SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 6, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Acosta, Román, JJ.

1475 Patricia Horst, Index 602652/05
Plaintiff-Appellant,

-against-

Owen Lloyd Brown,
Defendant-Respondent.

Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, Lake Success (Keith J. Singer of counsel), for appellant.

Owen Lloyd Brown, respondent pro se.

Order, Supreme Court, New York County (Louis B. York, J.), entered October 16, 2007, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment and dismissed certain of her claims on the ground of statute of limitations, reversed, on the law, without costs, the dismissed claims reinstated, plaintiff granted summary judgment as to liability on those claims, and the matter remanded for a trial as to damages.

CPLR 3211(e) explicitly provides that an objection or defense based on the statute of limitations is waived unless raised in a responsive pleading or in a pre-answer motion to

dismiss. Defendant failed to do either, and thus waived this defense (*see Buckeye Retirement Co., L.L.C., Ltd. v Lee*, 41 AD3d 183 [2007] [statute of limitations defense waived unless raised by aggrieved party]).

As defendant waived the affirmative defense of statute of limitations, Supreme Court erred in its sua sponte consideration of that defense (*see Paladino v Time Warner Cable of N.Y. City*, 16 AD3d 646 [2005] ["court may not take judicial notice, sua sponte, of the applicability of a statute of limitations if that defense has not been raised"]).

While "courts generally allow pro se litigants some leeway on the presentation of their case" (*Stoves & Stones v Rubens*, 237 AD2d 280, 280 [1997]), in this particular case it was error to treat defendant's opposition to plaintiff's motion for summary judgment on damages as either a motion to amend defendant's answer, or a cross motion for summary judgment based on the statute of limitations. "A motion for summary judgment 'on one claim or defense does not provide a basis for searching the record and granting summary judgment on an unrelated claim or defense'" (*Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73, 82 [2002], *quoting Sadkin v Raskin & Rappoport*, 271 AD2d 272, 273 [2000]).

All concur except Gonzalez, P.J. and Román, J. who dissent in part in a memorandum by Román, J. as follows:

ROMÁN, J. (dissenting in part)

Well-settled law mandates an outcome, for the most part different from that which the majority holds and therefore, I dissent.

From February 3, 1992 through July 23, 1999, plaintiff made a series of personal loans to the defendant. Some of the loans were evidenced by promissory notes, others by checks. Notably, at his deposition, and in his affidavit in opposition to plaintiff's motion, defendant conceded that he did in fact borrow all the money alleged by plaintiff. A review of the record shows that with the exception of one promissory note, dated July 21, 1992, there is no indication as to when defendant was obligated to repay plaintiff the money borrowed or when, if at all, plaintiff demanded payment of the loans. The promissory note dated July 21, 1992, however, states that defendant agreed to repay a loan totaling $16,200 within 60 months of the note's execution.

Plaintiff moved for summary judgment alleging that inasmuch as defendant admitted borrowing money from the plaintiff as well his failure to repay the debt, plaintiff was entitled to summary judgment. Defendant opposed plaintiff's motion arguing that all but one of the loans made to him by the plaintiff were unenforceable as time barred. Defendant conceded that plaintiff's loan of $1950, made on July 18 and 23, 1999,

evidenced by a promissory note dated July 23, 1999, was not time-barred. The motion court, acknowledging that defendant had not raised the statute of limitations defense in his answer, nevertheless found that this defense barred the majority of plaintiff's claims, with the exception of the loan made July 1999. In the absence of any motion by the defendant, the court directed judgment in defendant's favor, with the exception of the loan made to defendant on July 18 and 23, 1999, in the amount of $1950, as to which it directed judgment in plaintiff's favor. Plaintiff appeals, averring that the motion court erred in allowing defendant to interpose a statute of limitations defense, a defense defendant never asserted in his answer nor in a pre-answer motion to dismiss. For the reasons that follow hereinafter, I believe that the law dictates a modification of the motion court's decision, rather than, as concluded by the majority, almost wholesale reversal of the same.

Generally, when a defendant fails to plead the statute of limitations as a defense in his or her answer or fails to move for dismissal on that ground, via a pre-answer motion, the defense is ordinarily waived (*see Dougherty v City of Rye*, 63 NY2d 989, 991-992 [1984]; *Fade v Pugliani*, 8 AD3d 612, 614 [2004]). However, when a defendant fails to plead an affirmative defense, as required by CPLR 3211(e) and 3018(b), but nevertheless asserts that defense in connection with a motion for

summary judgment, the waiver is said to be retracted and the court can grant, when the defendant is the movant, or deny, when the defendant is the opponent, summary judgment based upon the unpleaded affirmative defense (*see Lerwick v Kelsey*, 24 AD3d 918, 919-920 [2005]; *Allen v Matthews*, 266 AD2d 782, 784 [1999]; *Adsit v Quantum Chem. Corp.*, 199 AD2d 899 [1993]). The threshold inquiry is whether in considering the unpleaded defense, the opponent of the defense is prejudiced thereby (*see BMX Wordlwide v Coppola N.Y.C.*, 287 AD2d 383 [2001]; *Allen v Matthews*, 266 AD2d 782, 784 [1999]; *Seaboard Sur. Co. v Nigro, Bros.* 222 AD2d 574 [1995]; *Rogoff v San Juan Racing Assn. Inc.*, 77 AD2d 831 [1980], *affd* 54 NY2d 883 [1981]). Such prejudice, however, is ameliorated when the defense was previously raised on a prior motion or during discovery (*id.*), or when the opponent of the motion, where defendant seeks summary judgment based upon said defense, is given an opportunity to fully respond to the motion for summary judgment (*Sheils v County of Fulton*, 14 AD3d 919 [2005], *lv denied* 4 NY3d 711 [2005]; *Kirilescu v American Home Prods. Corp.*, 278 AD2d 457 [2000], *lv denied* 96 NY2d 933 [2001]; *McSorley v Philip Morris, Inc.*, 170 AD2d 440 [1991], *appeal dismissed* 77 NY2d 990 [1991]; *International Fid. Ins. Co. v Robb*, 159 AD2d 687 [1990]).

In this case, the motion court properly considered defendant's statute of limitations defense proffered for the

first time in opposition to plaintiff's motion for summary judgment (*Allen* at 784). In its decision, the motion court noted that defendant had "vigorously asserted such a defense" in his post-answer submissions, i.e., in opposition to plaintiff's motion for summary judgment. Additionally, a review of the record shows that plaintiff, who had ample opportunity to address the statute of limitations defense in reply to defendant's opposition to her motion for summary judgment, never alleged that she was surprised or actually prejudiced as a result of defendant's newly-raised defense. Accordingly, nothing precluded the motion court from considering the defense. The majority, simply ignores the legion of cases, which create an exception to the well-settled rule related to affirmative defenses, waiver and motions for summary judgment.

The motion court thus erred not in procedurally awarding defendant relief but in substantively concluding, on this record, that all but one of plaintiff's claims are in fact time barred.

When a court is deciding a motion for summary judgment, it can search the record and, even in the absence of a cross motion, may grant summary judgment to a non-moving party (CPLR 3212[b]; *Dunham v Hilco Constr. Co., Inc.*, 89 NY2d 425 [1996]. Furthermore, a cause of action for breach of contract must be commenced within six years (CPLR 213[2]). The cause of action

accrues at the time of the breach (*John J. Kassner & Co. v City of New York*, 46 NY2d 544 [1979]. When the cause of action is one to recover a sum of money owed pursuant to contract, the cause of action accrues when plaintiff possesses the legal right to demand payment (*see Verizon N.Y. Inc. v Sprint PCS*, 43 AD3d 686 [2007]).

Based on the foregoing, the motion court, providently exercised its discretion when it searched the record to determine whether, in light of defendant's statute of limitations defense, any of plaintiff's claims were time-barred thereby meriting dismissal. Contrary to the majority's decision and the cases cited therein, this was not an instance where the court, *sua sponte*, granted summary judgment on an issue never raised (*see Buckeye Retirement Co., L.L.C., Ltd. v Lee*, 41 AD3d 183 [2007]; *Paladino v Time Warner Cable of N.Y. City*, 16 AD3d 646 [2005]; *Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73 [2002]). Instead, the court granted summary judgment on an issue which, although defendant never pleaded, he did in fact raise in opposition to plaintiff's motion. However, insofar as the court concluded that virtually all of plaintiff's claims were time-barred, the court erred as a matter of law.

With the exception of the loans governed by the promissory note dated July 21, 1992, which stated that it was to be repaid within 60 months and for which, therefore, the six-year statute of limitations would have expired on or about July 21, 2003, and

the loan made July 18 and 23, 1999, which defendant concedes is not time barred, on this record, there is no evidence as to whether that the statute of limitations has run with regard to the 12 remaining loans, since there is no evidence of any breach related thereto.

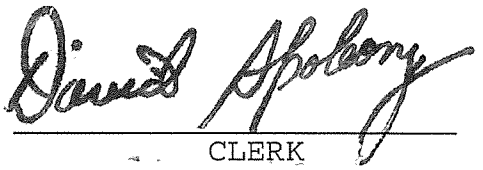
The motion court thus erred when it concluded that recovery on these 12 loans was time-barred. The record fails to indicate when, if at all, plaintiff was entitled to or demanded repayment of these loans. Thus, the record is bereft of any evidence as to when defendant breached each agreement so as to trigger the statute of limitations as to each of these loans. Accordingly whether claims as to these loans are time-barred is an issue of fact warranting denial of plaintiff's motion for summary judgment with regard to them.

Based on the foregoing, I believe that the motion court correctly granted plaintiff and defendant summary judgment on the July 1999 loan and on the July 21, 1992 promissory note, respectively. However, to the extent that it granted defendant summary judgment on the remainder of plaintiff's claims, the court erred. Accordingly, I would modify the motion court's

decision and order, to the extent of vacating its determination that defendant is entitled to summary judgment with regard to all the remaining claims asserted by plaintiff.

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

ENTERED: APRIL 6, 2010



CLERK

Saxe, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4136-
4137 Jemrock Realty Co. LLC, Index 570593/06
Petitioner-Respondent,

-against-

Jay Krugman,
Respondent-Appellant.

Barry J. Yellen, New York, for appellant.

The Abramson Law Group, PLLC, New York (Jeff Bodoff of counsel), for respondent.

Upon remittitur from the Court of Appeals (13 NY3d 924 [2010]), the order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on or about December 4, 2007, in effect, modifying the order of Civil Court, New York County (Jean T. Schneider, J.), entered on or about September 29, 2006, which, after a nonjury trial, directed judgment in respondent tenant's favor in the amount of $37,847.92, to the extent of awarding possession of the apartment to petitioner landlord, declaring that landlord is entitled to a rent increase above the $2,000 luxury decontrol threshold for improvements and remanding the matter to Civil Court for a determination of the rent arrears owed by tenant to landlord, unanimously affirmed, without costs.

Jemrock Realty Co. LLC (landlord) commenced this proceeding in Civil Court seeking rent arrears and possession of apartment

16E at 210 West 101st Street in Manhattan based on Krugman's (tenant) rent arrears. Tenant answered, asserting, inter alia, that his monthly rent was illegal under the Rent Stabilization Law (RSL). Specifically, tenant challenges an Individual Apartment Increase (IAI) claimed by the landlord pursuant to RSL 2522.4[a][1] for work performed in the apartment during the vacancy period prior to tenant's occupancy.

When the prior long-term, rent-stabilized tenant vacated the apartment, landlord retained a contractor to perform work in the apartment to prepare it for the new tenant. Landlord paid the contractor a total sum of $50,000 for the extensive work performed in the apartment, which landlord then used as an IAI to increase the apartment's legal rent. The last stabilized tenant paid a monthly rental of $920.12 and vacancy and longevity increases raised the rent to $1,247.68. Landlord then claimed an additional monthly improvement increase of $1,250 (one fortieth of $50,000), raising the legal rent above $2,000 and exempting the premises from regulation. Landlord relied upon the $50,000 figure in the notice and certification attached to the lease entered into by Krugman as the basis for the increase. The monthly rent for the apartment was listed as $3,600.

At a nonjury trial, landlord proved that the contractor performed extensive work in the apartment for which he was paid $50,000. Civil Court further found that the contractor performed

work that included renovations that were "extensive and substantial," as well as repairs. Civil Court denied the IAI because it found "no reliable contemporaneous evidence breaking down the cost of the work so that the court can distinguish between the cost of extensive repairs and the cost of allowable improvements." Appellate Term, however, over a dissent, reversed Civil Court's determination that landlord was not entitled to the rent increase for improvements, and as a result held that the increased monthly rent properly exceeded $2,000. Specifically, Appellate Term reasoned that no breakdown of costs was necessary to distinguish between costs of allowable improvements and costs of repairs, where the work involved extensive renovations. A divided panel of this Court affirmed (64 AD3d 290 [2009]), essentially for the reasons expressed by Appellate Term.

On appeal, the Court of Appeals reversed this Court on limited grounds, explaining:

> This case turns on the factual issue of whether the landlord's expenditures for "improvements" were at least equal to the amount (approximately $30,000) necessary to bring the legal rent above the luxury decontrol threshold. Contrary to the contentions of both parties, and to the majority and dissenting opinions at the Appellate Division, the resolution of that issue is not governed by any inflexible rule either that a landlord is always required, or that it is never required, to submit an item-by-item breakdown, showing an allocation between improvements and repairs, where the landlord has engaged in extensive renovation work. The question is one to be resolved by the factfinder in the same manner as other issues, based on the persuasive force of the evidence submitted by the parties (13 NY3d at 926).

On this issue, the Court of Appeals pointed out, Appellate Term found that "landlord had met its burden of showing that its expenditures on improvements exceeded the requisite amount" (*id.*). The Court of Appeals, however, remitted the action to this Court because we "erroneously decided this question as a matter of law, and did not exercise [our] power to review the facts" (*id.*).

Exercising our authority to review the record developed at trial and render the judgment warranted by the facts (*see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492 [1983]), we find that landlord's expenditures for improvements were sufficient to bring the legal rent for the unit above the luxury decontrol threshold. The trial evidence established, and it is not disputed, that the renovations included installing new kitchen cabinets, countertops and appliances; installing a ceramic tile floor; replacing kitchen and bathroom plumbing; rewiring the apartment's electrical lines and replacing electrical outlets, switches and fixtures; and replacing moldings. On the other hand, the repairs included repairing the kitchen underflooring; repairing walls; refinishing the wood floors; and plastering and painting of the entire apartment. Such evidence, in our view clearly establishes that landlord's expenditures for "improvements" viz-a-viz repairs were

at least equal to $30,000, the amount necessary to bring the legal rent above the luxury decontrol threshold.

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

ENTERED: APRIL 6, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam JJ.

1700 The People of the State of New York, Ind. 4407/04
Respondent,

-against-

Kenneth Hayes,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Gina Mignola of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered September 9, 2005, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 2 years, affirmed.

The People did not violate their disclosure obligations under *Brady v Maryland* (373 US 83 [1963]), and defendant is not entitled to dismissal of the indictment on the ground that exculpatory material was permanently lost or destroyed by the police. Defendant raised a justification defense in connection with his stabbing of another patron at a crowded movie theater. Shortly before trial, the prosecutor informed defense counsel that a police sergeant had just told him about statements the sergeant overheard at the crime scene minutes after the stabbing, in which two apparently unconnected bystanders commented that the

victim had the knife first. The sergeant, who was busy securing the hectic crime scene, did not obtain identities or contact information for these persons. Although the information that the victim had the knife first was material to the issue of justification and favorable to the defense, the People did not suppress it; under the circumstances, earlier disclosure would not have enabled defendant to make use of it. Defendant argues that regardless of whether or not he acted in good faith, the sergeant was obligated to "preserve" the exculpatory information by asking, or directing another officer to ask the two bystanders for their pedigrees, and that disclosure of the content of their statements was pointless without providing contact information. There is no question that law enforcement agencies are required to preserve exculpatory evidence already in their possession. However, although the dissent faults the police for not obtaining the identities or contact information of the bystanders, the law is clear that they are not required to affirmatively acquire or gather additional evidence that might be helpful to the accused (*People v Alvarez*, 70 NY2d 375, 381 [1987]). This case does not involve a duty to memorialize or otherwise preserve information already known (*cf. People v Bayard*, 63 AD3d 481 [2009], *lv granted* 13 NY3d 858 [2009]). Here, the identities of the bystanders and their contact information were never known to law enforcement. Finally, the bystanders were never in the People's

control, and merely acquiring their pedigrees would not have placed them in such control (*compare People v Jenkins*, 41 NY2d 307, 310-311 [1977]). The failure of the police to perform a function not required of them should not be used to support the basis for an interest-of-justice argument.

The court properly exercised its discretion in precluding the defense from using the bystanders' statements on cross-examination for the purpose of challenging the thoroughness of the police investigation, specifically by showing that the police should have tested the knife for the victim's fingerprints and interviewed the bystanders.

The dissent contends that the court's failure to specifically instruct the jury that a finding of not guilty of the greater crime based on justification precluded it from considering the lesser included offenses - a "stop consideration" charge - compels reversal of the judgment and dismissal of the indictment. Although acknowledging that this claim is unpreserved by reason of defendant's failure to object to the charge as given (*see People v LaPetina*, 9 NY3d 854 [2007]), the dissent argues that we should, in the interest of justice, exercise our discretion and consider this claim.

While our powers of review "in the interest of justice" are extremely broad (CPL 470.15[6]), they are not unlimited and should be exercised with care. In this regard, we have long held

that in exercising this power, "we must guard against being capricious and whimsical, affirming when we feel like it, and reversing when we feel like it" (*People v Kidd*, 76 AD2d 665, 667 [1980, *lv dismissed* 51 NY2d 882 [1980]]; *see also People v Bourne*, 139 AD2d 210, 215 [1988], *lv denied* 72 NY2d 955 [1988]).

The evidence at trial revealed that defendant and six of his friends went to a large multiplex cinema in Times Square. Because the theater was crowded, they sat in the uppermost tier of the theater. For 15 minutes after the movie started, 10 people in the front near the screen were talking and making noise, which "annoyed" defendant and his friends, as well as other patrons in the theater. Defendant claimed that when he went down alone to confront the noisemakers, the victim jumped up and began arguing with him. When the victim reached into his waistband, defendant believed he had a weapon. According to defendant, the victim took a swing at him and he could tell from the reflection on the movie screen that the victim had a knife. Defendant testified that both he and the victim fell to the floor, and in the scuffle, he took the knife away from the victim. Defendant further testified that although he now had the knife, the victim continued to attack him and that he was only trying to protect himself, not to stab the victim. In the melee that followed, defendant ran from the building and was observed by a police officer discarding the knife under a car. As was to

be expected in this type of scenario, the victim, as well as other witnesses who testified both for and against defendant, gave varying stories as to what had taken place.

The jury was thus faced with a classic credibility determination, one that is not changed by the absence of any testimony from the two unknown bystanders. Having observed the witnesses who did testify, and hearing the testimony that was subject to cross-examination, the jurors were in the best position to determine which version of the incident was most credible. In fact, on appeal defendant does not challenge the legal sufficiency of the proof that persuaded the jury to convict him of assault in the second degree and criminal possession of a weapon in the fourth degree. Factually, there is no reason to set aside the verdict in the interests of justice.

With respect to the jury instruction, the record is clear that defense counsel did not, in fact, request a "stop consideration" charge. Rather, he asked for and received a charge that justification applies to all three assault counts.

Notably, it was the People who requested the "stop consideration" charge. Defense counsel agreed, stating, "If they find it is justified, it is an acquittal." The court thereafter instructed the jury that the People were required to prove each element of each crime charged, and to disprove justification "with regard to each count that you will consider." Although the

court did not give a specific "stop consideration" charge in its instructions to the jury (*see People v Roberts*, 280 AD2d 415 [2001], *lv denied* 96 NY2d 906 [2001]), the charge, when read as a whole, "adequately conveyed the principle that if the jury found that defendant was not guilty of a greater charge on the basis of justification, it was not to consider any lesser counts" (*People v White*, 66 AD3d 585, 586 [2009]). Defense counsel did not object after the charge, and it thus became the law of the case.

In short, the underlying facts and applicable law do not warrant the exercise of our interests-of-justice review, and the conviction should be affirmed.

All concur except Moskowitz and Abdus-Salaam, JJ. who dissent in a memorandum by Abdus-Salaam, J. as follows:

ABDUS-SALAAM, J. (dissenting)

I respectfully dissent. The charge on justification was erroneous. Under the circumstances, we should, in the interest of justice, exercise our discretion and reverse the conviction for assault in the second degree. The trial court's error "in failing to instruct the jurors that if they found the defendant not guilty of a greater charge on the basis of justification, they were not to consider any lesser counts, is of such nature and degree so as to constitute reversible error" (*People v Feuer*, 11 AD3d 633, 634 [2004]; *see also People v Roberts*, 280 AD2d 415 [2001], *lv denied* 96 NY2d 906 [2001]), and is compelling reason to exercise our discretion in the interest of justice (*see* CPL 470.15[6][a]).

I disagree with the majority's assessment that the charge, when read as a whole, adequately conveyed the law on justification to the jury. In *People v White* (66 AD3d 585 [2009]), cited by the majority, where this Court held that "the court's instructions adequately conveyed the principle that if the jury found that defendant was not guilty of a greater charge on the basis of justification, it was not to consider any lesser counts" (at 586), the record showed the court charged that if the jury found the People had failed to prove beyond a reasonable doubt that the defendant was not justified on the top count, then they must find the defendant not guilty on all counts of assault.

This is the charge on justification set forth in the Criminal Jury Instructions (CJI2d[NY] Penal Law § 35.15), based upon our decision in *Roberts* (280 AD2d 415, *supra*), as well as decisions from other Departments.

The charge given in this case did not track the language of the CJI charge, nor did it adequately convey the proper legal principles applicable to the defense of justification. As there is no way of knowing whether the acquittals of first-degree assault and attempted first-degree assault were based on a finding of justification (*People v Roberts*, 280 AD2d 415 [2001], *supra*), the judgment should be reversed. The error committed by the trial court in failing to properly charge the jury regarding the defense of justification is particularly egregious in this case where the defense was greatly hampered because the police did not obtain the identities of the bystanders who had been heard to say that the victim had the knife first. Defendant had no way of contacting these individuals in order to obtain their testimony at trial. Thus, the majority's observation that the jury was faced with a classic credibility determination and that factually, there is no reason to set aside the verdict in the

interest of justice, appears to be made without any consideration that defendant was deprived of an opportunity to contact witnesses that the police confirmed might very well have been helpful in establishing a justification defense.

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

ENTERED: APRIL 6, 2010

CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

2487-
2488 The People of the State of New York, Ind. 3186/04
Respondent, 52587C/05

-against-

Robert Brown,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx ((Justin J. Braun of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered October 26, 2006, convicting defendant, after a jury trial, of assault in the second degree (two counts) and assault in the third degree, and sentencing him to an aggregate term of 7 years, unanimously affirmed. Judgment, same court and Justice, rendered November 9, 2006, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to a concurrent term of 5 years, unanimously modified, on the law, to the extent of vacating the term of postrelease supervision and remanding for the sole purpose of imposing a lawful term thereof, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility.

The court properly permitted the People to introduce a tape of a 911 call made by an unidentified declarant. The content of the call establishes that it qualified under both the excited utterance (*see People v Edwards*, 47 NY2d 493, 497 [1979]) and present sense impression (*see People v Brown*, 80 NY2d 729 [1993]) exceptions to the hearsay rule, and that it was not testimonial within the meaning of *Crawford v Washington* (541 US 36 [2004]) in that it was made "to enable police assistance to meet an ongoing emergency" (*Davis v Washington*, 547 US 813, 822 [2006]).

As the People concede, since defendant was a first felony offender for sentencing purposes, the five-year term of postrelease supervision imposed for his conviction by guilty plea was unlawful, and the correct term of PRS should be between one and one-half and three years. We perceive no other basis for reducing any of the sentences.

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

ENTERED: APRIL 6, 2010

CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

2489 In re Ronald Cohen, Index 100298/09
Petitioner-Appellant,

-against-

Arthur Engoron, etc.,
Respondent-Respondent.

Ronald Cohen, Wilmington, NC, appellant pro se.

Andrew M. Cuomo, Attorney General, New York (Robert C. Weisz of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered November 2, 2009, which denied the petition brought pursuant to CPLR article 78 seeking (1) to compel Judge Engoron of the Civil Court, New York County to vacate his order dated October 5, 2007, denying the motion to dismiss an underlying action against petitioner's client in the case of *Marte v Graber* (17 Misc 3d 1139[A], 2007 NY Slip Op 52348[U] [2007]), and all subsequent orders issued in that case, (2) to cause such orders to be removed from the public record, and (3) to direct Judge Engoron to cease and desist from maintaining the validity of such orders, and dismissed the proceeding, unanimously affirmed, without costs.

In the underlying action, the incarcerated plaintiff sought to recover a retainer paid to attorney Herman Graber for legal services to be rendered in connection with the filing of his criminal appeal. Graber allegedly failed to perform such

services and he died approximately three months before the plaintiff commenced the underlying action. Thereafter, the defense sought dismissal of the underlying action and the plaintiff moved to substitute Graber's widow as the defendant and for leave to amend the summons. Supreme Court denied the motion to dismiss and granted the relief sought by the plaintiff. The court also removed the action to Civil Court, New York County. Supreme Court then granted the defense's motion for reargument and, upon reargument, adhered to its prior determination.

The defendant appealed Supreme Court's orders and while the appeal was pending, the defendant moved in Civil Court to dismiss the underlying action. In an order dated October 5, 2007, Judge Engoron denied the motion on the basis that Supreme Court's order constituted law of the case. The court also denied the motion on the basis that the defendant's attorney (petitioner) did not maintain an office within the state for the "transaction of law business" as required by Judiciary Law § 470 (*Marte v Graber*, 17 Misc 3d 1139[A]). The defendant moved to reargue, and in an order dated February 27, 2008, Judge Engoron granted the motion and, upon reargument, adhered to the prior determination.

On November 13, 2008, this Court reversed Supreme Court and dismissed the underlying action (58 AD3d 1 [2008]). We held that the underlying action was a nullity from its inception since the summons and complaint were filed after the death of Herman

Graber, that Graber was never a party to the action, and thus there was no party for whom a substitution could be made nor a legal summons which could be amended (*id.* at 4). Following this Court's decision, petitioner brought the subject article 78 proceeding.

Supreme Court properly denied the petition as neither mandamus nor prohibition is available since petitioner did not meet his burden of demonstrating a "clear legal right" to the relief requested, namely to have the Civil Court's orders in the underlying action removed from the public record (*Matter of Council of the City of N. Y. v Bloomberg*, 6 NY3d 380, 388 [2006] [internal quotation marks and citation omitted]). Because this Court's holding rendered the action before the Civil Court a nullity, the court properly found that the issues raised in this proceeding have been rendered academic (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]), and that the portion of the order holding that petitioner failed to satisfy the requirement of Judiciary Law § 470 is not an issue that warranted the circumvention of the mootness doctrine.

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

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

ENTERED: APRIL 6, 2010

CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

2490 Glenfield Effatt, et al., Index 23858/99
Plaintiffs-Respondents, 83624/03

-against-

Otis Elevator Co.,
Defendant,

Nouveau Elevator Industries, Inc.,
Defendant-Appellant.

[And a Third-Party Action]

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for appellant.

Weisman & Calderon LLP, Mount Vernon (Dion Sankar of counsel), for respondents.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered August 7, 2008, which, to the extent appealed from, denied defendant Nouveau's motion to dismiss the complaint against it, unanimously affirmed, without costs.

When plaintiff Glenfield Effatt, an employee of Lenox Hill Hospital, leaned against the exterior door of Elevator 12 at the hospital, the door gave way and he fell approximately 30 feet to the floor of the empty shaft. Nouveau maintained and serviced all the elevators at the hospital.

Plaintiffs raised triable issues of fact as to whether Nouveau was responsible for maintaining and inspecting Elevator 12, and whether it had actual or constructive notice of any

defects (*see Rogers v Dorchester Assoc.*, 32 NY2d 553 [1973]; *Nye v Putnam Nursing & Rehabilitation Ctr.*, 62 AD3d 767 [2009]; *Solowij v Otis El. Co.*, 295 AD2d 145 [2002]). Notwithstanding that Nouveau's service contract for Elevator 12 was designated as "Limited - Oil & Grease," the contract also delineated numerous duties on Nouveau's part in maintaining and inspecting the elevator. Furthermore, the deposition of Nouveau's elevator service supervisor raised an issue as to whether the "limited" scope of services for Elevator 12 related only to billing matters, as he testified that parts and services not related to lubrication would be inspected on Elevator 12 after approval by building personnel and for an additional charge for labor and parts. Nouveau did perform an annual inspection of the elevator two months prior to the accident, and performed maintenance work on it only two days prior, which further highlights the issue of whether Nouveau had actual or constructive notice of a defect such as worn-down parts in the doors protecting the hoist-way.

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

ENTERED: APRIL 6, 2010

CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

2491 The People of the State of New York, Ind. 2547/08
Respondent,

-against-

Dean Taylor,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about November 3, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: APRIL 6, 2010

David Apolony

CLERK

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

Friedman, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

2493 Noho Star Inc., Index 115123/08
Petitioner,

-against-

New York State Division of
Human Rights, et al.,
Respondents.

Samuel Friedman, New York, for petitioner.

Caroline J. Downey, Bronx (Toni Ann Hollifield of counsel), for New York State Division of Human Rights, respondent.

Brown & Gropper, LLP, New York (James A. Brown of counsel), for Ching Fai To, respondent.

Determination of respondent State Division of Human Rights, dated September 12, 2008, inter alia, awarding complainant damages upon a finding that his employment as a cook was terminated by petitioner restaurant in retaliation for his having agreed to provide assistance to another complainant in a proceeding alleging discrimination in violation of the State Human Rights Law, unanimously confirmed, the petition denied, the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Marilyn Shafer, J.], entered March 24, 2009), dismissed, and the cross petition for enforcement of the determination granted, without costs.

The finding that complainant established a prima facie case of retaliatory discharge is supported by substantial evidence

(*see generally Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106 [1987]) that petitioner terminated complainant within a day after it learned that he had agreed to be a witness in support of a discrimination complaint filed with respondent Division by petitioner's former first cook. Statutory protection extends to an employee who is named as a voluntary witness in a discrimination proceeding although never called on to testify (*Jute v Hamilton Sundstrand Corp.*, 420 F3d 166, 168 [2d Cir 2004]; *cf. Unotti v American Broadcasting Cos.*, 273 AD2d 68 [2000]; *Sorrentino v Bohbot Entertainment & Media*, 265 AD2d 245, 245-246 [1999]), and a causal connection between a protected activity and an adverse employment action can be inferred from evidence that the protected activity was followed closely by discriminatory treatment (*DeCintio v Westchester County Med. Ctr.*, 821 F2d 111, 115 [2d Cir 1987], *cert denied* 484 US 965 [1987]; *see Velez v Frion Realty Corp.*, 300 AD2d 103 [2002]).

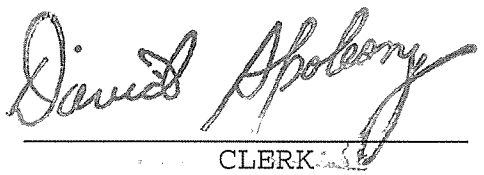
No basis exists to disturb the findings of credibility rejecting the testimony of petitioner's witnesses that they did not know that complainant had agreed to assist the former first cook, and that the decision to terminate him had been made weeks earlier based on his lack of cooperation in training new chefs hired to replace the former first cook and reluctance to make certain types of desserts (*see Granelle*, 70 NY2d at 106, *supra*). The witnesses' testimony in the latter regard was contradicted by

the evidence that, just weeks before terminating complainant, petitioner had offered him a promotion to the first cook position because he was a good chef who was qualified for the position. Nor did petitioner offer any documentation of its dissatisfaction with complainant's work.

Substantial evidence also supports the awards for emotional distress and back pay, and offsets in favor of petitioner were properly denied on a record that contains no evidence as to the amount of any unemployment benefits or other income received by complainant (*see Exxon Shipping Co. v New York State Div. of Human Rights*, 303 AD2d 241, 241-242 [2003], *lv denied* 100 NY2d 505 [2003]; Executive Law § 297[4][c]; *see generally Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 216-217 [1991]).

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

ENTERED: APRIL 6, 2010



CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

2494 In re Steven Harris, et al., Petitioners, Index 400263/08

-against-

Tino Hernandez, as Chairman of The New York City Housing Authority, Respondent.

Joan L. Beranbaum, District Council 37 Health and Security Plan, Municipal Employees Legal Services, New York (Stephen Shepard of counsel), for petitioners.

Sonya M. Kaloyanides, New York (Byron S. Menegakis of counsel), for respondent.

Determination of respondent New York City Housing Authority, dated October 10, 2007, terminating petitioners' public housing tenancy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Marylin G. Diamond, J.], entered July 30, 2008), dismissed, without costs.

Petitioners, who allowed their son to live in the subject apartment in violation of a stipulation to permanently exclude him, argue that the Hearing Officer failed to consider mitigating circumstances, namely, that they did not read or understand the stipulation and that they were concerned about the health of their son, who had just been discharged to petitioners from a drug rehabilitation program because of psychiatric problems. We

reject that argument. Ample basis exists in the record, including petitioners' own testimony, for the Hearing Officer's express finding that petitioners understood that the son "was not permitted to reside in the subject apartment" (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Further, the Hearing Officer's recital that the son had been repeatedly arrested during the year or more that he resided in the apartment, including twice on Housing Authority property for sale and possession of unlawful narcotics, indicates that she considered petitioners' concern for their son's health and determined that it did not warrant a mitigated penalty. To the extent petitioners challenge the validity of the stipulation, the challenge is time-barred (CPLR 217[1]; *see Matter of Lockett v New York City Hous. Auth.*, 56 AD3d 280 [2008]). The penalty of termination does not shock our conscience (*see Matter of Romero v Martinez*, 280 AD2d 58, 64 [2001], *lv denied* 96 NY2d 721 [2001]).

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

ENTERED: APRIL 6, 2010

CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

2496 Ripert Spanish, LLC, etc., Index 600341/07
Plaintiff-Respondent,

-against-

BR Guest, Inc., et al.,
Defendants-Appellants.

Reed Smith LLP, New York (Steven Cooper of counsel), for appellants.

Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP, New York (Ralph R. Hochberg of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered May 5, 2009, which granted plaintiff's motion for leave to vacate its note of issue and serve a second amended complaint and denied defendants' cross motion for summary judgment in their favor, unanimously modified, on the law and the facts, to deny the motion to vacate the note of issue and for leave to serve a second amended complaint, and otherwise affirmed, without costs.

This action arises out of a failed restaurant venture between Steven P. Hanson, the principal of defendant entities, and Eric Ripert, a professional chef and the owner of plaintiff Ripert Spanish, LLC. Plaintiff alleges that, after the restaurant opened for business, the manager of the company failed to comply with its obligation under the operating agreement to provide plaintiff with monthly operating and financial

statements, and that Hanson thereafter closed the restaurant, without the requisite notice to plaintiff and a meeting to vote on whether the business should cease its operations. Plaintiff commenced this action seeking an accounting, full and complete access for itself and its duly appointed representatives to the restaurant's books and records, and damages arising out of excessive management fees paid to the company's initial manager. After Hanson admitted at a deposition that the assets of the restaurant had been sold for $1.5 million to an entity that he either controlled or was a member of, plaintiff demanded the production of all documentation concerning the sale, which was furnished shortly before the court-ordered deadline for the filing of the note of issue. Plaintiff timely filed its note of issue, but the court subsequently allowed plaintiff to vacate its note of issue (*see* 22 NYCRR 202.21[e]), in order to amend its complaint so as to assert a cause of action for fraud. Our review of the record shows that it failed to make allegations that support a fraud claim. Accordingly, the motion to vacate the note of issue and serve a second amended complaint should have been denied.

Defendants, however, failed to demonstrate their entitlement to summary judgment, since the record presents triable issues of fact whether defendants' document production constituted an

accounting of the restaurant's business and whether the restaurant borrowed funds from Hanson which it was obligated to repay.

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

ENTERED: APRIL 6, 2010

CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

2497N Charles Zito, Index 22357/00
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent,

Consolidated Edison Company of New York Inc.,
Defendant.

Cascione, Purcigliotti & Galluzzi, P.C., New York (Thomas G. Cascione of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered September 14, 2009, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to amend and supplement his bill of particulars and granted defendant City of New York's motion to preclude plaintiff's expert from testifying, unanimously affirmed, without costs.

The court properly denied plaintiff's motion to amend and supplement his bill of particulars to incorporate a new theory of liability after the filing of the note of issue and absent a reasonable excuse for the delay in moving (*Lupo v Pro Foods, LLC*, 68 AD3d 607, 608 [2009]). In light of the foregoing, the court

properly precluded plaintiff's expert from testifying as to the new theory.

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

ENTERED: APRIL 6, 2010

CLERK

Tom, J.P., Mazzarelli, Nardelli, Acosta, Renwick, JJ.

2499-
2500 The People of the State of New York, Ind. 4131/06
Respondent,

-against-

Damien Jones,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Andrew C. Fine of counsel), and Davis Polk & Wardwell, LLP, New York (Christopher J. Roche of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Carol Berkman, J. on motions; Edwin Torres, J. at jury trial and sentence), rendered November 15, 2006, as amended November 27, 2006, convicting defendant of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony drug offender, to an aggregate term of 6 years, and order, same court and Justice, entered on or about June 21, 2007, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We further find that the verdict was not against the

weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The police entered an apartment pursuant to a search warrant and found 43 individual packages of cocaine and heroin in open view on the floor. Defendant was within 10 feet of the drugs, and had nearly $900 in his pocket. While a defense witness offered an explanation for defendant's possession of that much cash, the jury could have readily discredited that testimony. Although other persons were present during the police entry, the circumstances warranted the inference that defendant was, at least, a participant in a drug-selling operation and a constructive possessor of the drugs, rather than a customer or visitor (*see People v Bundy*, 90 NY2d 918, 920 [1997]).

Defendant did not preserve any of his challenges to alleged errors or omissions made by the court in its jury instructions, or to the scope of the People's expert testimony on the narcotics trade, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits, except that we find any deficiency in the court's charge on expert witnesses to be harmless. Although defendant argues that his counsel was ineffective for failing to raise these unpreserved issues, we conclude that counsel's failure to do so did not deprive defendant of a fair trial or cause him any

prejudice (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]; *compare People v Turner*, 5 NY3d 476 [2005]). Defendant has not shown that any of these applications would have been successful, or that any of them would have affected the outcome of the case. Accordingly, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

The court properly denied defendant's suppression motion without a hearing. Regardless of whether defendant established his standing to suppress any evidence, he was not entitled to a hearing under *People v Darden* (34 NY2d 177 [1974]) because the record sufficiently establishes that the judge who issued the search warrant verified the informant's existence (*see People v Edwards*, 95 NY2d 486, 493 [2000]), and he did not set forth a factual basis for any other type of hearing.

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

ENTERED: APRIL 6, 2010

David Gpoleony

CLERK

Tom, P.J., Mazzarelli, Nardelli, Acosta, Renwick, JJ.

2501 Veronica Lopez, Index 8523/06
Plaintiff-Respondent,

-against-

724 Management, LLC,
Defendant-Appellant.

McCabe, Collins, McGeough & Fowler, LLP, Carle Place (Barry L. Manus of counsel), for appellant.

Seligson, Rothman & Rothman, New York (Martin S. Rothman of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about February 26, 2009, which, inter alia, granted plaintiff's motion to reargue, and, upon reargument, vacated a prior order which had granted defendant's motion to vacate its default and denied the motion, unanimously affirmed, with costs.

Defendant's failure to argue, either in its motion to vacate the default or in opposition to plaintiff's motion to reargue, that plaintiff failed to meet the statutory requirements of CPLR 3215(f), renders the argument unpreserved, and we decline to review it in the interest of justice (*see Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827, 829-830[2008]). Were we to review it, we would find that plaintiff indeed met the statutory requirements.

The court providently exercised its discretion in denying defendant's motion to vacate its default, as defendant failed to

offer a reasonable excuse for failing to appear (*see* CPLR 5015[a]). Defendant's excuse that it had moved and was no longer conducting business at the address where process was served, was belied by defendant's own documents tending to show the contrary (*see Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9-10 [2002]; *see also Cadle Co. v Nunez*, 43 AD3d 653, 656 [2007]).

We have considered defendant's remaining contentions, including that vacating the default is warranted under CPLR 317, and find them unavailing.

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

ENTERED: APRIL 6, 2010

CLERK

Tom, J.P., Mazzarelli, Nardelli, Acosta, Renwick, JJ.

2502 Cadlerock, L.L.C., Index 105570/08
Plaintiff-Appellant,

-against-

Jan Z. Renner,
Defendant-Respondent.

Vlock & Associates, P.C., New York (Steven P. Giordano of counsel), for appellant.

Goldstein & Greenlaw, LLP, Forest Hills (Andrew W. Schwarsin of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered September 3, 2009, which denied plaintiff's motion for summary judgment on its claim for recovery on a promissory note, unanimously affirmed, with costs.

Defendant sufficiently pleaded his statute of limitations affirmative defense (*see Immediate v St. John's Queens Hosp.*, 48 NY2d 671, 673 [1979]). Contrary to plaintiff's contention, the promissory note, which required defendant to pay principal and interest payments monthly for 20 years, after which the loan would have self-liquidated, was an installment contract (*see Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 141-142 [1993]), and, since the debt was not accelerated while defendant was making the monthly payments, the applicable six-year statute of limitations (CPLR 213[2]) began to run on the date on which

each installment became due and payable (*see Phoenix Acquisition Corp.* at 141). Thus, the statute of limitations bars plaintiff from seeking to recover the amount of the installment payments, including any interest, that defendant defaulted on before April 18, 2002, when this action was commenced (*see id.*; *Sce v Ach*, 56 AD3d 457, 458-459 [2008]).

The defense of laches is unavailable in this action at law commenced within the period of limitations (*see Matter of American Druggists' Ins. Co.*, 15 AD3d 268 [2005], *lv dismissed* 5 NY3d 746 [2005]; *Kahn v New York Times Co.*, 122 AD2d 655, 663 [1986]). However, we conclude that a triable issue of fact exists whether plaintiff's claims are barred by the doctrine of equitable estoppel, i.e., whether defendant justifiably relied on the nine years of inaction by plaintiff and its predecessors-in-interest to reasonably conclude that his monthly payments were sufficient to satisfy his payment obligations under the note, and therefore was misled into paying a reduced amount for years without realizing that interest was accruing at the 14% interest

rate (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 106-107 [2006]; *Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443, 448 [1958]).

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

ENTERED: APRIL 6, 2010

CLERK

Tom, J.P., Nardelli, Renwick, Acosta, JJ.

2503-
2503A Ramades Seda, Jr., Index 22778/05
Plaintiff-Respondent-Appellant,

-against-

Nina Epstein, et al.,
Defendants-Appellants-Respondents.

Eustace & Marquez, White Plains (John R. Marquez of counsel), for appellants-respondents.

Harris/Law, New York (Matthew Gaisi of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Alan J. Saks, J.), entered on or about June 11, 2009, and amended order, same court and Justice, entered June 30, 2009, which, to the extent appealed from, respectively, denied plaintiff's motion to strike defendants' answer for spoliation of evidence and denied so much of defendants' cross motion for summary judgment as sought to dismiss plaintiff's Labor Law § 200 and common-law negligence claims, unanimously affirmed, without costs.

Contrary to defendants' contention, whether they controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common law negligence claims, since plaintiff alleges that his injury arose from a defective condition of the premises, where he was washing windows (*see e.g. Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555 [2009]). The issue is whether defendants either created or had notice of the defective

second-floor storm window frame, which plaintiff alleges broke or became dislodged, causing him to fall to the concrete patio below (*see Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [2008]; *Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202-203 [2005]; *Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [2004]). Summary judgment in defendants' favor is precluded by issues of fact raised by conflicting testimony as to whether defendants created the condition that caused plaintiff to step outside onto the ledge to clean the window, i.e., that the window had been painted shut, whether they had notice that the storm window frame needed repair, and whether the window frame had been properly repaired.

In view of plaintiff's testimony that he informed defendants a year before the accident that the window frame needed repair, that on the day of the accident defendant Nina Epstein told him it had been repaired, and that the frame did not seem loose when he touched the storm window, defendants failed to demonstrate conclusively that plaintiff was the sole proximate cause of his injuries.

The motion court properly declined to strike defendants' answer for spoliation of evidence (*see Quinn v City Univ. of N.Y.*, 43 AD3d 679 [2007]). There is no evidence that defendants' removal of the debris was willful; indeed, the preliminary conference order merely stated that defendants were to make the premises available for inspection, and plaintiff did not schedule

an inspection for more than two years (*see e.g. Jimenez v Weiner*, 8 AD3d 133 [2004]). However, in view of defendants' failure to notify plaintiff's counsel of the intended removal, the court properly ordered the lesser sanction of an adverse inference charge (*see e.g. Balaskonis v HRH Constr. Corp.*, 1 AD3d 120, 121 [2003]).

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

ENTERED: APRIL 6, 2010

CLERK

Tom, J.P., Mazzarelli, Nardelli, Acosta, Renwick, JJ.

2504 Accurate Copy Service of America, Inc., et al., Plaintiffs-Appellants, Index 101802/08

-against-

Fisk Building Associates L.L.C., et al., Defendants-Respondents.

DeLotto & Fajardo LLP, New York (Eduardo A. Fajardo of counsel), for appellants.

Dewey Pegno & Kramarsky LLP, New York (David S. Pegno of counsel, for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered May 13, 2009, which, insofar as appealed from as limited by the briefs, in an action alleging, inter alia, that plaintiffs were overcharged for electricity in violation of their leases, granted defendants' motion to dismiss the first, second and third causes of action of the complaint as against defendant Fisk Building Associates, L.L.C. (Fisk), unanimously affirmed, without costs.

The first cause of action alleging breach of the subject leases was properly dismissed, since the complaint fails to even allege that Fisk did not enforce the electricity provisions of the leases in conformance with their terms or that the profit earned by Fisk violates the terms of the leases. Dismissal of the second cause of action for unjust enrichment was warranted because there is an enforceable agreement between the parties

(*see Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 358 [2006]).

The third cause of action seeking rescission of the electricity provisions of the lease was properly dismissed, since plaintiffs failed to plead that claim with the specificity required by CPLR 3016(b). Indeed, plaintiffs failed to include "specific and detailed allegations of fact" in the complaint (*Callas v Eisenberg*, 192 AD2d 349, 350 [1993]), and while the complaint makes reference to representations purportedly made during lease negotiations about what the electricity charges would be, that merely suggests fraud and is insufficient to sustain the claim (*see Sempra Energy Trading Corp. v BP Prods. N. Am., Inc.*, 52 AD3d 350 [2008]). Nor did plaintiffs sufficiently allege that the leases were unconscionable, as such a claim requires plaintiffs to have pleaded facts supporting both procedural and substantive unconscionability (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10-11 [1988]). Here, plaintiffs failed to plead anything regarding an alleged lack of meaningful choice regarding the electricity provisions, and it is noteworthy that plaintiffs were free to walk away from the lease negotiations at any time and rent space elsewhere (*see e.g. Scotts Co., LLC v Ace Indem. Ins. Co.*, 51 AD3d 445, 446 [2008]).

To the extent plaintiffs argue that the complaint supports a claim for breach of the implied covenant of good faith and fair

dealing, plaintiffs failed to state a cause of action under that theory because they did not allege that Fisk is misapplying the formula set forth in the leases or that it is injuring their rights "to receive the fruits of the contract" in some other way (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [internal quotation marks and citation omitted]).

Plaintiffs' policy-based arguments are also unavailing, as the public policy in New York is to respect negotiated commercial leases (*see e.g. Holy Props. v Cole Prods.*, 87 NY2d 130, 133-134 [1995]). "[A] lease is subject to the rules of construction applicable to any other agreement" and "[o]nce a contract is made, only in unusual circumstances will a court relieve the parties of the duty of abiding by it" (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 217, 218 [1978]). Furthermore, the unambiguous terms of a lease will not be disregarded "for the purpose of alleviating a hard or oppressive bargain" (*id.* at 219).

As pertains to the specific arguments put forth by plaintiffs, we note that "escalation clauses are common in commercial leases and have been approved and enforced according to their terms" (*Meyers Parking Sys. v 475 Park Ave. S. Co.*, 186 AD2d 92, 92 [1992]). In *George Backer*, the Court of Appeals approved of the common practice in commercial leases of using formulas for computing additional rent charges, even where the

charges are not tied to the landlord's actual costs and may result in the landlord obtaining a profit in excess of its actual costs. The Court noted that the clause before it "contain[ed] no requirement that rent escalations be measured by actual costs" and held that the clause was not unconscionable even though the landlord received "economic advantage" of the formula (46 NY2d at 218). It does not avail plaintiffs to describe the profit in this case as a "windfall," since it is the result of a formula to which the parties agreed. Nor is this case distinguished from *George Backer* because the escalation clause in that case was tied to an objective industry accepted wage-rate chart (*id.* at 218).

We have considered plaintiffs' remaining arguments, including that the subject lease provisions are ambiguous, and find them unavailing.

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

ENTERED: APRIL 6, 2010

David Spoleony

CLERK

Tom, J.P., Mazzarelli, Nardelli, Acosta, Renwick, JJ.

2505-
2505A
2505B

Australia Collado, as Administratrix of the Estate of Kervin F. Collado, et al.,
Plaintiffs-Respondents,

-against-

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

Parsons Brinckerhoff Construction Services, Inc.,
Defendant-Respondent-Appellant,

New York City Department of Environmental Protection,
Defendant.

- - - - -

Parsons Brinckerhoff Construction Services, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Kiska Construction Corporation - U.S.A,
Third-Party Defendant-Respondent.

Index 403369/06
590874/06

McAndrew, Conboy & Prisco, LLP, Woodbury (Mary C. Azzaretto of counsel), for appellants-respondents.

Zetlin & De Chiara LLP, New York (Lori Samet Schwarz of counsel), for respondent-appellant/appellant.

Arnold E. DiJoseph, III, New York, for Australia Collado, respondent.

Freehill Hogan & Mahar LLP, New York (John F. Karpousis of counsel), for Kiska Construction Corporation - U.S.A., respondent.

Orders, Supreme Court, New York County (Carol R. Edmead, J.), entered January 20, 2009, which, insofar as appealed from, granted plaintiff's motion for summary judgment on the issue of

liability under Labor Law § 240(1) as against defendants City of New York and New York City Department of Transportation (the City defendants), denied the City defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim predicated upon 12 NYCRR 23-1.7(c) as against them, granted the motion of defendant Parsons Brinckerhoff Construction Services (PBCS) for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as against it, denied the City defendants' and PBCS's motions for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against them, denied the City defendants' cross motion for summary judgment on their claims for indemnification against PBCS, denied the City defendants' cross motion to strike the complaint based upon plaintiff's spoliation of evidence, and granted third-party defendant Kiska Construction Corporation's motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant the City defendants' and PBCS's motions for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against them and to grant PBCS's motion for summary judgment dismissing the City defendants' cross claims for indemnification against it, and otherwise affirmed, without costs.

Plaintiff's decedent, a dock builder employed by Kiska, was standing on the fender system at the base of the Third Avenue Bridge handling an air hose used to supply power to pneumatic

dock building tools when he lost his footing, fell backward into the river 10 feet below, and drowned.

Plaintiff demonstrated that the City defendants' failure to provide adequate safety devices against an elevation-related hazard, as required under Labor Law § 240(1), was a contributing cause of the decedent's injuries and therefore that the decedent was not the sole proximate cause of his injuries (*see Clarke v Morgan Contr. Corp.*, 60 AD3d 523, 523 [2009]; *Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 564 [2008]). The City defendants failed to raise an inference that the life vest that had been provided to the decedent was an adequate safety device and that the decedent's alleged decision not to wear it was the sole proximate cause of his injuries.

Contrary to the City defendants' argument, the fender system from which the decedent fell was a "work location" within the meaning of 12 NYCRR 23-1.7(c), given the evidence that workers, including the decedent, performed work duties on it, and the record presents issues of fact whether there was a continuously patrolling boat at the accident site and whether the absence of such a boat was a factor in the drowning death.

The record demonstrates that PBCS lacked sufficient supervisory control over the work of Kiska's employees to be held a statutory agent of the City defendants for purposes of

liability under the Labor Law (*see Kagan v BFP One Liberty Plaza*, 62 AD3d 531, 531-532 [2009], *lv denied* 13 NY3d 713 [2009]; *Smith v McClier Corp.*, 22 AD3d 369, 371 [2005]; *Vaneer v 993 Intervale Ave. Hous. Dev. Fund Corp.*, 5 AD3d 161, 162-163 [2004]).

There is no support in the record for plaintiff's contention that the decedent's accident resulted from a dangerous or defective condition of the work place, rather than from "the means and methods of [the decedent's] work" (*Masullo v 1199 Hous. Corp.*, 63 AD3d 430, 433 [2009]), i.e., the absence of safety devices to prevent a fall. Since neither the City defendants nor PBCS possessed the requisite supervisory control to be held liable under Labor Law § 200 or in common-law negligence for an accident resulting from the means and methods of the work, the Labor Law § 200 and common-law negligence claims should have been dismissed (*see id.*; *Arrasti v HRH Constr. LLC*, 60 AD3d 582 [2009]).

As plaintiff cannot sustain any causes of action against PBCS, the City defendants' cross claims for indemnification against PBCS should have been dismissed.

We have considered the City defendants' and PBCS's remaining contentions and find them unavailing.

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

ENTERED: APRIL 6, 2010

CLERK

Tom, J.P., Mazzarelli, Nardelli, Acosta, Renwick, JJ.

2506 The People of the State of New York, Ind. 1164/06
Respondent,

-against-

Odell Poole,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York, and Wachtell, Lipton, Rosen & Katz, New York (Jasand P. Mock of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; James A. Yates, J. at jury trial and sentence), rendered August 28, 2006, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The undercover officer gave a detailed and accurate description of defendant's clothing, including the particular brand name of defendant's jacket, and identified him no more than 10 minutes after the sale.

The court properly exercised its discretion in permitting the prosecutor to question defendant's witness regarding the

circumstances under which the witness offered, but then declined, to testify for defendant in the grand jury. The extent to which these circumstances affected the witness's credibility was a matter for the jury.

The court properly denied defendant's suppression motion. The description was sufficiently specific to, at the very least, provide reasonable suspicion, given the very close temporal and spatial proximity between the sale and the arrest (*see e.g. People v Rampersant*, 272 AD2d 202 [2000], *lv denied* 95 NY2d 870 [2000]).

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

ENTERED: APRIL 6, 2010

CLERK

Tom, J.P., Mazzarelli, Nardelli, Acosta, Renwick, JJ.

2507-
2507A Delores Tomaino, et al., Index 111817/06
Plaintiffs-Respondents,

-against-

209 East 84th Street Corp.,
Defendant-Appellant.

Carol R. Finocchio, New York, for appellant.

Alpert & Kaufman, LLP, New York (Norman A. Olch of counsel), for respondents.

Orders, Supreme Court, New York County (Paul G. Feinman, J.), entered October 19, 2009, which denied defendant's motions for summary judgment dismissing the complaint and to preclude plaintiffs' expert testimony, respectively, unanimously affirmed, without costs.

Defendant failed to satisfy its prima facie burden of establishing the absence of issues of fact concerning the injured plaintiff's inability to identify the cause of her fall and whether it created or had actual or constructive notice of the hazardous condition that caused the fall (*see Weingrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Fernandez v VLA Realty, LLC*, 45 AD3d 391 [2007]; *Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 109 [2006]).

We reject defendant's contention that plaintiff was required to identify at the time of the accident exactly where she fell

and the precise condition that caused her to fall (*see Welch v Riverbay Corp.*, 273 AD2d 66 [2000]; *Vitanza v Growth Realties*, 91 AD2d 917 [1983]; *Gramm v State of New York*, 28 AD2d 787, 788 [1967], *affd* 21 NY2d 1025 [1968]). Plaintiff identified the location of her fall in her deposition testimony and stated that she pointed this location out to an employee of defendant when he found her at the bottom of the stairs. Although she did not know at the time that she slipped on the steps because of the worn treads, she discovered this when she returned to the scene a few weeks later (*see Seivert v Kingpin Enters., Inc.*, 55 AD3d 1406 [2008]; *Sweeney v D & J Vending*, 291 AD2d 443 [2002]). Based on the testimony of two employees of defendant that the photographs taken two to three months after the accident accurately represented the condition of the treads on the steps before and on the day of the accident, there is no reason to believe that the condition of the treads changed significantly between the date of the accident and the date of plaintiff's return to the scene.

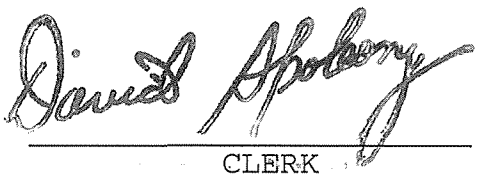
The court properly declined to preclude plaintiffs' expert's affidavit and testimony. Plaintiffs established good cause for the untimely disclosure (*see LaFurge v Cohen*, 61 AD3d 426 [2009], *lv denied* 13 NY3d 701 [2009]; *St. Hilaire v White*, 305 AD2d 209, 210 [2003]), which does not appear to have surprised or

prejudiced defendant (*see Moreno v Fabre*, 46 AD3d 254, 255 [2007]).

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

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

ENTERED: APRIL 6, 2010



CLERK

Tom, J.P., Mazzarelli, Nardelli, Acosta, Renwick, JJ.

2508-
2509-
2509A

Palestine Monetary Authority,
Plaintiff-Appellant,

Index 107777/05
105521/05

-against-

David Strachman, as Administrator of the Estate of Yaron Ungar, et al.,
Defendants-Respondents.

- - - - -

The Estate of Yaron Ungar, etc., et al.,
Plaintiffs-Respondents,

-against-

The Palestinian Authority,
Defendant.

Lynch Daskal Emery LLP, New York (Scott R. Emery of counsel), for appellant.

Jaroslawicz & Jaros, LLC, New York (Robert J. Tolchin of counsel), for respondents.

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 1, 2009, awarding judgment creditors (the Ungars) the total sum of $9,719,355.62 pursuant to an order, same court and Justice, entered March 31, 2009, which, inter alia, granted the Ungars' motion to direct the Palestine Monetary Authority (PMA) to turn over to them the sum of the PMA's net profits of $7,598,451 for the 2005 fiscal year, plus interest from February 8, 2006, unanimously reversed, on the law and the facts, without costs, the motion denied, the judgment vacated and the matter remanded for further proceedings. Appeals from the aforesaid order and from order, same court and Justice,

entered September 17, 2009, which denied the PMA's motion to vacate the aforesaid judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment, and as academic, respectively.

The only issue before us regarding fraudulent conveyance in the prior appeal (*Palestine Monetary Auth. v Strachman*, 62 AD3d 213 [2009]) was whether the IAS court erred in denying the Ungars' motion for leave to amend their pleading to add a fraudulent conveyance claim (*see id.* at 221). Thus, we did not find that the Palestinian Authority (PA)'s waiver of its right to the PMA's 2005 net profits actually constituted a fraudulent conveyance; rather, we found that the record lent sufficient support to the fraudulent conveyance claim (*see id.* at 225) that the Ungars should be permitted to add it.

The Ungars contend that they are entitled to turnover pursuant to CPLR 5227, independent of Debtor and Creditor Law § 273-a. However, the Ungars could obtain a turnover order only if the PMA were indebted to the PA (*see* CPLR 5227). We did not decide that issue on the prior appeal; on the contrary, we said that the IAS court should have ordered full discovery on "whether the PMA . . . owes any debts to the PA that could be subject to . . . turnover pursuant to CPLR article 52" (62 AD3d at 222) and

that "the PMA has the burden of proof on . . . its assertion[] . . . that it owes no debts to the PA or the PLO" (*id.* at 231).

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

ENTERED: APRIL 6, 2010

CLERK

Tom, J.P., Mazzarelli, Nardelli, Acosta, Renwick, JJ.

2510 The People of the State of New York, Ind. 2219/05
Respondent,

-against-

Rafael Delossantos, etc.,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Cheryl P. Williams of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered June 16, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the first degree, and sentencing him to an aggregate term of 8 years, unanimously affirmed.

Defendant did not preserve his claim under *Bruton v United States* (391 US 123 [1968]) that portions of the nontestifying, jointly tried codefendant's statement implicated him and thereby violated his right of confrontation, and we decline to review it in the interest of justice. As an alternative holding, we conclude that the statement did not violate defendant's constitutional rights. In any event, any error was harmless in view of the overwhelming evidence of defendant's guilt (*see People v Smith*, 97 NY2d 324 [2002]). We also reject defendant's

ineffective assistance of counsel claim regarding this evidence.

Defendant also complains that a prosecution witness improperly referred to defendant's own statement, in violation of an alleged order or agreement precluding that statement for the purpose of protecting the codefendant's *Bruton* rights. However, no such order or agreement appears in the record, and even to the extent the record suggests it may have existed in some form, it does not establish it was intended to exclude that portion of the statement in which defendant only incriminated himself. In any event, defendant's statement was plainly admissible against himself, and he has not shown how he, as opposed to the codefendant, was prejudiced.

The court properly exercised its discretion in denying defendant's mistrial motion made when a prosecution witness inadvertently read from an unredacted transcript of an intercepted phone call, thereby revealing information that, according to defendant, suggested the possibility of an uncharged drug sale. The offending testimony was cut off after only a few words, and the court's curative actions were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]). In any event, any error was harmless.

We have considered defendant's remaining claims and conclude that none of them warrant reversal.

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

ENTERED: APRIL 6, 2010

CLERK

Tom, J.P., Mazzarelli, Nardelli, Acosta, Renwick, JJ.

2511N Jamal Frantz Pierre-Louis, etc., et al., Petitioners-Respondents, Index 20351/08

-against-

New York City Health and Hospitals Corporation, Respondent-Appellant.

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

Friedman Khafif & Sanchez, LLP, Brooklyn (Albert Khafif of counsel), for respondents.

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about October 10, 2008, which, in an action alleging medical malpractice, granted petitioners' motion for leave to file a late notice of claim, unanimously reversed, on the law and the facts, without costs, and the motion denied.

Petitioners failed to demonstrate that respondent had actual notice of the facts constituting the claim and would not be prejudiced by the delay (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531 [2006]). Respondent's mere possession of medical records does not demonstrate that it has actual knowledge of the essential facts constituting the claim, as the medical records, on their face, indicate that infant petitioner underwent a routine circumcision without complications, and do not evince any

malpractice (*id.* at 537; *see Webb v New York City Health & Hosps. Corp.*, 50 AD3d 265 [2008]). Petitioners also failed to offer a reasonable excuse for the delay of more than one year in seeking leave to file a late notice of claim. Petitioner mother did not state when she became aware of the alleged malpractice, nor is there any indication that the delay was a result of the infancy (*see Matter of Nieves v New York Health & Hosps. Corp.*, 34 AD3d 336, 337 [2006]).

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

ENTERED: APRIL 6, 2010

CLERK