SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 30, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

13691-
13691A Mario DeMaria, Index 106013/11
590391/12
590675/12
Plaintiff-Respondent,

-against-

RBNB 20 Owner, LLC, et al.,
Defendants-Respondents,

Linden Construction Corp., et al.,
Defendants-Appellants,

Tower Interior Corp.,
Defendants.

- - - - -

RBNB 20 Owner, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Linden Construction Corp.,
Third-Party Defendant-Appellant.

- - - - -

Linden Construction Corp.,
Second Third-Party Plaintiff-Appellant,

-against-

Tower Interior Corp.,
Second Third-Party Defendant.

- - - - -

RBNB 20 Owner, LLC, et al.,
Third Third-Party Plaintiffs-Respondents,

-against-

Forest Electric Corp.,
Third Third-Party Defendant-Appellant.

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Murphy Higgins & Schiavetta, LLP, New Rochelle (Jody C. Benard of counsel), for Linden Construction Corp., appellant.

Ahmuty, Demers, & McManus, Albertson (Glenn A. Kaminska of counsel), for Forest Electric Corp., appellant.

Hogan & Cassell, LLP, Jericho (Michael D. Cassell of counsel), for Mario DeMaria, respondent.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for RBNB 20 Owners LLC, NB 20 Developers, LLC and Newmark Construction Services, LLC, respondents.

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Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about February 25, 2014 and March 3, 2014, which, insofar as appealed from as limited by the briefs, denied defendant Linden Construction Corp.'s motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims and the Labor Law § 241(6) claim as predicated on 12 NYCRR 23-1.7(e)(2) as against it and the third-party contractual indemnification claim, denied defendant Forest Electric Corp.'s motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims and the Labor Law § 241(6) claim as

predicated on 12 NYCRR 23-1.30 as against it and the third third-party contractual indemnification claim, and granted the cross motion by defendants RBNB 20 Owner, LLC and NB 20 Developers, LLC (collectively, the owner defendants) and Newmark Construction Services, LLC (Newmark) for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them and for summary judgment on their third-party contractual indemnification claims against Linden and Forest, unanimously modified, on the law, to grant Linden's motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it, and to deny the owner defendants and Newmark's cross motion insofar as it sought summary judgment on their contractual indemnification claims against Forest and Linden and summary judgment dismissing the common-law negligence and Labor Law § 200 claims against defendant Newmark, and otherwise affirmed, without costs.

Plaintiff sustained injuries when he stepped on and fell over an 8- to 10-inch sprinkler pipe at the construction site. Defendant RBNB 20, the owner of the building under construction, retained defendant NB 20 as the "Contractor" on the project. RBNB and NB20, the owner defendants, retained defendant Newmark as the "construction manager." NB 20 subcontracted the

electrical work (including lighting of the work site) to defendant Forest, the drywall and carpentry work to defendant Linden, and the fire protection work to nonparty Active Fire Sprinkler, which was plaintiff's employer. Linden, in turn, sub-subcontracted the taping and spackling work to defendant Tower Interior Corp. and the sheetrocking and carpentry work to nonparty New York Drywall. Plaintiff testified that the pipe was residual waste from his sprinkler work and that the spacklers employed by Tower created the hazardous condition by knocking over the disposal bucket in which he had placed the pipe. He also testified that inadequate lighting was a cause of his accident.

Linden was entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it. As a subcontractor and, therefore, the statutory agent of the owner and general contractor, Linden stands in the shoes of the owner and general contractor, neither of which may be held liable under common-law negligence or Labor Law § 200 (a codification of common-law negligence) for injuries arising from a dangerous condition in the absence of evidence that such party actually created the dangerous condition or had actual or constructive notice of it (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139,

144 [1st Dept 2012]; *Lopez v Dagan*, 98 AD3d 436, 438 [1st Dept 2012], *lv denied* 21 NY3d 855 [2013]). Uncontroverted evidence establishes, as a matter of law, that Linden sub-subcontracted all of its work to Tower and New York Drywall and furnished no workers in its own employ to perform work. Rather, Linden's presence at the site was limited to one-hour visits by its president once a week or every other week. Since there is no evidence that Linden itself created the condition in question or had actual or constructive of it, it cannot be held liable for injuries arising from that condition under common-law negligence or Labor Law § 200, neither of which makes an owner, a general contractor or their statutory agent vicariously liable for the negligence of a downstream subcontractor (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] ["While the conditions that allegedly caused the accident may have been created by the negligence of . . . the flooring subcontractor, neither the common law nor Labor Law § 200 makes STI, as general contractor, vicariously liable for the negligence of its subcontractors"]).

However, given that Linden's subcontract with NB 20 delegated to it the authority to supervise all drywall work, and given plaintiff's allegation that the presence of the pipe

segment on the floor was caused by employees of Linden's spackling sub-subcontractor (Tower), Linden is subject to liability under Labor Law § 241(6) as a statutory agent (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192-193 [1st Dept 2011]). Contrary to Linden's contention, that plaintiff "slipped," rather than "tripped," on the pipe does not render 12 NYCRR 23-1.7(e)(2) ("Tripping and other hazards") inapplicable to his case (*see e.g. Capuano v Tishman Constr. Corp.*, 98 AD3d 848 [1st Dept 2012]; *Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259 [1st Dept 2005]; *Nankervis v Long Is. Univ.*, 78 AD3d 799 [2d Dept 2010]).

Forest, the subcontractor responsible for electrical work on the project and for lighting at the site, failed to establish prima facie that it had no notice of a burnt-out light bulb in the area where plaintiff fell. Further, on this record, an issue of fact exists as to whether inadequate illumination contributed to the causation of the accident. Pursuant to the terms of its subcontract with NB 20, Forest is subject to liability under Labor Law § 241(6) as a statutory agent (*see Russin*, 54 NY2d at 317-318; *Nascimento*, 86 AD3d at 192-193), and plaintiff is entitled to have his claim against Forest under that statute,

predicated on 12 NYCRR 23-1.30 ("Illumination"), proceed to trial. In addition, because a triable issue exits as to whether Forest had actual or constructive notice of the inadequate lighting in advance of the accident, plaintiff is also entitled to go to trial on his claims against Forest under Labor Law § 200 and common-law negligence. Accordingly, the motion court correctly denied Forest summary judgment dismissing all of these claims.

The owner defendants cannot be held liable for plaintiff's injuries under Labor Law § 200 or common-law negligence principles, since nothing in the record shows that the owner defendants created or had notice of the dangerous conditions caused by the pipe or the inadequate lighting, which allegedly caused plaintiff's accident (*see Lopez v Dagan*, 98 AD3d at 438; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]). However, plaintiff's testimony that, before the accident, he had complained to Newmark's construction supervisor about the burnt-out lightbulb in the room where the accident occurred creates an issue as to whether Newmark had notice of a dangerous condition that allegedly contributed to the accident. Accordingly, the motion court erred in granting Newmark summary judgment dismissing the common-law negligence and Labor Law § 200

claims against it.

In view of the existence of triable issues as to whether employees of Tower, Linden's sub-subcontractor, created the condition giving rise to plaintiff's injury, and as to whether inadequate lighting provided by Forest contributed to plaintiff's accident, the motion court correctly denied both Linden and Forest summary judgment dismissing the owner defendants' and Newmark's third-party claims for contractual indemnification against them, pursuant to their respective subcontracts. However, since the statutory liability of the owner defendants and Newmark may be found to arise from the work of either Linden or Forest, and whether the loss arose from the work of either or both of them will not be determined until after trial, the owner defendants should not have been granted summary judgment on their indemnification claim against either Linden or Forest. In addition, as previously discussed, an issue of fact exists on

this record as to whether Newmark had notice of the inadequate lighting, which precludes summary judgment for Newmark on its indemnification claims at this juncture.

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

ENTERED: JUNE 30, 2015

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

13003- Index 651515/12
13004 Alex Backus, et al.,
Plaintiffs-Respondents,

-against-

Aeroflex Holding, et al.,
Defendants-Appellants.

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Appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered on or about February 27, 2014, and from a judgment (same court and Justice), entered February 28, 2014,

And said appeals 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 September 23 2014,

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

ENTERED: JULY 30, 2015

CLERK

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

14973 The People of the State of New York, Ind. 497/10
Respondent,

-against-

Ruben Burgos,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered January 26, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree and criminal possession of a weapon in the second degree, sentencing him to concurrent terms of three years and three and one-half years respectively, and ordering forfeiture of $34,505, affirmed.

At sentencing, defendant and the People executed, and the court so-ordered, a stipulation wherein defendant agreed to forfeit, pursuant to CPL 220.50(6), the sum of $34,505 seized at the time of his arrest on drug charges. The stipulation bore the criminal caption "THE PEOPLE OF THE STATE OF NEW YORK -against- Ruben Burgos, Defendant." After the stipulation was executed,

the court sentenced defendant to the promised term of imprisonment. Defendant now appeals from the judgment of conviction seeking to vacate the forfeiture stipulation.

At the outset, we reject the People's contention, adopted by the dissent, that this appeal is not properly before us because the forfeiture was not part of the judgment of conviction. Pursuant to Penal Law § 60.30, a court has the authority to order a forfeiture of property, and any order exercising that authority "may be included as part of the judgment of conviction." In *People v Detres-Perez* (127 AD3d 535 [1st Dept 2015]), relying on Penal Law § 60.30, this Court recently found that a forfeiture agreement was part of the judgment of conviction and thus reviewable on the appeal from the judgment. Likewise here, the court's so-ordering of the stipulation at the time of sentencing rendered it part of the judgment of conviction and reviewable on this appeal as of right (*see* CPL 450.10). Contrary to the dissent's position, we do not conclude that Penal Law § 60.30 authorizes the inclusion of forfeiture as part of a defendant's *sentence*. Rather, that provision allows a court to order forfeiture as a separate component of the judgment of conviction (*see People v Carmichael*, 123 AD3d 1053 [2d Dept 2014] ["although not an authorized component of a criminal sentence[,]" "an order

of forfeiture pursuant to a valid settlement of a civil forfeiture claim may be included as part of the judgment of conviction"]). The dissent fails to convincingly distinguish this Court's recent precedent in *Detres-Perez* and the Second Department's decision in *Carmichael*. The cases relied upon by the dissent do not require us to hold that defendant's challenge is not reviewable on this appeal. In *People v Smith* (15 NY3d 669 [2010]), the Court found that the registration requirements of New York City's Gun Offender Registration Act (GORA) were not part of the defendant's sentence or otherwise subsumed within the judgment of conviction (*id.* at 673). In reaching that conclusion, the Court reasoned that neither the Penal Law nor the Criminal Procedure Law authorizes a sentencing court to impose GORA registration (*id.*). Here, in contrast, Penal Law § 60.30 explicitly authorizes the inclusion of a forfeiture order as part of the judgment of conviction. Nor does *People v Abruzzese* (30 AD3d 219 [1st Dept 2006], *lv denied* 7 NY3d 784 [2006]) require a different result. Unlike *Abruzzese*, where the sentencing court did not order any forfeiture, the court here explicitly so-ordered the forfeiture stipulation at the time the sentence was pronounced. Finally, the omission of the forfeiture order from the sentence and commitment sheet does not render the order

unreviewable since a forfeiture, although not a component of a criminal sentence, can nevertheless be part of the judgment of conviction (*see People v Carmichael*, 123 AD3d at 1053; Penal Law § 60.30).

The appeal being properly before us, the judgment of conviction should be affirmed. At sentencing, defendant did not raise any of his current appellate challenges to the stipulation, seek to withdraw his plea, or otherwise express any unwillingness to proceed with sentencing if forfeiture was a condition of the plea. Thus, defendant's claims are unpreserved (*see People v Detres-Perez*, 127 AD3d at 535), and we decline to reach them in the interest of justice.

As an alternative holding, we reject the claims on the merits. Defendant contends that the forfeiture stipulation is not enforceable because the procedures set forth in Penal Law § 480.10 were not followed. The stipulation makes clear, however, that the forfeiture was governed by CPL 220.50, not Penal Law § 480.10 (*see People v Rodriguez*, 123 AD3d 631 [1st Dept 2014]). Any failure to strictly adhere to the procedures set forth in CPL 220.20 would not be a basis for reversal here in light of defendant's acknowledgment, in the stipulation, that he agreed to forfeit the money as a condition of his plea. Contrary

to defendant's contention, there is no basis to conclude that the court coerced him to execute the stipulation, or that the stipulation was not otherwise entered into knowingly and voluntarily. Nor is there any showing that the court specifically required defendant to execute the stipulation before sentencing.

All concur except DeGrasse, J. who dissents in a memorandum as follows:

DEGRASSE, J. (dissenting)

On this appeal, defendant seeks to challenge his forfeiture of $34,505 pursuant to a written stipulation that he signed on the date of his sentence. Defendant contends that the forfeiture was not carried out in the manner prescribed by Penal Law § 480.10. Accordingly, he argues that "[b]ecause the forfeiture mandate was not authorized as a matter of law, the judgment should be modified on the law by vacating the forfeiture of appellant's money." The stipulation was so-ordered by the court and contains a recital that the money was subject to forfeiture as "a condition of defendant's plea . . ." Nonetheless, I dissent and would dismiss this appeal because I disagree with the majority's premise that the forfeiture was part of the judgment of conviction.

"[N]o appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute" (*People v Pagan*, 19 NY3d 368, 370 [2012] [internal quotation marks and citation omitted]). As relevant here, CPL 450.10 authorizes a defendant to appeal only from a judgment rendered in a criminal case (*see People v Smith*, 15 NY3d 669, 673 [2010]). "A judgment is comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence" (*id.*

[internal quotation marks and citation omitted]). For the reasons stated below, the forfeiture, which defendant asks us to vacate, was not part of his guilty plea or his sentence. Accordingly, it was not part of a judgment of conviction within the contemplation of CPL 1.20(15) and 450.10.

As demonstrated by the minutes, the forfeiture was not mentioned at all during defendant's January 11, 2011 plea colloquy. Therefore, it could not have been part of the plea. Nor was the forfeiture part of the January 26, 2011 sentence since it was not included as part of the court's pronouncement of sentence. CPL 380.20 and 380.40(1) collectively require that courts pronounce sentence in every case where a conviction is entered (*see People v Sparber*, 10 NY3d 457, 470 [2008]). This means that a forfeiture of property would have to be included as part of the sentence pronounced in order to be regarded as such (*cf. People v Guerrero*, 12 NY3d 45, 47 [2009] [finding that the mandatory surcharge and crime victim assistance fee need not be pronounced by judge at sentencing proceeding]). As shown by the minutes, the only reference to the forfeiture on the sentencing day was the following:

> "[PROSECUTOR]: People rely on the promise. I believe forfeiture was part of the agreed upon sentence.

"[DEFENSE COUNSEL]: It was not.

"[THE COURT]: I don't recall.

"[DEFENSE COUNSEL]: Based on my memory and file that was never discussed.

"[THE COURT]: What is the amount?

"[PROSECUTOR]: Thirty four thousand five hundred dollars.

"[THE COURT]: Pretty significant.

"[DEFENSE COUNSEL]: Can I have the forfeiture agreement?

"[PROSECUTOR]: Yes.

"[DEFENSE COUNSEL]: Judge, I am handing up the executed forfeiture agreement . . ."

There was no other mention of the forfeiture during the sentencing. The foregoing colloquy does not approach a pronouncement of the forfeiture as part of the sentence as required under CPL 380.20 and 380.40(1). For this reason and because of its omission from the plea colloquy, the forfeiture is not part of the judgment of conviction. Also, the fact that the stipulation apparently did not surface and was not executed until the sentencing date further refutes any argument that it was a condition of the plea. Moreover, the stipulation contains no reference to, let alone a recital that it was to be made part of defendant's sentence. The majority posits that "the court's so-

ordering of the stipulation at the time of sentencing rendered it part of the judgment of conviction." However, the majority stops short of attributing the forfeiture to either the plea or the sentence. By operation of CPL 1.20(15) and 450.10, it must be part of one or both to be appealable as of right.

This case is controlled by *People v Abruzzese* (30 AD3d 219 [1st Dept 2006], *lv denied* 7 NY3d 784 [2006]) in which we dismissed an appeal on the ground that the forfeiture in that case was not part of the judgment of conviction. To be specific, in *Abruzzese*, we dismissed a "[p]urported appeal from [a] forfeiture agreement . . . as taken from a nonappealable paper" (*id.* at 220). The same unavailable relief is sought here inasmuch as defendant's opening brief calls for an order "vacating the forfeiture of money recovered from appellant." Significantly, the forfeiture requirement does not appear on defendant's "Uniform Sentence and Commitment" form (commitment sheet). This omission confirms my belief that it is not part of the judgment of conviction (*see Smith*, 15 NY3d at 674 [analogous omission from a commitment sheet confirmed the Court's conclusion that requirements of registration and notice under New York

City's Gun Offender Registration Act[1] were not part of a sentence]). The majority cites *People v Carmichael* (123 AD3d 1053 [2d Dept 2014]), in which the court held that "an order of forfeiture pursuant to a valid settlement of a civil forfeiture claim may be included as part of the judgment of conviction" (*id.* at 1053 [citation omitted]). The reference to *Carmichael*, however, merely begs the central question of how a forfeiture becomes part of a judgment. *People v Detres-Perez* (127 AD3d 535 [1st Dept 2015]) is distinguishable insofar as we found in that case that the "forfeiture agreement was part of the judgment of conviction" (*id.*). As stated above, the record here supports no such finding. As the majority notes, Penal Law § 60.30 authorizes the inclusion of a forfeiture or other civil penalty as part of a judgment of conviction. The problem here is that no inclusion in a manner required by law has taken place. I find it

[1]Administrative Code of the City of New York §§ 10-601 *et seq.*

unnecessary to address defendant's remaining arguments in light of the fact that the appeal should have been dismissed in the first instance.

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

ENTERED: JUNE 30, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, Feinman, JJ.

15115-
15116 Nancy Cruz,
Plaintiff-Respondent,

-against-

Bronx Lebanon Hospital Center,
Defendant-Appellant.

Index 24402/06

Kaufman Borgeest & Ryan LLP, New York (Edward J. Guardaro, Jr. of counsel), for appellant.

Burns & Harris, New York (Blake G. Goldfarb of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered August 6, 2013, following a jury trial, which awarded plaintiff damages for past and future pain and suffering in the amounts of $140,000 and $60,000, respectively, as reduced by prior order of the court, entered May 16, 2013, modified, on the law and facts, to the extent of restoring the amounts awarded by the jury for past and future pain and suffering, $300,000 and $270,000, respectively, and otherwise affirmed, without costs. Appeal from the May 16, 2013 order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

On August 16, 2006, plaintiff, a 65-year-old grandmother, attended a cookout on the grounds of Bronx-Lebanon Hospital with

four of her grandchildren. The picnic was held in a courtyard with a gated playground area. A series of interconnected rubber mats lined the floor of the playground.

Plaintiff testified that as she entered the playground with her five-year-old grandson, her foot became caught in a hole in the rubber mat, and she fell forward, her right elbow striking the ground. Plaintiff described the hole as being caused by "worn out" rubber.

Plaintiff was taken via ambulance to the hospital, where the staff performed a closed reduction and placed her arm in a cast. Plaintiff's and defendant's expert were in agreement that plaintiff sustained an avulsion or "chip fracture," and a dislocation of the right elbow as a result of the accident. Defendant's expert agreed that plaintiff has pain and range of motion limitations as a result of the avulsion. Plaintiff's expert, a board-certified orthopedic surgeon, explained that it "take[s] a lot of trauma" to dislocate an elbow, which is a more stable joint than the shoulder. Plaintiff suffered loss of grip strength and loss of sensation in the affected arm as a result. "Loose bodies," comprised of cartilage and small bone fragments, are still floating around in her elbow. The fragments render the joint unstable and make plaintiff feel as if "the elbow is going

to come out." As a result of the presence of the fragments, plaintiff is expected to suffer pain for the duration of her life. The loss of range of motion is unlikely to improve given the formation of scar tissue in the elbow.

The vice-president of support services at defendant hospital testified that the maintenance staff inspects and cleans the accident area at least once per day. He further testified that his records did not contain a work order for the claimed defect in the rubber mat.

Following a week-long trial, the jury rendered a verdict in favor of plaintiff, and awarded her $300,000 for past pain and suffering and $270,000 for future pain and suffering. Upon defendant's motion, the award was reduced to $140,000 and $60,000, respectively.

To set aside a jury verdict as unsupported by sufficient evidence, the movant must demonstrate that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards,* 45 NY2d 493, 499 [1978]). The standard for setting aside a verdict as against the weight of the evidence is "whether the evidence so preponderate[d] in favor of the [movant]

that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]).

The liability verdict was based on legally sufficient evidence of defendant's constructive notice of a dangerous condition on its premises and was not against the weight of the evidence (*see e.g. Sigue v Chemical Bank*, 284 AD2d 246 [1st Dept 2001]; *Luciano v Niagara Frontier Vocational Rehabilitation Ctr.*, 255 AD2d 974 [4th Dept 1998] [the defendant failed to establish as a matter of law that it lacked constructive notice of worn and curled floor mat]).

Plaintiff's testimony that she was caused to fall when her foot became ensnared in a "worn out" section of the rubber mat was sufficient to support a finding of liability (*see e.g. Sigue*, 284 AD2d at 246 [plaintiff's testimony that "the tape fastening the plastic mat to the ramp on which she fell was worn, had holes in it, was always turning over," constituted legally sufficient evidence of an unsafe condition to support liability verdict]). The fact that plaintiff's testimony provided the lone evidence of the claimed defect is not a basis to conclude that there was insufficient evidence of a hazardous defect to impose liability on the premises owner (*see Signorelli v Great Atl. & Pac. Tea*

Co., Inc., 70 AD3d 439 [1st Dept 2010] [plaintiff's testimony that the floor on which he slipped was wet and slippery was sufficient to raise a triable issue as to liability]).

The dissent's contention that there was insufficient evidence to support the inference that the worn out area was visible or apparent by reasonable inspection cannot withstand scrutiny.[2] A "worn out" section by definition occurs over the passage of time. As the trial court noted "the very description of a worn out area pre-supposes a slow process, and can support a jury inference that the defect should have been discovered." The jury having reasonably credited plaintiff's direct observations and testimony over that of the defense witnesses, it is not for us to second-guess the verdict.

The amounts awarded by the jury for past and future pain and

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[2]The cases upon which the dissent relies are distinguishable. *Soto v New Frontiers 2 Hope Hous. Dev. Fund Co., Inc.* (118 AD3d 471 [1st Dept 2014]) involved a mailbox receptacle unit which fell from the wall after being closed wherein the defect was not visible or apparent and a reasonable inspection would not have revealed that the box was loose (*compare Williamson v Ogden Cap Props., LLC*, 124 AD3d 537 [1st Dept 2015] [the defendants failed to show that cursory inspection of mailbox panel would not have disclosed loose condition of mailbox panel]). *Singh v United Cerebral Palsy of N.Y. City, Inc.* (72 AD3d 272 [1st Dept 2010]), involved a defect in the motor sensor of an automatic door that was not visible or apparent and would not have been uncovered by a routine inspection.

suffering, $300,000 and $270,000, respectively, do not deviate materially from what would be reasonable compensation under the circumstances (*see e.g. Vertsberger v City of New York*, 34 AD3d 453 [2d Dept 2006] [$1.4 million combined award appropriate for a plaintiff with shattered left elbow]; *Roshwalb v Regency Mar. Corp.*, 182 AD2d 401 [1st Dept 1992] [$750,000 combined award appropriate for a 63-year-old plaintiff who suffered a comminuted fracture of the elbow], *lv denied* 80 NY2d 756 [1992]; *Capuccio v City of New York*, 174 AD2d 543 [1st Dept 1991] [combined award of $997,690 not excessive for a 53-year-old plaintiff who suffered a fractured humerus and had limited mobility in the right shoulder as the result of a fall], *lv denied* 79 NY2d 751 [1991]). We accordingly reinstate those awards (*see* CPLR 5501[c]).

While plaintiff's counsel's challenged summation remarks were inflammatory and not an appropriate response to defense counsel's summation remarks, which were soundly based upon references to the record, the limited number of inflammatory remarks, along with the court's curative instructions, do not

support a conclusion that defendant was denied a fair trial (*see generally Newark v Pimentel*, 117 AD3d 581 [1st Dept 2014]; *Smith v Au*, 8 AD3d 1 [1st Dept 2004]).

All concur except Friedman, J.P. and Saxe, J. who dissent in a memorandum by Saxe, J. as follows:

SAXE, J. (dissenting)

Plaintiff claimed that, while playing with her grandson at a picnic in defendant's courtyard playground, she tripped and fell when her foot was caught in a "worn out" spot in the rubber matting covering the playground. The jury found defendant liable, and the trial court denied defendant's motion to set aside the verdict on the grounds, among others, that the evidence of constructive notice of the condition was insufficient and the verdict was against the weight of the evidence. The majority now affirms.

I would reverse. To impose liability on the defendant, there must be evidence that a defective condition existed and that the defendant either created the condition or had actual or constructive notice of it (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]). Plaintiff failed to adduce evidence showing that the claimed defect in the matting existed for a sufficient length of time and in a noticeable condition such as would allow defendant to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

There was no testimony that anyone had observed the claimed defect prior to the alleged accident, and the testimony of defendant's employee that the matting was inspected each day was

irrelevant because there was no evidence that the claimed worn area was visible or apparent by reasonable inspection (*see Soto v New Frontiers 2 Hope Hous. Dev. Fund Co., Inc.*, 118 AD3d 671 [1st Dept 2014]; *Singh v United Cerebral Palsy of N.Y. City, Inc.*, 72 AD3d 272, 276 [1st Dept 2010]).

Notably, plaintiff failed to introduce either photographs of the alleged defect (*see Taylor v New York City Tr. Auth.*, 48 NY2d 903, 904 [1979] [verdict finding constructive notice of defect supported by photograph which depicted irregularity, width, depth and appearance of defect in concrete surface]), or expert testimony to show that it had been in existence for a sufficient length of time (*see Tese-Milner v 30 E. 85th St. Co.*, 60 AD3d 458 [1st Dept 2009] [expert opinion]; *Alexander v New York City Tr. Auth.*, 34 AD3d 312, 313-314 [1st Dept 2006] [expert opinion and photograph]). While it may be possible for the testimony of a plaintiff to be sufficient by itself to establish constructive notice, here, plaintiff's testimony failed to make such a showing. Plaintiff failed to provide the dimensions of the alleged defect and never stated that she saw it either before or after the incident, rendering her testimony that the matting was "wasted" or "worn" merely conclusory and insufficient proof of constructive notice (*see Joseph v New York City Tr. Auth.*, 66

AD3d 842, 843 [2d Dept 2009]).

In view of the lack of evidence that defendant had either actual or constructive notice of the claimed defective condition in the matting, I would set aside the verdict as based on insufficient evidence, and dismiss the complaint.

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

ENTERED: JUNE 30, 2015

CLERK

Andrias, J.P., Moskowitz, DeGrasse, Gische, Kapnick, JJ.

15270 Joshua Hobson, Index 108955/11
Plaintiff-Respondent, 590309/12

-against-

The Halcyon Construction Corp.,
et al.,
Defendants.

- - - - -

Consolidated Edison Company of
New York, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Hallen Construction Co.,
Third-Party Defendant-Appellant.

_____

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for appellant.

Law Office of Vaccaro & White, New York (Steve Vaccaro of counsel), for Joshua Hobson, respondent.

Law Office of David M. Santoro, New York (Stephen T. Brewi of counsel), for Consolidated Edison Company of New York, Inc., respondent.

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Order, Supreme Court, New York County (Kathryn Freed, J.), entered June 30, 2014, which denied the motion of third-party defendant Hallen Construction Co. (Hallen) for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to the extent of dismissing the causes of action for breach of contract for failure to procure insurance and for

common law indemnification, and otherwise affirmed, without costs.

Plaintiff was injured when, while riding his bicycle, his left foot got caught on the lip of a metal plate that protruded above the surface of the road. Defendant third-party plaintiff Con Ed hired Hallen to repair a gas leak at the location and Hallen installed the plate, which was to remain in position until the final restoration was completed, to cover its excavation work. However, before plaintiff's accident, Con Ed performed backfill work that could not have been completed without moving the plate. The contract between Con Ed and Hallen contained an indemnification provision requiring Hallen to indemnify Con Ed for personal injury claims "resulting in whole or in part from, or connected with, the performance of [Hallen's work] . . ." There is an issue of fact as to whether plaintiff's claims against Con Ed resulted from or were connected to Hallen's work at the site, requiring denial of that portion of the motion seeking summary judgment on the cause of action for contractual indemnification (*see DeSimone v City of New York*, 121 AD3d 420, 422 [1st Dept 2014]; *Espinal v City of New York*, 107 AD3d 411 [1st Dept 2013]).

As conceded at oral argument, Con Ed has failed to produce

competent evidence to support its common law indemnification claim against Hallen. Furthermore, Con Ed did not oppose that portion of the motion seeking dismissal of the breach of contract cause of action. Accordingly, the motion is granted as to those claims.

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

ENTERED: JUNE 30, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15437 Soho Snacks Inc., et al., Index 103643/12
Plaintiffs-Appellants, 590847/12

-against-

Michael Frangioudakis, et al.,
Defendants-Respondents.

[And a Third Party Action]

_____

Vaneria & Spanos, New York (John Sebastian Vaneria of counsel), for appellants.

Maniatis & Dimopoulos, P.C., Tuckahoe (Nicole Dinos Gerace of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 2, 2014, which, insofar as appealed from, granted defendants' motion to dismiss the derivative causes of action and for summary judgment dismissing the direct cause of action, unanimously reversed, on the law, without costs, and the motion denied.

Defendants are the corporate plaintiff's majority shareholders, as well its officers and directors. The individual plaintiffs are the corporation's minority shareholders. Plaintiffs allege, inter alia, that defendants, as the persons responsible for the corporation's day-to-day operations, improperly diverted corporate opportunities to other companies

owned by them, excluding plaintiffs from those opportunities.

The motion court correctly found that the complaint failed to set forth with particularity a demand by plaintiffs that the board commence an action against defendants (Business Corporation Law § 626[c]; *see Tomczak v Trepel*, 283 AD2d 229, 229-230 [1st Dept 2001], *lv dismissed in part, denied in part* 96 NY2d 930 [2001]). However, the complaint adequately sets forth plaintiffs' reasons for not making a demand (Business Corporation Law § 626[c]). It alleges that defendants, as the corporation's sole directors, were self-interested in the challenged conduct because they received a personal benefit as the owners of the corporations to which they diverted corporate opportunities (*see Marx v Akers*, 88 NY2d 189, 202 [1996]; *Matter of Comverse Tech., Inc. Derivative Litig.*, 56 AD3d 49, 54 [1st Dept 2008]). Moreover, plaintiffs allege that defendants, in their role as directors, ignored plaintiffs' earlier attempts to compel them to cease their alleged wrongdoing.

It was inappropriate for the motion court to dismiss the breach of contract cause of action in light of the allegations that defendants, as directors, did not act in good faith (*see Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012]). Plaintiffs allege, inter alia, that defendants denied them access to the

company's books and records, diverted corporate opportunities to their separate businesses, made substantial distributions and other payments to themselves to the exclusion of the minority shareholders, and misappropriated business assets. At this stage of the litigation, it cannot be said that the claim is barred as a matter of law by the business judgment rule and we accordingly reinstate it.

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15552-
15553 The People of the State of New York,
Respondent,

-against-

Kenneth Lewis,
Defendant-Appellant.

Ind. 2418/85

_____

Ostrer & Associates, P.C., Chester (Benjamin Ostrer of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Richard Lee Price, J.), entered on or about July 11, 2014, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered January 21, 1986, unanimously affirmed. Appeal from order (same court and Justice), entered on or about March 19, 2014, unanimously dismissed, as subsumed within the appeal from the July 11, 2014 order.

The court's summary denial of the motion (45 Misc 3d 396 [Sup Ct Bronx County]) was proper, because there was no factual dispute that was sufficient to warrant a hearing. Defendant's 1986 conviction arose from his arrest for possession of a revolver that was defaced, thereby constituting a nonviolent

felony under Penal Law § 265.05(3), and that was also "loaded" in the sense of being accompanied by ammunition (*see* Penal Law § 265.00[15]), thereby constituting a violent felony under former Penal Law § 265.05{4).

To the extent defendant is claiming that his 1986 conviction was not in fact a violent felony conviction, we note that defendant did not challenge the use of that conviction as a predicate violent felony at his 1990 adjudication as a second violent felony offender. Moreover, the 1986 conviction was similarly employed in adjudicating defendant a persistent violent felony offender in 2000, and this Court specifically upheld that adjudication (*People v Lewis*, 3 AD3d 402, 403 [1st Dept 2004], *lv denied* 1 NY3d 630 [2004]). In any event, regardless of whether any of defendant's claims are procedurally barred (*see People v Odom*, 63 AD3d 408 [1st Dept 2009], *lv denied* 13 NY3d 798 [2009]), we find them to be without merit.

The plea minutes unambiguously show that defendant pleaded guilty to possession of a loaded weapon, which, as noted, constitutes a violent felony. There was no mention whatsoever of the Penal Law § 265.03(3) defaced-firearm theory. Although a certificate of disposition, prepared long after the conviction, refers to Penal Law § 265.03(3), the certificate is contradicted

by the plea minutes, and is therefore both inaccurate and irrelevant.

The plea minutes also establish that the plea was knowing, intelligent and voluntary, and there is nothing to cast doubt on counsel's effectiveness. Defendant claims that his plea was defective because he was not advised by his attorney, or by the court, of the consequences of pleading guilty to a violent felony as opposed to a nonviolent felony. However, the consequences he cites, most notably the more serious sentencing-enhancement consequences of a violent felony, are plainly collateral and contingent, and as such the absence of such advice did not invalidate the plea (*see e.g. People v Pierre*, 80 AD3d 441 [1st Dept 2011], *lv denied* 16 NY3d 862 [2011]; *People v Watkins*, 244 AD2d 269, 270 [1st Dept 1997], *lv denied* 92 NY2d 863 [1998]; *People v Silvers*, 163 AD2d 71 [1st Dept 1985], *lv denied* 76 NY2d 865 [1990]).

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15556-
15557 In re Brianna Monique F.,

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

Monique F.,
Respondent-Appellant,

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

_____

Tennille M. Tatum-Evans, New York, for appellant.

John R. Eyerman, New York, for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Valerie Pels, J.), entered on or about March 10, 2014, which, upon a fact-finding determination that respondent mother is mentally ill within the meaning of Social Services Law § 384-b and that the child would be in danger of becoming a neglected child if placed in or returned to her care and custody, terminated respondent's parental rights to the child and transferred the care and guardianship of the child to petitioner and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The court properly denied respondent's motion for a *Frye* hearing (*see Frye v United States*, 293 F 1013 [DC Cir 1923]), since petitioner's expert's opinion did not involve "obviously novel forensic and social science techniques" (*Selig v Pfizer, Inc.*, 185 Misc 2d 600, 606 [Sup Ct NY County 2000], *affd* 290 AD2d 319 [1st Dept 2002], *lv denied* 98 NY2d 603 [2002]).

Petitioner demonstrated by clear and convincing evidence that respondent is presently and for the foreseeable future unable, by reason of mental illness, to provide adequate care for the child (*see* Social Services Law § 384-b[4][c], [6][a], [3][g][i]).

The court-appointed expert psychologist conducted a thorough, comprehensive, and extensive review of respondent's medical records, agency case records, and court files, and interviewed respondent for more than four hours. She testified that respondent suffered from "[s]chizophrenia residual type with concurrent bipolar disorder, NOS," had a very poor history of compliance with treatment, i.e., taking medication, "over many years," and "a demonstrated history of placing the child in danger when she's experiencing acute symptoms," and that, "[b]ased on an established long-term history of chronic and severe mental illness, it's very likely that the mother . . .

will continue to experience symptoms that will impede her parental functioning." The expert concluded, with a reasonable degree of "clinical and professional certainty," that respondent suffered from mental illness to the extent that the child, if returned to her care in the foreseeable future, "would be at risk of becoming a neglected child as defined in Social Services Law § 384-b." Respondent failed to controvert this conclusion. It was not necessary for the expert to observe interaction between respondent and the child before reaching her conclusion (*see Matter of Donovan Jermaine R. (Jamie R.)*, 123 AD3d 593 [1st Dept 2014], *lv denied* 24 NY3d 917 [2015]).

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15558 Albert E. Acosta, Index 309684/11
Plaintiff-Appellant,

-against-

Zulu Services, Inc., et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 26, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny the motion to the extent it seeks dismissal of plaintiff's claims of a permanent consequential and significant limitation of use of his cervical and lumbar spine, and otherwise affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain permanent consequential or significant limitations in the spine, knees, and left shoulder by submitting the affirmed report of their medical experts, who determined, after reviewing the MRIs, that the claimed injuries were degenerative, preexisted the accident or were not otherwise caused by the accident (*see Santos*

v Perez, 107 AD3d 572, 573 [1st Dept 2013]). Further, defendants showed that plaintiff had no range-of-motion limitations in his knees or left shoulder (*see Clementson v Price*, 107 AD3d 533 [1st Dept 2013]).

In opposition, although plaintiff showed evidence of tears in his knees and left shoulder, these tears, standing alone, without any evidence of limitations, are insufficient to raise a triable issue of fact as to whether a serious injury exists in those body parts (*see Clementson*, 107 AD3d at 533). Plaintiff, however, raised issues of fact as to his cervical and lumbar spine, by submitting the affirmed report of his treating physician, who measured the range of motion of plaintiff's spine and found significant deficits (*see Mulligan v City of New York*, 120 AD3d 1155, 1156 [1st Dept 2014]).

Defendants met their burden of showing that plaintiff did not sustain a 90/180-day injury, by relying on his deposition testimony that he was confined to bed for only three days and to home for only about a month during the relevant period (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522, 522–523 [1st Dept 2010]). In opposition, plaintiff failed to raise a triable issue of fact. That plaintiff missed more than 90 days of work is insufficient to raise an issue of fact (*see Nicholas v*

Cablevision Sys. Corp., 116 AD3d 567, 568 [1st Dept 2014]).

If, at trial, plaintiff establishes that his cervical and/or lumbar spine injuries are serious injuries within the meaning of Insurance Law § 5102(d), he can recover damages for all injuries proximately caused by the accident, even those not meeting the serious injury threshold, such as the injuries to the knees and left shoulder (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15559 Lashana Pickett, Index 307039/13
Plaintiff-Appellant,

-against-

Verizon New York Inc., et al.,
Defendants-Respondents.

_____

Subin Associates, LLP, New York (Robert J. Eisen of counsel), for appellant.

McAndrew, Conboy & Prisco, Melville (Mary C. Azzaretto of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 17, 2014, which denied plaintiff's motion for summary judgment as to liability, unanimously affirmed, without costs.

It is undisputed that plaintiff's car was double-parked in the lane of travel in violation of 34 RCNY 4-08(f)(1), when it was struck in the rear by defendants' vehicle. Plaintiff failed to make a prima facie showing that her own negligence in double-parking her car in the traveling lane was not a proximate cause of the collision (*White v Diaz*, 49 AD3d 134, 138-140 [1st Dept 2008]; *Gonzalez v Ceesay*, 98 AD3d 1078, 1079 [2d Dept 2012]). We reject plaintiff's argument that her double-parked car's presence in the lane of traffic merely furnished the condition or occasion

for the collision, rather than constituting one of its proximate causes, as a reasonable factfinder could conclude that a rear-end collision is a foreseeable consequence of double-parking (*see White*, 49 AD3d at 139).

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15560 Azra Fashiuddin, Index 103877/06
Plaintiff-Respondent,

-against-

Afzal D. Khan,
Defendant-Appellant.

_____

Law Offices Of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Ahmadd Naqvi Rodriguez, LLP, New York (Hyder A. Naqvi of counsel), for respondent.

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Appeal from judgment, Supreme Court, New York County (Doris Ling-Cohan, J.), entered May 22, 2014, awarding plaintiff $141,156.03, unanimously dismissed, without costs.

The record establishes that the judgment appealed from was entered on defendant's default in responding to plaintiff's motion to vacate and is therefore nonappealable (*see* CPLR 5511; *Marson Constr. Corp. v Illinois Union Ins. Co.*, 276 AD2d 294 [1st Dept 2000]). Defendant's only remedy was to make an application to vacate the order entered March 26, 2009, which granted

plaintiff judgment on his default (*see* CPLR 5015; *Hodson v Vinnie's Farm Mkt.*, 103 AD3d 549, 549 [1st Dept 2013]).

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15561 Paul L. Banner as Trustee of David L. Monroe,
Plaintiff-Appellant,

-against-

Rockland Home for the Aged Housing Development Fund Company, Inc., et al.,
Defendants-Respondents.

Index 100694/11

Dupée & Monroe, P.C., Goshen (Jon C. Dupée Jr. of counsel), for appellant.

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C., Albany (Jonathan E. Hansen of counsel), for Rockland Home for the Aged Housing Development Fund Company, Inc., respondent.

Babchik & Young, LLP, White Plains, (C. Briggs Johnson of counsel), for Thyssenkrupp Elevator Corporation, respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered September 2, 2014, which, insofar as appealed from as limited by the briefs, granted the motion of defendant Rockland Home for the Aged Housing Development Fund Company, Inc. (Rockland Home) for summary judgment dismissing the Labor Law § 240(1) claim, and granted the motion of defendant Thyssenkrupp Elevator Corporation (TEC) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

The Labor Law § 240(1) claim was properly dismissed in this

action where plaintiff was injured while attempting to climb out of an elevator pit in the absence of a pit ladder. The record shows that plaintiff was in the process of tightening bolts and replenishing oil, which he acknowledged is an ordinary occurrence in hydraulic elevators. Accordingly, the work plaintiff was engaged in constituted routine maintenance, and was not an activity to which the statute applies (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]*; Smith v Shell Oil Co.*, 85 NY2d 1000, 1002 [1995]).

The court also properly dismissed the complaint and all cross claims as against TEC, whose predecessor manufactured the elevator. Whether or not TEC's predecessor also installed the elevator, TEC made a prima facie showing that it owed plaintiff no duty, in that it is a general contractor's responsibility to provide a pit ladder, which is not a component of an elevator. In opposition, plaintiff failed to raise a triable issue of fact,

his expert's conclusory assertions notwithstanding.

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: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15562- Ind. 3280/10
15563-
15564- The People of the State of New York,
Respondent,

-against-

Hipolito Ramos,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Katherine A. Gregory of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered September 15, 2011, as amended September 30, 2011, convicting defendant, upon his plea of guilty, of rape in the third degree, and sentencing him to a term of 1½ years, with five years' postrelease supervision, unanimously affirmed. Order, same court and Justice, entered on or about February 2, 2012, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although defendant's waiver of his right to appeal from the judgment was invalid (*see People v Santiago*, 119 AD3d 484 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]; *People v Oquendo*, 105

AD3d 447, 448 [1st Dept 2013], *lv denied* 21 NY3d 1007 [2013]),, we perceive no basis for reducing the sentence.

As for defendant's civil appeal from his sex offender adjudication, we find that clear and convincing evidence supported the court's assessment of 10 points under the risk factor for failure to accept responsibility, based on defendant's statements that "tended to minimize his guilt" (*People v Hernandez*, 117 AD3d 524, 524 [1st Dept 2014], *lv denied* 24 NY3d 902 [2014]), regardless of whether these statements asserted any defense to the rape charge.

Defendant failed to preserve his arguments that the court should not have assessed 10 points under the risk factor for forcible compulsion, and that the court failed to state a finding on the risk factor for drug or alcohol abuse, under which the court did not assess any points, and we decline to review those arguments in the interest of justice. In any event, we find that they are without merit.

The court providently exercised its discretion in departing upwardly from defendant's presumptive risk level two to level three, based on the seriousness of defendant's course of conduct against the victim, his numerous other convictions, his failure to participate in a mandatory batterers' program, and his

violation of an order of protection pertaining to the victim of the underlying offense. These factors were not adequately taken into account by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861 [2014]).

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15566 Chaqulia Craig, as Administrator of the Estate of Lillie B. Johnson, etc., Plaintiff-Appellant, -against- St. Barnabas Nursing Home, Defendant-Respondent. Index 302109/11

Sinel & Associates, PLLC, New York (Judith E. Crumpton of counsel), for appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered November 20, 2013, which granted defendant nursing home's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action alleging violations of Public Health Law §§ 2801-d and 2803-c, as well as causes of action for medical malpractice, negligence, and wrongful death, the nursing home made a prima facie showing of its entitlement to judgment as a matter of law by submitting, among other things, its expert affirmation and medical records (*Negron v St. Barnabas Nursing Home*, 105 AD3d 501 [1st Dept 2013]). The medical records support the nursing home's expert's opinion that decedent's skin ulcers

and other complications were unavoidable and the result of preexisting conditions, as well as other risk factors (*id.*).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff submitted a conclusory and speculative affirmation of an unnamed expert who failed to mention the decedent's existing health conditions contributing to the ulcers, her comatose state, or that she had end-stage failure of her critical organs, including the skin (*see id.*). Moreover, the affirmation contained numerous misstatements of law and fact, and the expert failed to establish that he or she was qualified to opine on the care rendered at the nursing home (*Guzman v 4030 Bronx Blvd. Assoc., L.L.C.*, 54 AD3d 42, 48 [1st Dept 2008]).

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15568 The People of the State of New York, Ind. 9026/96
Respondent,

-against-

Terrance McCormick,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (William Terrell, III, of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about May 7, 2014, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification from level three to level one, unanimously affirmed, without costs.

The court providently exercised its discretion in denying any modification. Defendant emphasizes that he did not commit any additional sex crimes during the approximately 12 years that followed his release from custody. However, defendant had many other conflicts with the law during that period, including two separate felony convictions, and this pattern indicates an inability to control his behavior. This factor, as well as the seriousness of the underlying sex crime involving young children,

outweighs the factors cited by defendant (*see People v Johnson*, 124 AD3d 495 [1st Dept 2015]; *People v McFarland*, 120 AD3d 1121 [1st Dept 2014], *lv denied* 24 NY3d 1053 [2015]; *People v* Vega, 115 AD3d 461 [1st Dept 2014], *lv denied* 23 NY3d 905 [2014]).

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15570 In re Aharon Lieder, Index 101585/13
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Tenenbaum Berger & Shivers, LLP, Brooklyn (David M. Berger of counsel), for petitioner.

David I. Farber, New York City Housing Authority, New York (Hanh H. Le of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority, dated July 31, 2013, which, after a hearing, denied petitioner's grievance seeking succession rights as a remaining family member to the tenancy of his late grandmother, 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 [Shlomo Hagler, J.], entered June 10, 2014), dismissed, without costs.

Substantial evidence supports respondent's finding that petitioner did not qualify for remaining family member status because he did not obtain respondent's written consent to his occupancy (*see Matter of King v New York City Hous. Auth.*, 118

AD3d 636, 636 [1st Dept 2014]). Petitioner did not show that respondent acquiesced to his occupancy and, in any event, petitioner may not invoke estoppel against respondent (*id.* at 637).

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15571N Tina Love Nyadzi, Index 306871/12
Plaintiff-Appellant,

-against-

Ki Chul Lee, et al.,
Defendants-Respondents.

_____

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

Raven & Kolbe, LLP, New York (Michael T. Gleason of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered December 4, 2014, which denied plaintiff's motion to strike the answer of defendants, unanimously affirmed, without costs.

The court providently exercised its discretion in declining to strike the answer of defendants, as there was no discovery violation (*see* CPLR 3126; *Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]). The court's (Laura Douglas, J.), order entered August 14, 2014, which is not on appeal here, directed defendants to produce "Mr. Roderick Roberts on behalf of defendant Ki Chul Lee," and superseded the two prior conference orders directing "all parties" to appear for depositions. Defendants complied with the order entered August 14, 2014.

Further, defense counsel acted properly during the deposition of defendant 3420 Boston Road Corp.'s owner.

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15572 Mohammed Ahmed, Index 303435/12
Plaintiff-Appellant,

-against-

Donald Cannon,
Defendant-Respondent.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Russo & Toner, LLP, New York (Alexandra L. Alvarez of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered January 20, 2015, which granted defendant's motion for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to the claims of significant and permanent consequential limitation of use of the lumbar spine and left shoulder and significant limitation of use of the right wrist, and otherwise affirmed, without costs.

Defendant established prima facie that plaintiff did not sustain a permanent consequential or significant limitation of use of the cervical spine by submitting his orthopedist's and neurologist's reports finding no significant limitations, negative clinical results, and a resolved sprain (*see Thomas v*

NYLL Mgt. Ltd., 110 AD3d 613 [1st Dept 2013]). In addition, defendant's radiologist found degenerative disc disease and no post-traumatic changes in plaintiff's cervical spine (*see Macdelinne F. v Jimenez*, 126 AD3d 549, 551 1st Dept 2015]). Plaintiff does not argue on appeal that a triable issue of fact exists as to a serious injury of his cervical spine.

Defendant failed to establish that plaintiff did not sustain a permanent consequential or significant limitation of use of the lumbar spine resulting from the September 2010 motor vehicle accident, since his own orthopedist found a significant limitation in flexion during his July 2013 evaluation of plaintiff (*see Susino v Panzer*, 127 AD3d 523 [1st Dept 2015]). Moreover, although defendant's radiologist found in the MRI film an unremarkable spine and no post-traumatic changes, his orthopedist's report refers to an MRI report on the same film finding a disc bulge with left foraminal herniation and impingement, and an EMG/NV report finding L5 radiculopathy.

Defendant failed to establish that plaintiff did not sustain a permanent consequential or significant limitation of use of the left shoulder. He did not submit MRI findings by his radiologist, but his orthopedist's report refers to an MRI report finding "partial thickness tear of the acromioclavicular ligament

superiorly and inferiorly," and his orthopedist and neurologist found persisting limitations in the shoulder during their July 2013 examinations of plaintiff. Defendant submitted no proof that these injuries were not causally related to the accident.

Defendant established prima facie that plaintiff did not sustain a permanent consequential or significant limitation of use of the right wrist by submitting his radiologist's MRI report finding degenerative changes and no acute or traumatic injuries (*see Macdelinne F.*, 126 AD3d at 551). In opposition, plaintiff raised a triable issue of fact as to a significant limitation of use of his wrist by submitting his radiologist's MRI report finding tears in the ligaments and his treating physiatrist's report and an orthopedist's report finding limitations and a disability of the hand during their December 2010, February 2011, May 2011, and July 2011 evaluations. Although unaffirmed, the radiologist's report may be considered since it is not the sole basis for plaintiff's opposition (*see Rivera v Super Star Leasing, Inc.*, 57 AD3d 288 [1st Dept 2008]). Further, the orthopedist's opinion as to causation, which was based on his examinations, plaintiff's reported history, and a review of the medical records, is sufficient to raise an issue of fact as to causation (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Grant v*

United Pavers Co., Inc., 91 AD3d 499 [1st Dept 2012]). However, to the extent plaintiff relies on the physicians' March 2012 and March 2014 findings of limitations to demonstrate permanency, his reliance is misplaced since neither expert addresses the effects of a subsequent (November 2011) accident on the injuries (*see Pommells v Perez*, 4 NY3d 566, 574-575 [2005]).

Defendant established that the 90/180-day injury claim should be dismissed (*see Mitrotti v Elia*, 91 AD3d 449 [1st Dept 2012]). Plaintiff alleged in his bill of particulars that he was confined to bed for at most only two weeks, and confined to home for at most a week, after the accident. His claim that he did not work more than 90 days during the relevant period is not dispositive (*see Weinberg v Okapi Taxi, Inc.*, 73 AD3d 439 [1st Dept 2010]).

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15573 The People of the State of New York Ind. 5280/09
Respondent,

-against-

Jonathan Gonzalez-Alvarez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered February 15, 2012, as amended February 28, 2012, convicting defendant, after a jury trial, of murder in the second degree and gang assault in the first degree, and sentencing him to an aggregate term of 23 years to life, unanimously affirmed.

Defendant was not prejudiced by the court's postsummation change of plan regarding a jury instruction. Before summations, the court granted the prosecution's request for an accessorial liability charge, over defendant's objection. During his summation, defense counsel referred to the prosecutor's anticipated alternative argument that defendant acted as an accessory, arguing that it represented a change of course for the prosecution, reflecting a lack of confidence in its case. The

prosecutor's summation emphasized the extensive proof that defendant personally killed the deceased, but briefly mentioned an alternative theory of accessorial liability. After summations, the court determined that it would not charge accessorial liability. This was error, because it misled defense counsel as to what the court intended to charge. However, the error was plainly harmless, because there was overwhelming evidence that defendant personally stabbed the victim to death, because defense counsel was not prevented from fully arguing to the jury regarding the key issue of whether defendant himself committed the crime, and because the effect of the court's change of course upon the defense summation was insignificant (*see People v Miller*, 70 NY2d 903, 907 [1987]).

The court properly declined to submit manslaughter in the first degree as a lesser included offense. Given the types,

locations, and multiplicity of the stab wounds, there was no reasonable view of the evidence, viewed most favorably to defendant, that he acted with anything less than homicidal intent (*see People v Butler*, 84 NY2d 627 [1994]).

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15576N Elizabeth Elting, etc., Index 651423/14
Plaintiff-Appellant,

-against-

Philip Shawe,
Defendant-Respondent,

Transperfect Global, Inc., et al.,
Nominal Defendants.

- - - - -

In re Elizabeth Elting, etc.,
Petitioner-Appellant,

For the Dissolution of Transperfect Translations International, Inc.

- - - - -

Kramer Levin Naftalis & Frankel LLP,
Nonparty Appellant.

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Kramer Levin Naftalis & Frankel LLP, New York (Philip S. Kaufman of counsel), for appellants.

Kaplan Rice, New York (Howard J. Kaplan of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 9, 2015, which granted defendant Shawe's motion for costs and legal fees against plaintiff Elting and her counsel, Kramer Levin Naftalis & Frankel LLP, unanimously reversed, on the law and the facts, without costs, and the motion denied.

The motion court's factual determination that Elting and

Kramer Levin became aware of their mistaken representations, and failed to promptly notify defendant or the court of them, is not based on a fair interpretation of the evidence (*see Grozea v Lagoutova*, 67 AD3d 611 [1st Dept 2009] [imposition of costs and/or sanctions is not entitled to deference if there is a clear abuse of discretion]). The record shows that it was defendant, not plaintiff, who discovered plaintiff's misstatements in her complaint, and that defendant, rather than notifying plaintiff or the court of the misstatements, moved to dismiss the complaint. Moreover, the misstatements, while inaccurate, are not material (22 NYCRR 130-1.1[c][3]; *Bahamonde v State of New York*, 269 AD2d 551, 552 [2d Dept 2000]). Accordingly, defendant is not entitled to costs and fees pursuant to 22 NYCRR 130-1.1.

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

ENTERED: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15577N Boaz Bag Bag, etc., et al., Index 653179/12
Plaintiffs-Appellants,

-against-

Asher Alcobi, et al.,
Defendants-Respondents,

MEP Auto, Inc.,
Defendant.

_____

Joseph H. Neiman, Jamaica Estate, for appellants.

Debra J. Millman, P.C., New York (Norman Landres of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 14, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for leave to amend their amended complaint and, sub silentio, denied their motion to strike defendants' answer or compel discovery, unanimously modified, on the facts and in the exercise of discretion, to deem the revised second amended verified complaint (except for the ninth cause of action) to be the operative complaint, and otherwise affirmed, without costs.

The IAS court providently exercised its discretion (*see Heller v Louis Provenzano, Inc.,* 303 AD2d 20, 22 [1st Dept 2003]) by refusing to allow plaintiffs to add the ninth cause of action.

It is true that "leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). However, "it is equally true that the court should examine the sufficiency of the merits of the proposed amendment" (*Heller*, 303 AD2d at 25 [internal quotation marks omitted]). "Therefore, a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (*Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st Dept 1998] [internal quotation marks omitted]). Contrary to plaintiffs' contention, the court was *not* required to accept their allegations as true on a motion to amend (*see id.* at 117).

While "[t]he recitation of receipt of consideration is a mere admission of a fact which, like all such admissions, may be explained or disputed by parol evidence" (*Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 258 [1970] [internal quotation marks omitted]), "[i]t was essential for the [plaintiffs], in claiming absence of consideration, to state their version of the facts in evidentiary form" (*id.* at 259). Neither Mr. Bag Bag, Emily Sara L. nor Jackie L. (Emily's mother

and Mr. Bag Bag's ex-wife) submitted an affidavit controverting the agreement's recital of valuable consideration, receipt of which was acknowledged by all parties.

However, since the proposed second amended complaint (SAC) contains relevant corrections – for example, it corrects the spelling of Emily's last name, and it drops a claim against MEP Auto, Inc. which Mr. Bag Bag no longer wishes to pursue – the rest of the SAC (i.e., except for the ninth cause of action) we deem it the operative complaint.

Contrary to plaintiffs' contention, defendants did explain why they had not responded to plaintiffs' discovery requests – their counsel submitted an affirmation, saying they were waiting to hear back from plaintiffs about discontinuance of this action after defendants told them about the transfer agreements.

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: JUNE 30, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14545 The People of the State of New York, Ind. 4461/10
Respondent,

-against-

Daniel Velez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

Judgment Supreme Court, Bronx County (James M. Kindler, J.), rendered March 11, 2013, reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Richard T. Andrias
Karla Moskowitz
Barbara R. Kapnick, JJ.

Ind. 4461/10
14545

_____x

The People of the State of New York,
Respondent,

-against-

Daniel Velez,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (James M. Kindler, J.), rendered March 11, 2013, convicting him, after a jury trial, of attempted assault in the first degree and assault in the second degree, and imposing sentence.

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer and Peter D. Coddington of counsel), for respondent.

TOM, J.P.

A jury found defendant guilty of the lesser charges arising out of the stabbing of his girlfriend's son but acquitted him of the top count of the indictment, attempted murder in the second degree. Since justification was a central issue at trial and the court's instructions did not convey that acquittal of the greater charge of attempted murder based on a finding of justification precluded consideration of the lesser included offenses, the verdict is at best ambiguous. Thus, defendant was deprived of a fair trial, and a reversal is warranted in the interest of justice.

Rodger Meredith, the alleged victim, testified at trial that he was suspicious of the relationship between defendant, who is close to him in age, and Rodger's mother, Milagros Rolon. Both because of the age difference between defendant and Ms. Rolon and because Rodger noticed that defendant always came around near the end of the month when Ms. Rolon received her disability check, Rodger had never felt comfortable around defendant. When defendant did come to their apartment, he and Ms. Rolon would go right to her bedroom and get drunk.

Rodger's 13-year-old brother, Benjamin Jiminez, testified concerning a July 22, 2010 altercation between Rodger and defendant after their middle brother, Damian Meredith, pushed Ms. Rolon, who was drunk, causing her to fall to the floor.

Defendant emerged from the bedroom and confronted Damian, who called Rodger. The following morning, Rodger came to the apartment and argued with defendant in his mother's bedroom. When the two men emerged, they were fistfighting. About a week later, Damian went to live in Florida, and Rodger began staying at his girlfriend's apartment.

As to the assault that took place on the night of November 13, 2010, Rodger testified that he called Benjamin, as had become his practice following the July incident, to ask if his mother had company, by which he meant defendant, and Benjamin told him that "everything is okay, go ahead, come over." Just after entering the apartment building at about 10:40 p.m., as Rodger was putting away his keys, he saw defendant running down the stairs toward him holding a knife. Rodger put up his hand to protect his face but was cut on both his hand and his neck. He tripped, falling onto his right side, and defendant got on top of him, stabbing him in the stomach and left leg. Rodger bit defendant on the hand in an attempt to cause him to drop the knife, and defendant bit Rodger in the head. From the beginning of the assault, Rodger was yelling for his mother, and Benjamin, who heard the commotion from inside the apartment, called the police. When Ms. Rolon came down the stairs, defendant broke off the attack and ran out of the entrance door.

A police officer called by the defense testified that he filled out the initial complaint report in which Rodger stated that defendant pulled out a box cutter following a verbal dispute and stabbed him. The detective who arrested defendant testified that he noticed cuts on defendant's hands, and defendant's brother testified that, on the night of the stabbing, defendant came home with bleeding hands wrapped in a T-shirt. Medical records revealed that while being treated for his wounds at the hospital, defendant stated that he had been assaulted with a knife by an unknown person.

The trial court granted the defense request for a justification charge based, among other things, on defendant's palm-side injuries, which the jury might reasonably consider as defensive wounds. The court explained the justification defense and advised the jurors that they were to determine whether defendant had used, and had been entitled to use, physical or deadly physical force. The court further advised that to the extent they could distinguish among the multiple wounds Rodger allegedly sustained, they were required to "separately analyze the defense of justification with respect to each," and could conclude that defendant had acted reasonably in inflicting all, some or none of them. The jurors were additionally instructed that "an element of each count" was that defendant acted without

justification and if they found that the People "failed to prove beyond a reasonable doubt the defendant was not justified, then you must find the defendant not guilty of the crimes charged." Finally, even if the justification defense were disproved, the jurors were still required to find that the People had established all the other elements of an offense before finding defendant guilty. In setting forth the elements of each of the charged crimes (namely, attempted murder in the second degree, attempted assault in the first degree, and assault in the second degree), the court included, as the last element of each, "[t]hat the defendant was not justified."

In its explanation of the verdict sheet, the court gave the jurors the following instructions:

> "You should consider the counts in the order listed on the verdict sheet, the attempted murder count first, as the verdict sheet indicates you must consider counts one and three. One is attempted murder in the second degree, and count three is assault in the second degree. And you are to consider each of them no matter what your verdict is on each. However, you should consider count two, which is attempted assault in the first degree, only if your verdict on count one, the attempted murder count, is not guilty, and the verdict sheet indicates that."

On the verdict sheet, count one, attempted murder, was accompanied by an instruction that this count must be considered. Count two, attempted assault in the first degree, provided that

the jurors were to "[c]onsider this count only if your verdict on count one is Not Guilty." Count three, assault in the second degree, contained the direction that the "[j]ury must consider this count." Neither the verdict sheet nor the court's verbal explanation of its contents mentioned justification.

Defendant's primary contention on appeal is that the court failed to instruct the jury that acquittal on the top count of attempted murder based on justification precluded further deliberations. Presuming that acquittal on the top count was in fact predicated on his justifiable use of deadly force, defendant maintains that the remainder of the verdict convicting him of the two lesser crimes lacks "reliability."

The People respond that defendant failed to advance before the trial court either the claim that acquittal of any offense precludes consideration of any lesser offense or that guilt with respect to each offense charged must be based on his unjustified actions. Thus, his present contentions are unpreserved (citing CPL 470.05 [2]; *People v Hayes*, 72 AD3d 441, 442-444 [1st Dept 2010], *affd* 17 NY3d 46 [2011], *cert denied* ___ US ___, 132 S Ct 844 [2011]; *People v Crique*, 63 AD3d 566, 567 [1st Dept 2009], *lv. denied* 13 NY3d 835 [2009]). They further argue that the court's charge tracked the CJI pattern jury instructions by including lack of justification as an element of each crime

(citing *People v Palmer*, 34 AD3d 701, 703-704 [2d Dept 2006], *lv denied* 8 NY3d 848 [2007]).

On this record, review of the issue in the interest of justice is warranted because it is impossible to discern whether acquittal of the top count of attempted murder in the second degree was based on the jurors' finding of justification so as to mandate acquittal on the two lesser counts. While lack of justification was included as an element of each crime, the verdict sheet and the court's accompanying explanation created confusion, because they indicated among other things that the jurors "must consider" count three irrespective of their disposition of higher counts and they failed to explicitly convey that a finding of justification on the top count precluded further deliberation. While the trial court did follow the CJI justification instruction in its charge, it also included as an element of each offense "[t]hat the defendant was not justified," which may have led the jurors to conclude that deliberation on each crime required reconsideration of the justification defense, even if they had already acquitted the defendant of the top count of attempted murder in the second degree based on justification.

People v Feuer (11 AD3d 633 [2d Dept 2004]) is illustrative. There, the trial court instructed the jury on the defense of justification with respect to each of the four counts charged; it

did not direct that if the jury found defendant not guilty by reason of justification as to a greater count, it was not to consider any lesser counts (*id.* at 634), an instruction generally denominated a "stop deliberations" charge. The Second Department reviewed the defendant's claim in the interest of justice, noting that the justification defense was a critical component of the trial and that the asserted deficiency in the court's instructions constitutes reversible error (*id.*, citing *People v Ross*, 2 AD3d 465 [2d Dept 2003], *lv denied* 2 NY3d 745 [2004]; *People v Roberts*, 280 AD2d 415 [1st Dept 2001], *lv denied* 96 NY2d 906 [2001]).

In *Roberts*, this Court held that although the jurors were instructed that a unanimous guilty verdict on a greater charge precluded consideration of any lesser charges and that justification was a defense as to all counts, the trial court did not make clear that if they found the defendant not guilty by reason of justification on a count, they were not to consider any lesser crimes (280 AD2d at 416). We found that the trial court erred in failing to instruct the jurors that a finding of not guilty on a greater charge on the basis of justification precluded consideration of any lesser counts (*id.*). Without knowing the basis for acquittal on the top count, we held that reversal of the judgment was required (*id.*).

Considered as a whole, the instructions and verdict sheet at issue did not adequately convey the principle that if the jury found defendant not guilty of the greater charge on the basis of justification, it was not to consider any lesser counts. Because there is no way of knowing whether the acquittal of the top count of attempted murder in the second degree was based on a finding of justification by the jury, the two counts of the indictment that resulted in conviction must be reversed.

In light of this determination, we find it unnecessary to reach any other issues.

Accordingly, the judgment of the Supreme Court, Bronx County (James M. Kindler, J.), rendered March 11, 2013, convicting defendant, after a jury trial, of attempted assault in the first degree and assault in the second degree, and sentencing him, as a second violent felony offender, to concurrent prison terms of 9 years and 6 years, respectively, to be followed by 5 years'

postrelease supervision, should be reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

All concur.

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

ENTERED: JUNE 30, 2015

CLERK