, to the extent appealed from, granted the motion of defendant Alcedo Cruz, M.D. for summary judgment dismissing the complaint, unanimously affirmed, without costs. Judgments (same court and Justice), entered February 7, 2011, dismissing the complaint against defendants Francisco Bautista, M.D. and Robert Plummer, M.D., unanimously affirmed,

without costs. Appeal from the order entered January 11, 2011, to the extent it granted Dr. Bautista's and Dr. Plummer's motions for summary judgment dismissing the complaint, unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

In this medical malpractice action, plaintiff, as executrix of the estate of Narciza Torres, alleges that defendants-respondents doctors departed from good and accepted medical practice by failing to timely diagnose Torres with colon cancer, which had metastatized to her liver and caused her death. Defendants-respondents met their prima facie showing that they did not depart from good and accepted practice by submitting their deposition testimony, plaintiff's hospital and medical records, and their detailed affidavits showing that their treatment of plaintiff complied with good and accepted standards of medical practice (*see Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2008]; *Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [2001]).

Plaintiff failed to raise triable issues of fact. The expert affidavit of her hematologist/oncologist stating that defendants deviated from good and accepted practice lacked supporting facts and, therefore, was conclusory (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). The expert

affidavit of her internist/gastroenterologist, whose name has been redacted, was similarly conclusory, and also was flawed by its misstatements of the evidence and unsupported assertions (*see Wong v Goldbaum*, 23 AD3d 277 [2005]).

We have reviewed the remaining contentions and find them to be unavailing.

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

ENTERED: FEBRUARY 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6825 Dylan Stephens, Index 118106/06
Plaintiff-Appellant,

-against-

Skanska USA Building, Inc., et al.,
Defendants-Respondents,

STV Incorporated, et al.,
Defendants.

_____

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellant.

Cozen O'Connor, New York (Vincent P. Pozzuto of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 6, 2010, which granted defendants Skanska USA Building, Inc. and Skanska USA Construction Services, Inc.'s (defendants) motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established that they did not have notice of an unsafe environment or dangerous condition at the site where plaintiff worked from February 2005 through July 2005 (*see Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 596 [2010]). The reports they submitted by environmental assessment entities that conducted testing at the site years before and after plaintiff worked there indicate that, where toxins or contaminants were

present, they fell "well below hazardous levels."

Defendants also established that plaintiff did not suffer an exacerbation or accelerated progression of his chronic myeloid leukemia (CML) as a result of his exposure to conditions at the site. Plaintiff's own medical records demonstrate that his CML was in "complete hematologic remission" as of March 2006.

Plaintiff failed to present evidence that raised an inference either that defendants had notice of an unsafe environment or dangerous condition at the site or that he was injured as a consequence of working at the site.

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

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

ENTERED: FEBRUARY 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6826 Larry Carr, Index 104602/10
Plaintiff-Appellant,

-against-

Pamela D. Hayes, etc., et al.,
Defendants-Respondents,

Regina L. Darby, etc.,
Defendant.

_____

Larry Carr, appellant pro se.

Pamela D. Hayes, New York, respondent pro se and for Christina Clements, respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 21, 2011, which, insofar as appealed from as limited by the briefs, granted the motion of defendants Hayes and Clements to dismiss the complaint as against them, unanimously affirmed, without costs.

Plaintiff's conclusory allegations that his ex-wife, Clements, and her divorce attorney, Hayes, who also represented plaintiff in the sale of the couple's home, defrauded plaintiff out of his share of the proceeds of that sale, are insufficient to state a cause of action sounding in fraud and breach of trust (*see* CPLR 3016; *see generally Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). Moreover, plaintiff's unsupported assertions that all of the documentation regarding

the sale of the home, submitted to the court below, was "fraudulent," "false" and "staged," are insufficient to defeat the motion to dismiss plaintiff's claims for fraud, conversion and legal malpractice (*see* CPLR 3211[a][1]).

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 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6827- Wells Fargo Bank, Index 600356/10
6827A National Association, etc., et al.,
Plaintiffs-Appellants,

-against-

GSRE II, Ltd., et al.,
Defendants-Respondents.

_____

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for appellants.

Cadwalader, Wickersham & Taft LLP, New York (Patrick T. Quinn of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 2, 2010, dismissing the complaint with prejudice, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered November 17, 2010, which granted defendants' motion to dismiss the complaint, and denied as moot plaintiffs' cross motion to compel discovery, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly dismissed the complaint upon finding that the documentary evidence conclusively established defendants' right to sell the mortgage loan, in its entirety, without plaintiffs' consent – the very act which plaintiffs contest (*see JFK Holding Co., LLC v City of New York*, 68 AD3d

477, 477 [2009] ["factual claims, which are . . . flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency"]).

The court also properly dismissed plaintiffs' equitable claims. Plaintiffs failed to show that they would suffer irreparable harm absent an injunction preventing sale of the mortgage loan (*see Broadway 500 W. Monroe Mezz II LLC v Transwestern Mezzanine Realty Partners II, LLC*, 80 AD3d 483, 484 [2011] [loss of investment can be compensated by damages, thus cannot be used to establish irreparable harm]). Moreover, the claim for declaratory relief was also properly dismissed, in light of the assertion of the breach of contract claim (*see Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 358 [2006] ["plaintiff may not seek a declaratory judgment when other remedies are available, such as a breach of contract action"]).

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 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6828 The People of the State of New York, Respondent, Ind. 3670/08

-against-

Anthony Toxey, Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Dov Gold-Medina 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 (Edward J. McLaughlin, J.), rendered March 3, 2009, as amended November 12, 2009, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fifth degrees, criminal possession of marihuana, and three counts of criminal use of drug paraphernalia in the second degree, and sentencing him, as a second felony drug offender, to an aggregate term of 11 years, unanimously affirmed.

Defendant did not preserve his challenge to the court's use of hypothetical examples in its supplemental instructions on constructive possession, and we decline to review it in the interest of justice. As an alternative holding, we find that the court provided a meaningful response to the jury's request for further instructions on the issue (*see People v Malloy*, 55 NY2d

296 [1982], *cert denied* 459 US 847 [1982]). The court's use of a set of hypotheticals was balanced and fair to the positions of both sides, and the court did not signal any opinion on the question of guilt or innocence (*see People v Leach*, 6 AD3d 238, 239 [2004], *lv denied* 3 NY3d 643 [2004]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6829-
6830 Carlton MacKay, Index 101934/08
Plaintiff-Appellant,

-against-

Edward C. Yoon, et al.,
Defendants-Respondents.

_____

Bamundo, Zwal & Schermerhorn, LLP, New York (Michael C. Zwal of counsel), for appellant.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered May 20, 2010, which, to the extent appealed from, provided for payments from a qualified settlement fund in the amount of $9,470.77 for disbursements to plaintiff's counsel, $22,500 in compensation to the settlement fund's administrator, $6,110 in compensation to counsel for the settlement fund, $0 to Plaintiff's Solutions, and directed the administrator to purchase an annuity for the benefit of plaintiff in the amount of $1,050,000 to be paid in monthly installments of $6,999.12 beginning July 1, 2010 for life with 15 years certain, unanimously modified, on the law and the facts, to the extent of increasing the award for disbursements to plaintiff's counsel to $17,975.77, vacating the award of $22,500 to the settlement fund administrator, reducing the award to the settlement fund's counsel to $3,000, awarding Plaintiff's Solutions $4,500, and

restating the terms of the structured settlement, *nunc pro tunc*, to reflect an actual monthly annuity payment of $6,680.90, the matter remanded to a different justice for a determination of the fund administrator's fee, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered June 27, 2011, which, to the extent appealed from as limited by the brief, denied plaintiff's motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable paper.

By Amended Order, dated March 16, 2010, after plaintiff settled this personal injury action for $2,250,000, Supreme Court approved plaintiff's application to establish a qualified settlement fund, into which the settlement proceeds were to be deposited, and appointed an administrator as well as legal counsel. In or about April 2010, following resolution of the Medicare and Medicaid liens, plaintiff and his counsel submitted a proposed order providing for distribution of the settlement proceeds, previously approved by the fund's administrator and counsel. At an April 28, 2010 conference before the court, plaintiff confirmed his understanding and approval of the requested disbursements.

The motion court abused its discretion in granting a $22,500 award to the settlement fund's administrator because the amount is arbitrary and not supported by the record. No evidence was

submitted to permit a valuation of the administrator's services, such as an hourly rate and time expended or bill for services rendered or those expected to be rendered (*see Flemming v Barnwell Nursing Home and Health Facilities, Inc.*, 56 AD3d 162, 167 [2008], *affd* 15 NY3d 375 [2010]). The award to the fund's counsel should be reduced as indicated to reflect her actual charges as demonstrated in the record and as consented to by Ms. Meyers.

The disbursements made by plaintiff's counsel were agreed to by plaintiff and were provided for in the retainer agreement pursuant to which plaintiff permitted counsel to incur and deduct from the gross recovery expenses for "services chargeable to the claim or prosecution of the action," with liens chargeable to plaintiff. Thus, the disbursements made by counsel on plaintiff's behalf in connection with this litigation, including the amount paid to Plaintiff's Solutions, a company retained by counsel to aid in the resolution of the outstanding liens resulting from plaintiff's extensive medical care, were properly incurred and payable from the settlement fund pursuant to the retainer agreement. Notably, plaintiff never objected to the disbursements, and to the contrary, submitted an affidavit in which he asserted that he understood and accepted the payments set forth in the proposed order.

To the extent the motion court erred in setting the monthly annuity payment, we correct the amount to reflect the agreed upon payment of $6,680.90.

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

ENTERED: FEBRUARY 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6831 Sterling Resources International, LLC, Index 602906/09
Plaintiff-Appellant,

-against-

Leerink Swann, LLC,
Defendant-Respondent.

_____

Sack & Sack, New York (Jonathan Sack of counsel), for appellant.

Curley, Hessinger & Johnsrud LLP, New York (Michael A. Curley of counsel), for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 14, 2010, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the first cause of action pursuant to CPLR 3211(a)(1), unanimously modified, on the law, to deny the motion with respect to so much of the first cause of action as seeks $300,000 for finding a Head of Investment Banking, and otherwise affirmed, without costs.

The amended complaint alleges, "Pursuant to the Retainer Agreement, [defendant] retained [plaintiff] to be its exclusive recruiting firm in its search to identify, recruit and hire a Head of its Investment Banking division *and other investment banking professionals*" (emphasis added). However, the provisions of a contract "prevail over conclusory allegations of the

complaint" (*805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]). Read as a whole, the Retainer Agreement clearly refers only to the hiring of a Head of Investment Banking (*see e.g. Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]; *Kass v Kass*, 91 NY2d 554, 566 [1998]).

The Retainer Agreement is not ambiguous, because plaintiff's interpretation – that the contract applies to individuals other than a Head of Investment Banking – is not reasonable (*see e.g. Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). By contrast, defendant's interpretation – that the Multiple Hires provision of the agreement would apply if defendant ended up hiring co-Heads of Investment Banking – accords with the overall purpose of the contract (*see e.g. Kass*, 91 NY2d at 567).

Plaintiff may not use extrinsic evidence to create an ambiguity in the Retainer Agreement (*see e.g. W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]).

Although defendant's interpretation of the Retainer Agreement is correct, the first cause of action should not have been dismissed in its entirety. The parties agree that defendant owes plaintiff $450,000 for the Head of Investment Banking whom

plaintiff found for defendant and whom defendant hired. The documentary evidence shows that defendant has paid only $150,000. Therefore, plaintiff has a breach of contract claim for the remaining $300,000.

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

ENTERED: FEBRUARY 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6832 Longina Gifford, as Administratrix of the Estate of Thomas Markoski,
Plaintiff-Respondent,

-against-

Commerce Bank, et al.,
Defendants-Appellants. Index 112522/08

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White and Williams LLP, New York (Michael J. Kozoriz of counsel), for Commerce Bank, appellant.

Gallo Vitucci & Klar, LLP, New York (Kimberly A. Ricciardi of counsel), for First Quality Maintenance, L.P., appellant.

Greenstein & Milbauer, LLP, New York (Andrew Bokar of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 14, 2011, which, in an action for personal injuries, denied defendants' motions for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the motion granted.

Defendants' motions for summary judgment should have been granted because they demonstrated that they lacked actual or

constructive notice of the alleged dangerous condition, and plaintiff's decedent's deposition testimony was insufficient to raise a triable issue of fact as to whether the cleaning contractor caused or created the condition.

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

ENTERED: FEBRUARY 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6833 The People of the State of New York, Ind. 3573/07
Respondent, 6511/07

-against-

Lawrence Jones,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about February 2, 2010,

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 16, 2012

CLERK

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

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6835-
6836 Carmen Cintron, Index 21705/05
Plaintiff-Appellant,

-against-

Montefiore Medical Center,
Defendant-Respondent.

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The Pagan Law Firm, P.C., New York (William Pagan of counsel), for appellant.

Widowski Law Group, LLP, New York (Esther S. Widowski of counsel), for respondent.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered September 15, 2010, which, in an action alleging medical malpractice, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 15, 2011, denying plaintiff's motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable order.

Defendant established its entitlement to summary judgment by showing that the treatment provided to plaintiff comported with good and accepted medical practice (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Defendant submitted the affirmations of experts who concluded, based on the medical records and the deposition testimony of plaintiff and her treating doctors, that

plaintiff's kidney disease was not caused by defendant's failure to discontinue certain medications prescribed to her to treat her rheumatoid arthritis. The experts opined that the low doses of medications did not contribute to the development of plaintiff's kidney disease, and they were timely discontinued to rule them out as potential causes of the disease (*see Tierney v Girardi*, 86 AD3d 447, 448 [2011]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's expert failed to demonstrate that there was any correlation between the doses of medication prescribed for plaintiff and her kidney disease (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Moreover, plaintiff's affidavit, wherein she stated that she was not adequately advised in a timely manner of the necessity of a renal biopsy, was contradicted by her deposition testimony where she acknowledged that defendant appropriately and timely recommended and discussed with her a biopsy to diagnose the cause of her kidney disease, but she consistently refused the procedure. It is well established that "[a]ffidavit testimony that is obviously prepared in support of litigation that directly contradicts deposition testimony previously given is insufficient to defeat

[a] motion for summary judgment" (*Beahn v New York Yankees Partnership*, 89 AD3d 589, 590 [2011]; *see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]).

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 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6838 The People of the State of New York, Ind. 1557/02
Respondent,

-against-

Louis Ruthledge,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered February 10, 2009, resentencing defendant to an aggregate term of 23½ years, with 2½ years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: FEBRUARY 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6839- Base Village Owner LLC, Index 651222/10-E
6840 Plaintiff-Appellant-Respondent,
6841
6842 -against-
6843
Hypo Real Estate Capital Corporation, et al.,
Defendants-Respondents-Appellants.

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Katsky Korins LLP, New York (Adrienne B. Koch of counsel), for appellant-respondent.

Cooley LLP, New York (Celia Goldwag Barenholtz of counsel), for respondents-appellants.

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Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered February 9, 2011, which granted defendants' motion to dismiss the cause of action seeking damages for breach of contract and denied the motion with respect to the causes of action for injunctive and declaratory relief, unanimously modified, on the law, to the extent of dismissing the causes of action for declaratory judgment and injunctive relief, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

The limitation of remedies provision in the parties' loan agreement was properly construed as clearly, explicitly and unambiguously barring plaintiff's claim for damages based on allegations that defendants' agent unreasonably withheld or delayed approval of the documentation upon which defendants'

obligation to extend the loan was conditioned (*see e.g. L.K. Sta. Group, LLC v Quantek Media, LLC*, 62 AD3d 487, 493 [2009]). In light of defendants' alleged economic self-interest, the provision was not rendered ineffective by allegations of misconduct that "smack" of intentional wrongdoing or willful, malicious or bad faith conduct (*see Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 438-439 [1994]; *see also e.g. Diplomat Props., L.P. v Komar Five Assoc., LLC*, 72 AD3d 596, 597-598 [2010], *lv denied* 15 NY3d 706 [2010]).

However, the claim for declaratory judgment relief based on defendants' alleged defaults should have been dismissed based upon the provision stating that plaintiff's obligation to make payment on its loan debt was independent of defendants' performance of their obligations (*see Rosenthal Paper Co. v National Folding Box & Paper Co.*, 226 NY 313, 319-320 [1919]). Because we need not reach the merits of the declaratory judgment claim (i.e., whether the defendants were in default), dismissal of the claim, rather than a declaration in favor of defendants, is appropriate (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]; *Matter of Powell v Town of Coeymans*, 238 AD2d 788, 789 [1997]). As to the claim for injunctive relief as the parties stated at oral argument, it is moot since foreclosure has taken place.

We have considered the parties' other contentions and find them unavailing.

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

ENTERED: FEBRUARY 16, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6845 The People of the State of New York, Ind. 3596/09
Respondent,

-against-

Diana Montague-Griffin,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York (Thomas Farber, J.), rendered on or about April 20, 2010,

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 16, 2012

CLERK

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

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6846N Benita Ayala, Index 14078/05
Plaintiff-Appellant, 15189/06

-against-

Lincoln Medical & Mental Health Center, et al.,
Defendants-Respondents.

- - - - - -

Benita Ayala,
Plaintiff-Appellant,

-against-

Dr. Avinash Jadhav, etc., et al.,
Defendants-Respondents.

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

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered July 8, 2010, which, in this consolidated medical malpractice action, to the extent appealed from as limited by the briefs, denied plaintiff's motion to strike defendants' answers, unanimously affirmed, without costs.

Striking the answers would have been inappropriate, given the lack of a clear showing that defendants' failure to comply with discovery orders was willful, contumacious, or in bad faith (*see Delgada v City of New York*, 47 AD3d 550 [2008]). Indeed, there is evidence in the record that defendants attempted to

comply with their disclosure obligations, but did not possess the requested discovery pertaining to plaintiff's total knee replacement surgery (*see Scott v King*, 83 AD3d 510, 511 [2011]; *see also Harris v City of New York*, 211 AD2d 662, 663 [1995]). In light of the strong preference that matters be decided on the merits (*Banner v New York City Hous. Auth.*, 73 AD3d 502, 503 [2011]), the court providently exercised its discretion in imposing a less drastic sanction (*see Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1999]).

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 16, 2012

CLERK

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

6366 In re Lonique M.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about January 3, 2011, affirmed, without costs.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Helen E. Freedman
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

6366

_____x

In re Lonique M.,

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

_____x

Lonique M. appeals from an order of disposition of the Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about January 3, 2011, which adjudicated him a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal trespass in the second degree, and placed him on probation for a period of nine months.

Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio, Steven Banks and Eileen Malunowicz of counsel), for appellant.

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

RICHTER, J.

In this juvenile delinquency proceeding, the evidence at the fact-finding hearing established the following. On January 2, 2010, at approximately 9:20 p.m., Police Officer Salvatore Tevere and his partner arrived at 2230 Grand Concourse, a six-floor residential apartment building in the Bronx containing "many apartments" on each floor. The building was part of the "Clean Halls" program, where police officers have the right to enter the building to check whether illegal activities are being conducted inside. The entrance to the building was secured by an iron gate requiring the use of a key or a buzzer entry; there was also a separate front door.

The officers entered the building to conduct a "vertical" patrol, which entailed going to the top floor and checking the building, floor by floor, for "illegal activity of people looting in the building [or] trespassing." After making sure the lobby was clear, Officer Tevere and his partner waited for the elevator. When the elevator doors opened in the lobby, Officer Tevere observed appellant and another youth, Aaron B., looking "shocked." According to the officer, "[t]heir eyes were wide open and they seemed very nervous." No one else was in the elevator. Officer Tevere noticed the smell of marijuana in the elevator, and saw Aaron throw what the officer believed was a lit

marijuana cigarette to the floor. The officer then escorted the two youths out of the elevator and recovered the marijuana cigarette.

Officer Tevere asked appellant and Aaron if they lived in the building, and both replied that they did not. When the officer asked why they were in the building, Aaron answered that he was there to visit his friend Christopher, who lived in apartment 2A; appellant initially agreed with him. Tevere continued to question the youths, asking if they were actually there to visit Christopher. In response, appellant told Aaron, "Tell them the truth," adding, "I don't want to get in trouble." When Officer Tevere again asked why they were in the building, appellant admitted that they were smoking on the sixth floor. Officer Tevere subsequently placed appellant and Aaron under arrest.

Maurice McKenzie, an employee of the company that managed the building, testified that according to the tenant list, appellant did not live there. Mr. McKenzie further testified that a woman named Blankes Nunez lived in apartment 2A with her father and her two children, none of whom was named Christopher.[1] The court credited the testimony of the two witnesses and found

[1] Appellant did not testify or call any witnesses.

that the evidence established beyond a reasonable doubt that appellant committed an act that, if committed by an adult, would constitute the crime of criminal trespass in the second degree (Penal Law § 140.15[1]).

A person is guilty of criminal trespass in the second degree when, in pertinent part, he "knowingly enters or remains unlawfully in a dwelling" (Penal Law § 140.15[1]). A person "enters or remains unlawfully" in or upon premises "when he is not licensed or privileged to do so" (Penal Law § 140.00[5]). "In general, a person is 'licensed or privileged' to enter private premises when he has obtained the consent of the owner or another whose relationship to the premises gives him authority to issue such consent" (People v Graves, 76 NY2d 16, 20 [1990]). The prosecution bears the burden of proving the absence of such license or privilege (People v Brown, 25 NY2d 374, 377 [1969]). The lack of a license or privilege to enter may be established by circumstantial evidence (People v Quinones, 173 AD2d 395, 396 [1991], lv denied 78 NY2d 972 [1991]).

Appellant argues that the evidence was legally insufficient to prove that he did not have a license or privilege to be in the building. In reviewing the sufficiency of the evidence in a juvenile delinquency proceeding, "the applicable standard is whether, after viewing the evidence in a light most favorable to

the presentment agency, the quantity and quality of the evidence is sufficient to show that the essential elements of the crimes charged have been proven beyond a reasonable doubt" (Matter of Ashley M., 30 AD3d 178, 179 [2006]; see People v Malizia, 62 NY2d 755, 757 [1984], cert denied 469 US 932 [1984]). In conducting its review, the Family Court's findings should be accorded great weight and should not be disturbed unless clearly unsupported by the record (Matter of Donnell W., 20 AD3d 431, 432 [2005]). Moreover, the court's assessment of the witnesses' credibility is entitled to great deference on appeal (Matter of Malik E., 85 AD3d 784, 785 [2011]).

Applying these principles, we conclude that there was legally sufficient evidence to find that appellant committed an act constituting second degree criminal trespass. Moreover, the finding was not against the weight of the evidence. The circumstantial evidence established that appellant entered the building without the requisite license or privilege. First, appellant expressly admitted that he did not reside in the building, a fact confirmed by the testimony of the building employee. Next, when the police officer asked appellant why he was in the building, appellant admitted that he was there for the unlawful purpose of smoking marijuana on the sixth floor. This fact was confirmed by the officer's testimony that he smelled

marijuana in the elevator and saw appellant's companion throw what the officer believed was a lit marijuana cigarette to the floor.

Appellant obviously lied to the police officer about why he was in the building. Appellant's companion told the police he was in the building to visit Christopher in Apartment 2A. However, the building employee testified that no one named Christopher lived in that apartment. Although appellant initially agreed with his friend's story about visiting Apartment 2A, he changed his tune upon further questioning. Appellant finally admitted the real reason he was in the building — to smoke marijuana on the sixth floor — and encouraged his friend to "[t]ell [the police] the truth" because he did not "want to get in trouble." Appellant's false statements to the police are evidence of consciousness of guilt (see People v Ficarrota, 91 NY2d 244, 250 [1997]; see also People v Babarcich, 166 AD2d 655, 655 [1990], lv denied 76 NY2d 1019 [1990]).

This case is similar to Matter of Ryan R. (254 AD2d 49 [1998]), where this Court upheld a finding of criminal trespass. In Ryan R., the appellant entered the front door of the building, which was usually locked, without using a key or the intercom, was standing in the vestibule counting money next to a person holding a tin of cocaine, and told the officer that he resided at

an address different from that of the building and that he had been making change for the person who had been standing near him. Likewise here, appellant was in the elevator of a locked and secure building engaging in unlawful activity, admitted that he did not live there and lied about the reason he was in the building.

Appellant argues that the presentment agency failed to rule out the possibility that one of the numerous tenants in the building gave appellant permission to be in the building. Thus, under appellant's view, the presentment agency had to call every single tenant as a witness. Such an onerous requirement, however, would eviscerate the rule allowing circumstantial evidence to establish the lack of license or privilege. In People v Quinones (173 AD2d at 396), we specifically held that "the testimony of one or all of those who could consent to entry is not in all cases indispensable." Here, the circumstantial proof offered at the hearing, including the admissions of appellant and the testimony of the building employee, was sufficient to sustain the court's finding that appellant was in the building without permission.

Appellant's reliance on Matter of Daniel B. (2 AD3d 440 [2003]) and Matter of James C. (23 AD3d 262 [2005]) is misplaced. In Daniel B., a police officer observed the appellant in the

lobby of an apartment building. The appellant told the officer that he did not live in the building and was just "hanging [out]," but failed to offer an explanation for his presence. In James C., the appellant was approached by a police officer in the lobby of the building. Although the appellant told the officer he was "hanging out" with friends, he did not provide the officer, in response to the officer's questions, with the name or apartment number of his friends. In each case, the court vacated the fact-finding order finding, inter alia, that it was not the appellant's obligation to explain his presence in the building. Here, however, appellant did more than simply fail to explain his presence in the building — he affirmatively made a false statement about his reason for being there.

We similarly reject appellant's challenge to the facial sufficiency of the petition.

Accordingly, the order of disposition of the Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about January 3, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if

committed by an adult, would constitute the crime of criminal trespass in the second degree, and placed him on probation for a period of nine months, should be affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 16, 2012

CLERK