SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 27, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

2483 Nelida Aller, Index 108480/04
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

Michael S. Appelbaum, et al.,
Defendants-Respondents.

Subin Associates LLP, New York (Brooke Lombardi of counsel), for appellant.

Hoey, King, Toker & Epstein, New York (Robert O. Pritchard of counsel), for Michael S. Appelbaum, respondent.

Michelle S. Russo, Pt. Washington, for George Heinrich, respondent.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina and Andrea M. Alonso of counsel), for Feroma Contracting Inc., respondent.

Faust Goetz Schenker & Blee LLP, New York (Christopher B. Kinzel of counsel), for C&E Plaster & Construction Co. Inc., respondent.

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered November 24, 2008, which granted motions by defendants Applebaum, Heinrich, Feroma and C&E for summary judgment dismissing the complaint and all cross claims as against them, respectively, unanimously modified, on the law, to deny the

motions of defendants Applebaum and Heinrich, and otherwise affirmed, without costs.

The court erred in finding plaintiff's deposition testimony to have been unduly speculative with respect to the location and cause of her injury since she clearly testified that she fell due to "unlevel" ground in the middle of the sidewalk between two buildings. This was consistent with the photographic evidence showing an uneven sidewalk at the location of the accident (*see Soto v Lime Tree Gourmet Deli*, 18 AD3d 284 [2005]; *Herrera v City of New York*, 262 AD2d 120 [1999]). The inconsistencies in plaintiff's testimony relied on by defendants raise credibility issues that should be resolved by a jury. Although defendant Heinrich maintains that the alleged defect is not on his property, the record does not disclose the location of the property line. The evidence is therefore insufficient to establish that his property was free of defects (*see Soto*, 18 AD3d at 285).

The claims against defendants Feroma Contracting, Inc. and C&E Plaster & Construction Co., however, were properly dismissed. The evidence demonstrated that Feroma performed only interior work at Applebaum's residence and that C&E satisfactorily completed the sidewalk replacement in front of Applebaum's residence no later than December 2001, more than two years before plaintiff's accident. Both property owner defendants testified

that there were no defects in the sidewalk when C&E's work was completed. Thus, both Feroma and C&E established their prima facie entitlement to summary judgment by showing that they neither created nor had actual or constructive notice of the alleged defect (*Garcia v Good Home Realty, Inc.*, 67 AD3d 424, 424 [2009]). In opposition, plaintiff failed to raise a triable issue of fact.

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

ENTERED: APRIL 27, 2010

CLERK

Gonzalez, P.J., Friedman, McGuire, Abdus-Salaam, JJ.

2484 Francis V. Adams, M.D., Index 104038/09
Plaintiff-Respondent,

-against-

Margaret Lewin, M.D., FACP,
Defendant-Appellant.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellant.

Debra J. Millman, New York (Steven P. Germansky of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered December 11, 2009, which granted plaintiff's motion for summary judgment to the extent of declaring valid and enforceable the sublease between the parties and nullifying defendant's purported cancellation thereof, finding defendant liable, in an amount to be determined at trial, for unpaid rent and other charges through the end of the sublease term, and dismissing defendant's counterclaims, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff leased medical office space at 650 First Avenue in Manhattan. He then subleased a portion of the space to defendant for use as a medical office, the term to run from September 15, 2005 to August 31, 2012. Paragraph 22 of the sublease contains a cancellation provision that, as pertinent here, permits defendant to cancel, by written notice, "for cause other than Undertenant's

relocation of her medical practice within the New York City Metropolitan area." The term "for cause" is not defined or otherwise used in the sublease. Paragraph 22 also provides that "[i]n consideration of [the right to terminate] Undertenant agrees that the Overtenant . . . may retain the three (3) months security held by him as liquidated damages."

According to defendant, in January 2008, she was diagnosed with terminal leukemia, making it unlikely that she would survive until the end of the sublease term. Defendant asserts that upon learning of her diagnosis, she planned to move to California to be near her son. She orally notified plaintiff of her intention to cancel the sublease, and followed up with a written notice of cancellation on March 18, 2008. Her circumstances changed when she learned that were she to shut down her medical practice and move to California, she and her disabled husband would lose access to health insurance for at least 11 months. She thus decided to join an existing medical practice group elsewhere in Manhattan, to ensure continued access to health insurance. She maintains as well that she could not continue to practice medicine in the subject premises because the health insurance policy she had obtained as a sole practitioner would terminate as soon as she closed the practice, a contingency she feared could happen suddenly and at any time given her medical condition. The record is not clear whether defendant made this decision before

or after her written notice on March 18. In any event, defendant asserts that she exercised her right to cancel the sublease because of her medical condition, not to relocate her practice. On April 1, 2008, plaintiff's counsel notified defendant that they had discovered she was relocating her practice within Manhattan, and rejected her purported cancellation of the sublease. This action followed.

Plaintiff's position that the cancellation provision permits cancellation only if defendant relocates her office outside the New York metropolitan area is contradicted by the provision's language. If the parties had intended such a restriction on the cancellation right, they easily could have provided that the sublease could be cancelled "only if" defendant were relocating outside of New York. As defendant contends, an alternative reading would be that cancellation can be for any "cause" except relocation within the New York metropolitan area. However, we cannot conclude as a matter of law that if the Undertenant relocates within the New York City Metropolitan area, he or she terminates "for cause" whenever relocating is not the reason for the decision to terminate. As the extent to which the cancellation right turns on the consequences of rather than the reasons for a decision to cancel is unclear, we find the cancellation provision ambiguous (*see generally Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66-67

[2008], *aff'd* 13 NY3d 398 [2009]). Accordingly, "construction of the lease and resolution as to the intention of the parties must await the trier of the facts" (*Wiener v Ga-Ro Die Cutting*, 104 AD2d 331, 333 [1984], *affd* 65 NY2d 732 [1985]).

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

ENTERED: APRIL 27, 2010

David Apolony

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Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2638 The People of the State of New York, Ind. 515/08
Respondent,

-against-

Kelvin Dunbar,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered July 16, 2008, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant's actions and spontaneous statements to the police reasonably conveyed that he had been selling jewelry without a vendor's license, and thus provided probable cause for his arrest, which did not require proof beyond a reasonable doubt (*see e.g. People v Lewis*, 50 AD3d 595 [2008], *lv denied* 11 NY3d 790 [2008]). Since the officer's belief that defendant had an outstanding warrant was not the basis for the arrest, but only

for the officer's decision not to issue a summons, the People were not obligated to establish the validity of the warrant.

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

ENTERED: APRIL 27, 2010

CLERK

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2640 In re Nyjaiah M., and Others,

Children Under the Age of
Eighteen Years, etc.,

Herbert M.,
Respondent-Respondent,

New York City Administration for
Children's Services,
Petitioner-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for appellant.

Bronx Defenders, Bronx (Mary Ann Barile of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Order, Family Court, Bronx County (Karen Lupuloff, J.), entered on or about December 7, 2009, which dismissed three derivative neglect petitions against the respondent-father on the ground that a prima facie case of derivative neglect had not been presented, unanimously reversed, on the law, without costs, and the matter remanded to the Family Court, Bronx County, for a continuation of the fact-finding hearing.

The petitions at issue were supported by evidence sufficient to establish a prima facie case of derivative neglect. Family Court erred in concluding that the 2004 fact-finding, that respondent had over the course of four years sexually abused his

older daughter, could not serve as a basis for a finding of derivative neglect warranting the removal of his three young daughters from his care. The 2004 fact-finding was based on respondent's admission that he improperly touched his daughter's genitals, evincing a profoundly impaired level of parental judgment that would place any child in the respondent's care at the risk of harm (*see Matter of Grant W.*, 67 AD3d 922 (2009). The court's emphasis on the fact that the 2004 finding was over five years old is of no moment (*see e.g. Matter of Ahmad H.* 46 AD3d 1357 [2007], *lv denied* 12 NY3d 715 [2009]), particularly where the sexual abuse took place continually over a four-year period (*see e.g. Matter of Chelsea M.*, 61 AD3d 1030, 1032 [2009]), and there was no evidence in the record to support a reasonable belief that respondent's proclivity for sexually abusing children has changed (*see e.g. Matter of Ahmad H.*, 46 AD3d at 1357-1358). Indeed, petitioner showed that there was no change in respondent's pattern of conduct by presenting evidence of his abuse of the subject children, which included blowing on

the exposed genitals of his then six-month-old daughter and placing the head of his three-year-old daughter under his shirt and near his crotch in actions approximating oral sexual contact.

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

ENTERED: APRIL 27, 2010

CLERK

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2641 The People of the State of New York, Respondent, Ind. 2485/05

-against-

Adil Shujaat, Defendant-Appellant.

Raymond L. Colon, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 17, 2006, convicting defendant, after a jury trial, of coercion in the second degree and harassment in the first degree, and sentencing him to a conditional discharge for a period of 1 year with 150 hours of community service and a $500 fine, unanimously affirmed.

Defendant has not established any compelling factor warranting dismissal in the interest of justice (*see generally People v Insignares*, 109 AD2d 221 [1985], *lv denied* 65 NY2d 928 [1985]). We see no reason to relieve defendant of any immigration consequences that may flow from his acts of misconduct against his wife. To the extent defendant is arguing that the verdict was based on legally insufficient evidence or

was against the weight of the evidence, we reject those claims (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

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

ENTERED: APRIL 27, 2010

CLERK

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2642 Rosa L. McDuffie, Index 17034/06
Plaintiff-Appellant,

-against-

Capellan B. Rodriguez, et al.,
Defendants-Respondents.

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

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

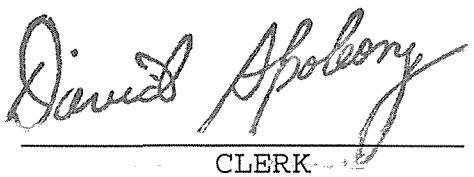
Order, Supreme Court, Bronx County (Alan Saks, J.), entered on or about June 19, 2009, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the complaint reinstated.

Defendants met their prima facie burden of establishing that plaintiff did not sustain a serious injury by submitting the affirmed reports of experts who, after examining plaintiff and reviewing her medical records and MRI studies, found a lack of causation between her complaint of right knee pain and the subsequent arthroscopic surgical repair and the accident, and instead attributed plaintiff's condition to pre-existing degenerative osteoarthritis (*see Jean v Kabaya*, 63 AD3d 509 [2009]). In opposition, plaintiff raised a triable issue of

fact, as her treating physician noted acute injuries related to the automobile accident as well as degenerative changes. Defendants' remaining arguments need not be addressed.

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

ENTERED: APRIL 27, 2010



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Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2643-
2644 Index 15000/07

Charles Ubaka Odikpo,
Plaintiff-Respondent,

-against-

American Transit, Inc., et al.,
Defendants-Appellants-Respondents,

DeFoe Corporation, et al.,
Defendants-Respondents-Appellants,

Guido Gonzalez, et al.,
Defendants.

Gallo Vitucci & Klar, New York (Yolanda L. Ayala of counsel), for appellants-respondents.

Marks, O'Neill, O'Brien & Courtney, P.C., Elmsford (Brian D. Meisner of counsel), for respondents-appellants.

Placid & Emmanuel, P.C., Jamaica (Chijioke Metu of counsel), for respondent.

Order, Supreme Court, Bronx County (Alan Saks, J.), entered on or about October 16, 2009, which, insofar as appealed from, in an action for personal injuries sustained in a multi-vehicle accident, denied defendants-appellants' cross motions for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

The record shows that defendant-appellant Birke, while driving a vehicle owned by defendant-appellant Defoe Corporation (collectively Birke), rear-ended defendant Gonzalez's vehicle in the left lane of the highway, and that appellant Williams, while

driving a vehicle owned by appellant American Transit, Inc. (collectively Williams), rear-ended defendant Rodriguez's vehicle in the center lane. Plaintiff claims that, while driving in the center lane, he ultimately collided with both Rodriguez's and Gonzalez's vehicles as a result of the other drivers' negligence.

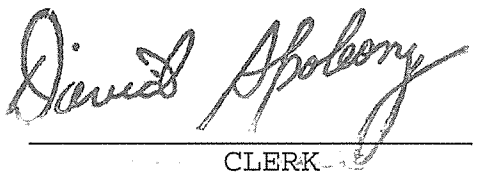
Birke failed to make a prima facie showing that he did not cause plaintiff to collide with Gonzalez's vehicle, as his own deposition testimony indicates that he caused Gonzalez's car to protrude into the center lane by three or four feet. Moreover, although Williams testified that Rodriguez's vehicle suddenly propelled into his lane from the left, Rodriguez stated that he had been in the center lane for a period of time before Williams hit him from behind. Such conflicting testimony creates triable issues of fact as to Williams' liability, and as to whether Williams was caught in an emergency situation (*see Hernandez v Fajardo*, 298 AD2d 199 [2002]). The fact that appellants' respective vehicles did not come in contact with plaintiff's vehicle does not negate a finding of causation as to either party (*see Tutrani v County of Suffolk*, 10 NY3d 906, 907 [2008]; *Turner-Brewster v Arce*, 17 AD3d 189, 189-190 [2005]).

Furthermore, the various parties' testimony as to the manner in which each driver controlled his vehicle, the circumstances

surrounding their collision, and the chain of events leading up to the collision involving plaintiff's vehicle raise other questions of fact, which are best left for a jury to decide (*see Lindgren v New York City Hous. Auth.*, 269 AD2d 299, 302 [2000]).

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

ENTERED: APRIL 27, 2010



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Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2646-
2646A In re Jazmin Marva B., and Another,

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

Cecile Marva B.,
Respondent-Appellant,

Gerald F.,
Respondent,

McMahon Services for Children,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Harris of counsel), Law Guardian.

Orders, Family Court, New York County (Susan K. Knipps, J.), entered on or about February 19, 2009, which, upon findings that respondent mother permanently neglected the subject children and that respondent father permanently neglected the child Janiyah F., terminated respondents' parental rights, and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect against the mother was supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record establishes that the agency made diligent efforts to encourage and strengthen the parental

relationship, including, inter alia, working with the mother to formulate a service plan, maintaining frequent contact with her, scheduling visits between the mother and the children, referring her for individual therapy and taking steps to assist her in obtaining suitable housing (*see Matter of Aisha T.*, 55 AD3d 435 [2008], *lv denied* 11 NY3d 716 [2009]). Despite these diligent efforts, the mother failed to plan for the children's future by failing to obtain the required treatment and appropriate housing. The father also failed to plan for his child's future by not obtaining appropriate housing (*see Matter of Gina Rachel L.*, 44 AD3d 367, 368 [2007] [finding of permanent neglect supported by failure to "take steps to correct the conditions that led to the removal of his daughter"]), and where he did not file for paternity until well after his daughter had been in care.

A preponderance of the evidence supports the determination that the termination of parental rights to facilitate the adoptive process was in the best interests of the children. The children have lived with their foster parents for most of their lives and are provided with a loving and supportive home (*see Matter of Racquel Olivia M.*, 37 AD3d 279, 280 [2007], *lv denied* 8 NY3d 812 [2007]).

The father's argument that the court should have entered a suspended judgment is unpreserved. In any event, suspending judgment was not in Janiyah's best interests, as she has bonded

with her foster family and "there [is] no evidence of a parental relationship with [the father] sufficient to justify delay of the adoptive process" (*Matter of Jazminn O'Dell P.*, 39 AD3d 235, 235 [2007]).

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

ENTERED: APRIL 27, 2010

CLERK

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2650 Tamara Hernandez, Index 24840/00
Plaintiff,

-against-

St. Barnabas Hospital,
Defendant-Respondent,

Otis Elevator Company,
Defendant-Appellant,

Delta Elevator Service Corporation,
Defendant.

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

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

Order, Supreme Court, Bronx County (Alan Saks, J.), entered July 24, 2009, which, insofar as appealed from as limited by the briefs, granted the motion by defendant St. Barnabas Hospital for summary judgment dismissing the complaint and all cross claims as against it to the extent of awarding St. Barnabas conditional judgment as against defendant Otis Elevator Company, unanimously reversed, on the law, without costs, and the award vacated.

After plaintiff was injured while a passenger in a defective elevator at St. Barnabas, she commenced this action against, in part, St. Barnabas and Otis, with whom St. Barnabas had contracted for repair and maintenance of its elevators. At the conclusion of discovery, St. Barnabas moved for summary judgment

dismissing the complaint and all cross claims as against it on the ground that since the hospital's maintenance staff never involved itself with elevator repair and, instead, always summoned Otis to deal with any elevator problems, it was not liable for plaintiff's alleged injuries. The motion court subsequently granted St. Barnabas's motion to the extent of awarding it a conditional judgment as against Otis.

St. Barnabas never sought any relief as against Otis, either in its motion or by means of interposing a cross claim. Furthermore, the court, in declining to afford the hospital summary judgment dismissal, implicitly determined that there are triable questions of fact as to its active negligence, no matter how minimal (*see Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257-259 [2008]). Under these circumstances, it was error to accord St. Barnabas conditional judgment, i.e, implied indemnification, as against Otis (*see id.* at 257).

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

ENTERED: APRIL 27, 2010

CLERK

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2651-
2651A Index 604133/07

MP Innovations, Inc.,
Plaintiff-Appellant,

-against-

Atlantic Horizon International, Inc.,
Defendant-Respondent.

Law Offices of Edward Weissman, New York (Edward Weissman of counsel), for appellant.

Kelley Drye & Warren LLP, New York (Jonathan K. Cooperman of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered December 23, 2009, which, sua sponte, recalled and vacated a prior order, same court and Justice, entered July 7, 2009, denying plaintiff's motion for leave to replead as moot, and, upon recall, denied plaintiff's motion for leave to replead, unanimously affirmed, without costs. Appeal from the July 7, 2009 order, unanimously dismissed, without costs, as academic.

Plaintiff commenced this action for, inter alia, breach of contract based on allegations that it presented defendant with a marketing concept for a personal detoxification product, and that defendant orally agreed to sell the product and to pay plaintiff a percentage of all sales generated. After being advised by defendant that it would not proceed with plans to purchase and resell the product, plaintiff subsequently learned that defendant

had indeed been doing so using information plaintiff had provided.

In October 2008, Supreme Court granted defendant's motion to dismiss the complaint, but granted plaintiff leave to move to replead its causes of action for breach of contract and unjust enrichment. Plaintiff moved for leave to replead and submitted a proposed amended complaint setting forth causes of action for breach of contract, unjust enrichment and fraud.

The motion court properly denied the motion for leave to replead. Plaintiff concedes that the alleged contract, whereby it was to be paid a six percent commission on all sales of the product for a three-year term, is governed by the statute of frauds (*see* General Obligations Law § 5-701[a][10]). The e-mail that plaintiff points to as satisfying said statute, however, does little more than identify the parties' principals. The writing does not, either "expressly or by reasonable implication," identify a number of material terms, including, inter alia, the product, time frame or rate of compensation. Accordingly, the alleged oral agreement is barred by the statute of frauds (*Morris Cohon & Co. v Russell*, 23 NY2d 569, 575 [1969]; *Nemelka v Questor Mgt. Co., LLC*, 40 AD3d 505, 506 [2007], *lv denied* 10 NY3d 705 [2008]).

General Obligations Law § 5-701(a)(10), by its own terms,

applies to implied as well as express contracts (*see Snyder v Bronfman*, 13 NY3d 504 [2009]). Plaintiff's unjust enrichment claim fails since it is a claim for reasonable compensation for services rendered in negotiating the purchase or sale of a business opportunity and therefore falls within the ambit of the statute of frauds (*see* General Obligations Law § 5-701[a] [10]). Thus, even if we were to find, as urged by plaintiff, that it need not make a showing that its ideas were novel or original (*compare Apfel v Prudential-Bache Sec*, 81 NY2d 470 [1993], *with American Bus. Training Inc. v American Mgt. Assn.*, 50 AD3d 219 [2008], *lv denied* 10 NY3d 713 [2008]), the claim is nevertheless barred by the statute of frauds.

Plaintiff also failed to adequately state a cause of action for fraud. Plaintiff's allegations are essentially that defendant never intended to honor its promise to pay plaintiff a commission for providing it with the marketing concept for the product, and a fraud claim does not lie where it simply "alleges that a defendant did not intend to perform a contract with a plaintiff when he made it" (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1988]).

We have considered plaintiff's remaining contentions,

including that the motion court failed to apply the correct standard of review for motions for leave to replead, and find them unavailing.

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

ENTERED: APRIL 27, 2010

CLERK

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2652 Linda Taylor, Index 6908/03
Plaintiff-Appellant,

-against-

United Parcel Service, Inc.,
Defendant-Respondent,

Eric White,
Defendant.

Edward M. Kratt and Jeffrey Cylkowski, New York, for appellant.

Ansa Assuncao LLP, White Plains (Stephen P. McLaughlin of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about March 13, 2009, which, inter alia, granted the motion of defendant United Parcel Service, Inc. (UPS) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Dismissal of the complaint as against UPS was appropriate in this action for injuries sustained by plaintiff as a result of a sexual assault upon her by UPS's employee when he was making a delivery to her apartment. The motion court properly recognized that plaintiff's vicarious liability claims were not viable since "[a]n employer cannot be held vicariously liable for an alleged assault where the assault was not within the scope of the employee's duties, and there is no evidence that the assault was

condoned, instigated or authorized by the employer" (*Yeboah v Snapple, Inc.*, 286 AD2d 204, 204-05 [2001]).

Plaintiff's negligent hiring claim was properly dismissed, where UPS established that at the time of his hire, the subject employee had no criminal record or history of civil complaints or protective orders against him to suggest that he had a propensity to commit sexual assaults (*see Gomez v City of New York*, 304 AD2d 374 [2003]; *cf. T.W. v City of New York*, 286 AD2d 243, 245 [2001]). In opposition, plaintiff failed to present evidence to support her claim that UPS was on notice that the employee had a propensity to engage in sexual assaults or that it should have conducted a more thorough investigation at the time of hire.

Plaintiff's claims alleging negligent retention and supervision were also properly dismissed, as UPS met its initial burden for summary dismissal of the claims by submitting evidence that the employee's employment records did not give it notice that he had a propensity for sexual misconduct or to commit a sexual assault on a stranger (*see G.G. v Yonkers Gen. Hosp.*, 50 AD3d 472 [2008]; *Ghaffari v North Rockland Cent. School Dist.*, 23 AD3d 342, 343 [2005]). In opposition, plaintiff failed to raise a triable issue of fact and her reliance on other examples of poor behavior exhibited by the employee, including rudeness and

inappropriate flirtation, is misplaced (*see Osvaldo D. v Rector Church Wardens & Vestrymen of Parish of Trinity Church of N.Y.*, 38 AD3d 480 [2007]; *Doe v State of New York*, 267 AD2d 913, 915-916 [1999], *lv denied* 95 NY2d 759 [2000]).

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

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

ENTERED: APRIL 27, 2010

CLERK

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2653 The People of the State of New York, SCI 3410N/08
Respondent,

-against-

Anthony Letterio,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda 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 (Patricia Nunez, J.), rendered on or about October 2, 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 27, 2010

CLERK

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

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2654 In re Estate of Philip Mandelbaum, Index 601050/08
Petitioner-Appellant,

-against-

Five Ivy Corp.,
Respondent-Respondent.

Orloff, Lowenbach, Stifelman & Siegel, P.A., Roseland, NJ (Samuel Feldman of counsel), for appellant.

Putney, Twombly, Hall & Hirson LLP, New York (Philip H. Kalban of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 23, 2009, which, in a proceeding pursuant to Business Corporation Law § 623 to fix the fair value of shares, inter alia, denied petitioner's motion to compel production of respondent's Subchapter S election documents for 2008 or 2009 and tax returns for 2008 and 2009, unanimously affirmed, with costs.

The motion court properly denied production of information regarding events subsequent to the undisputed valuation date of December 27, 2007. Contrary to petitioner's contention, the statute's requirement that the court consider "all other relevant factors" in fixing value does not modify its time frame for

fixing value "as of the close of business on the day prior to the shareholders' authorization date" (Business Corporation Law § 623[h][4]).

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

ENTERED: APRIL 27, 2010

CLERK

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2656-
2657N-
2658N

Index 104300/07

Kenneth DeRiggi,
Plaintiff-Respondent,

-against-

Edward Brady, et al.,
Defendants,

Mark Saad, et al.,
Defendants-Appellants.

Zimmet Bieber, LLP, New York (Bruce W. Bieber of counsel), for Mark Saad, appellant.

McMillan, Constabile, Maker & Perone, LLP, Larchmont (Stewart A. McMillan of counsel), for John Lugano, appellant.

Abraham, Lerner & Arnold, LLP, New York (Frank P. Winston of counsel), for respondent.

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 6 and May 7, 2009, which, in an action involving the parties' rights and obligations as investors in a business, denied motions by defendants-appellants to renew a prior order, same court and Justice, entered April 1, 2009, which had granted plaintiff's motion to strike the single answer that had been served on behalf of all defendants, unanimously reversed, on the facts, without costs, renewal granted, and, upon renewal, plaintiff's motion to strike the answer unanimously denied as to appellants. Appeal from the April 1, 2009 order unanimously dismissed, without costs, as academic.

Although we previously affirmed an order striking the answer as to other defendants (68 AD3d 487 [2009]), we reach a different result as to these defendants, the present appellants. Appellants assert that they were passive investors in the subject business who lost their investments and deny that they had any operational involvement, made any financial decisions, attended any meetings, or were aware of the unexecuted operating agreement on which plaintiff predicates his claims, all of which raises a meritorious defense. Appellants also assert that they never received discovery demands, but at the requests of the individual characterized by plaintiff as the main force behind the subject business and the attorney retained by that individual nominally on behalf of all defendants, they immediately provided all such documentation in their possession, and that they neither possess nor control other documents sought by plaintiff in discovery. Aside from plaintiff's conclusory statements to the contrary, no basis exists to reject appellants' sworn representations (*Perez v City of New York*, 63 AD3d 405 [2009]). Any deficiencies in timely responding apparently were occasioned by former counsel's failure to advise appellants of their discovery obligations (*CDR Creances S.A.S. v Cohen*, 62 AD3d 576 [2009]). We are disinclined to deprive these appellants, who seem marginal to the issues in the litigation, of their day in court because of former counsel's

possible neglect in this regard (*Chelli v Kelly Group, P.C.*, 63 AD3d 632 [2009]), especially when the motion court made no findings of willfulness, contumaciousness or bad faith specific to these appellants (*Shure v New York Cruise Lines, Inc.*, 59 AD3d 292, 294 [2009]).

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

ENTERED: APRIL 27, 2010

CLERK

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2659N IDX Capital, LLC, et al., Index 102806/07
Plaintiffs-Respondents,

-against-

Phoenix Partners Group LLC,
Defendant-Appellant,

Phoenix Partners Group LP, et al.,
Defendants.

John F. Bolton, New York, for appellant.

Olshan, Grundman, Frome, Rosenzweig & Wolosky LLP, New York (Herbert C. Ross of counsel), for IDX Capital, LLC, James Cawley, Helen Cawley, James Cawley, Sr., Ron Neal, Bhanu Patel and Starlight Investments, Ltd., respondents.

Graubard Miller, New York (Lawrence Bernfeld of counsel), for Brady Halper, respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered December 2, 2008, which, to the extent appealable, granted plaintiffs' motion to further amend their pleadings and serve a second amended complaint, unanimously affirmed, with costs. Appeal from so much of that order as denied defendant Phoenix Partners Group LLC's cross motion to strike scandalous and prejudicial pleadings, unanimously dismissed, without costs.

The court's acceptance of a motion made 10 days after the deadline it had set for submission was not an abuse of discretion, and was well within its continuing jurisdiction to reconsider any prior intermediate determination it has made (*see Aridas v Caserta*, 41 NY2d 1059, 1061 [1977]).

The court properly permitted plaintiffs to further amend the complaint in order to amplify their pleadings against defendants. To the extent the proposed amendment merely reflected new facts uncovered during discovery that were consistent with plaintiffs' existing theories sounding in tortious interference with contract and libel, it was not devoid of merit and would not result in significant prejudice or surprise (*see Saldivar v I.J. White Corp.*, 9 AD3d 357, 359 [2004]). Nor, in the absence of prejudice, is plaintiffs' delay in seeking to amend a second time and to add additional defendants a sufficient reason to deny the amendment (*Masterwear Corp. v Bernard,* 3 AD3d 305, 306 [2004]; *Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 [2001]).

Since the denial of a motion to strike allegations pursuant to CPLR 3024(b) is not appealable as of right, that portion of the appeal is dismissed (CPLR 5701[b][3]).

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

ENTERED: APRIL 27, 2010

CLERK

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1107 The People of the State of New York, Ind. 3509/03
Respondent,

-against-

Jose Rivera,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Thomas Farber, J.), rendered May 16, 2006, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 15 years, to be followed by five years of post release supervision, affirmed.

This crime resulted in a man's death. However, the jury acquitted defendant of homicide charges, only convicting him of criminal possession of a weapon in the second degree. Defendant's appeal centers on two related issues: (1) the lack of language in the charge that justification negated the unlawful intent component of criminal possession of a weapon in the second degree; and (2) the court's refusal to submit criminal possession of a weapon in the fourth degree as a lesser included offense. For the foregoing reasons, we reject defendant's position.

First, defendant did not request a justification charge with respect to the count for second degree possession and accordingly has failed to preserve this issue. Even if defense counsel had requested a justification charge in connection with criminal possession of a weapon in the second degree, it is questionable whether the court could have granted that request *(see People v Pons* (68 NY2d 264, 267 [1986] ["because possession of a weapon does not involve the use of physical force, there are no circumstances when justification can be a defense to the crime of criminal possession of a weapon" (citations omitted)]). More important, no reasonable view of the evidence supported anything other than defendant's possession of the weapon with intent to use it unlawfully.

The crime occurred after midnight on August 2, 2003. The victim was Owen Ferguson a.k.a. Danny Dred. Yolanda Jenkins testified for the prosecution. Apparently, Jenkins and the victim were planning to attend a party and had met in front of the building where she lived on Sherman Avenue. Defendant lived in the same building. Jenkins said that she and Ferguson noticed defendant enter a restaurant across the street. At some point, a friend, Ebony Williams, joined them.

Defendant owed Ferguson money from a drug purchase and Ferguson went into the restaurant presumably to talk to him about the drug debt. Jenkins observed Ferguson and defendant gesturing

in conversation. Ferguson exited the restaurant about five minutes later. Defendant pulled out a black gun and shot him three times. Jenkins testified that the victim had not turned around to face defendant, although in her grand jury testimony, Jenkins indicated that the victim had turned towards defendant whereupon defendant took out his gun. Jenkins testified that the victim did not have a gun.

Both Jenkins and Ebony Williams fled. According to Jenkins, defendant allegedly followed Jenkins into a doorway, held the gun to her head and threatened to kill her if she said anything. The defendant then ran into the building where they both lived.

Ferguson bled to death from the gunshot wounds. Medical testimony indicated that Ferguson had been shot four to five times, but from more than 18 to 30 inches away.

Defendant was arrested later that night. At the precinct, after a detective read him his *Miranda* rights, defendant wrote and signed a statement. In that statement defendant explained:

> "I, Jose Rivera, was read my Miranda Warnings by Detective Rodriguez. I am making this statement voluntarily. I, Jose Rivera, used to sell weed for Danny Dred [Ferguson]. I had owed him eighty dollars for two days. Danny Dred was looking for me. He was going around asking people for me. I didn't have the money, so I stood [*sic*] home last night. I came outside because I got forty dollars from my friend about 10 PM or 11 PM, I was walking with my friend and I seen Danny with his girl. He seen me walking. So, he told his girl something. She went to the basement, came back out, handed him something. So, I got scared, because I thought he had a knife or gun. I went into the chicken place because I felt safer there with

> people and cameras. As I go in the food spot, I sat by the crowd. As I looked through the window, I seen Danny approaching the door. *So, my friend hand me the pistol from the side.* Danny came in with his hand in his pocket. He kept yelling and screaming at me. I told him, I had forty dollars. He said, fuck that. He want his money now. Kept reaching in his pocket. He told me come out the store. He didn't know I was armed. He kept screaming at me, with his hand in his pocket, come out the store now. As he walked and I came behind him, as soon as we walked out, he reached again. I got so scared, I fired three shots and ran home. I didn't want this to happen. But his actions put me in fear of being hurt and I reacted" (emphasis added).

In defendant's videotaped confession he further explained that his friend gave him the gun at the same time he saw Jenkins give Ferguson "something."

Ebony Williams, testifying for the defense, gave a different account of the crime. She started out the night smoking marijuana with defendant, his girlfriend and Jenkins in apartment 4B in the Sherman Avenue building. She claimed this was her own apartment. Williams testified that Jenkins called the victim and told him to get more marijuana. Then Jenkins left to pick it up. After a while, Williams left the apartment with defendant's girlfriend to find Jenkins.

Williams testified that later she saw defendant with another man named Eric who indicated that he and defendant were going to get something to eat. She then saw Jenkins talking with Ferguson. Jenkins joined Williams. The two women heard shots, but could not see where the shots came from. Together, they ran

into the building, where they remained for 25 minutes. After that, they went together to apartment 4B. Williams testified that she did not see defendant with a gun.

The charges against defendant included murder in the second degree. The court submitted manslaughter in the first degree as a lesser included offense of intentional murder. On the homicide counts, the court submitted a justification charge. The court informed counsel that it would charge criminal possession of a weapon in the second degree, for which culpability was independent from the homicide charges, but denied defendant's application to submit criminal possession of a weapon in the fourth degree as a lesser included offense. Significantly, defendant did not request a justification charge with respect to criminal possession of a weapon in the second degree. And, when the court submitted that count to the jury, it did not provide a justification charge.

As applicable at the time of the crime, criminal possession of a weapon in the second degree requires, inter alia, that the perpetrator have the intent to use the firearm unlawfully against another (Penal Law § 265.03). Defendant argues that he possessed the gun only in self defense and therefore lacked the requisite intent to support second degree possession of a weapon. Lacking intent to use a firearm unlawfully against another, he argues he merely possessed a firearm which would render him guilty only of

fourth degree possession (Penal Law § 265.01[1] [possessing any firearm]). A trial court need only submit a lesser offense to the jury when there is a reasonable view of the evidence to support that finding (*see People v Negron*, 91 NY2d 788, 792 [1998]). Contrary to defendant's arguments, no reasonable view of the evidence supported submission of the charge of criminal possession of a weapon in the fourth degree as a lesser included offense. First, defendant admits in his confession that he followed the victim out of the restaurant and shot the victim in the back at least three times. Jenkins' trial testimony also shows that the victim had not turned around to face defendant and that defendant shot the victim in the back. This precludes the possibility that defendant used the gun only in self-defense.

Further, the gun was indisputably loaded. Defendant stated that his friend handed him the gun as he saw Ferguson approach the door. Moreover, while defendant did not have the gun until his friend handed it to him in the restaurant, the two had been together earlier in the evening. Also, defendant had been hanging out earlier with Ferguson's girlfriend and presumably knew that she had asked Ferguson to obtain more marijuana for them. Thus, defendant knew he had a good chance of running into Ferguson and that a loaded gun was within easy reach. Defendant was aware of these circumstances before he allegedly saw the victim's girlfriend hand "something" to the victim. This

sequence of events negates any reasonable possibility that defendant could have been guilty of merely possessing the gun. (*See People v Marrero*, 187 AD2d 281, 281 [1992], lv denied 81 NY2d 791 [1993] [no reasonable view of the evidence could establish that defendant possessed a pistol that was not loaded]).

Regardless, even if, as the dissent argues, defendant did not have the intent to use the gun unlawfully at the precise moment his friend handed it to him, there is no reasonable view of the evidence that he lacked such intent when the victim left the restaurant and defendant followed him outside. Notably, in his statement to the police, defendant never indicated that the victim forced him to leave the restaurant or threatened any harm if he did not come outside. Thus, contrary to the dissent's contention, our conclusion is not based on speculation but on defendant's own statement. Accordingly, the court's refusal to submit criminal possession of a weapon in the fourth degree as a lesser included offense to second-degree possession was appropriate. As the Court of Appeals noted in *People v Pons* (68 NY2d 264 [1986]):

> "it does not follow that because defendant was justified in the actual shooting of the weapon under the particular circumstances existing at that moment, he lacked the intent to use the weapon unlawfully during the continuum of time that he possessed it prior to the shooting" (*Pons* at 267-268)

As discussed earlier, the gun was within easy reach of

defendant well before he ran into Ferguson, defendant must have known that there was a good possibility that he would run into Ferguson eventually that evening and defendant took the gun from his friend when he saw Ferguson approaching the restaurant. Thus, no reasonable view of the evidence supports defendant's position that "he lacked the intent to use the weapon unlawfully during the continuum of time that he possessed it prior to the shooting."

Defendant's claim that the jury, by acquitting him of homicide charges, accepted his justification defense speculates as to the jury's thought processes and does not warrant a different result (*see People v Hemmings*, 2 NY3d 1, 5 [2004]; *People v Rayam*, 94 NY2d 557, 561 [2000]). Among other things, the jury could have concluded that, even if defendant was justified in shooting Ferguson, he otherwise possessed the weapon with intent to use it unlawfully, or the jury "could have found mitigating circumstances falling short of legal justification but meriting leniency" (*People v Gonzalez*, __ AD3d __, 2010 NY Slip Op 01879, * 1).

Nor did defendant preserve his challenge to the sufficiency of the evidence and we decline to review it in the interest of justice as well. As an alternative holding, we find that the evidence was legally sufficient. We further find that the verdict was not against the weight of the evidence (*see People v*

Danielson, 9 NY3d 342, 348-349 [2007]).

To the extent that defendant is raising an ineffective assistance of counsel claim, we find that he 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 record does not establish that defendant's sentence was based on any improper criteria, and we perceive no basis for reducing the sentence.

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

ACOSTA, J. (dissenting in part)

I dissent because in my opinion, defendant was entitled to a charge on the lesser included offense of criminal possession of a weapon in the fourth degree.

Prosecution witness Yolanda Jenkins, who lived in the same apartment building as defendant, had been smoking marijuana with her boyfriend, Owen Ferguson, a drug dealer, all day on August 1, 2003. Shortly after midnight, Jenkins and Ferguson, who were planning to attend a party, met in front of a building on East 165th Street and Sherman Avenue, where they met up with Ebony Williams. Jenkins saw Ebony's boyfriend, Eric, and defendant, who owed Ferguson $80 from a purchase of marijuana, enter a chicken restaurant across the street. Although Jenkins testified at trial that Ferguson entered the restaurant a few minutes later to eat before heading off to the party, according to her grand jury testimony, he went to the restaurant to speak to defendant about the $80 debt. Jenkins could see into the restaurant, and observed Ferguson and defendant, both gesturing, in conversation. She was able to see that Ferguson was upset. When Ferguson exited the restaurant about five minutes later with no weapon in hand, defendant pulled out a gun and shot him. She testified that Ferguson had not turned around to face the defendant, who shot him from a short distance away. She heard two shots at that time, then a third shot as she fled in one direction and Ebony

fled in the opposite direction.

According to Jenkins, as she ducked into a doorway, defendant entered after her. He grabbed her shirt, put the gun to the back of her head, threatened to "kill [her] too" if "[she] opened [her] mouth," and ran into the building where they both lived. She eventually went to the hospital where Ferguson had been taken.

Detective Daniel Mullarkey interviewed Jenkins at the hospital and at the precinct. In a first signed statement, she did not indicate that she had observed the shooting. In a subsequent signed statement, she indicated that she had. Jenkins testified that she told Mullarkey that defendant had owed money to Ferguson.

Defendant was arrested on August 2, 2003 at his home. After being informed of his *Miranda* rights, defendant wrote and signed a statement, where he stated:

> "I, Jose Rivera, was read my Miranda Warnings by Detective Rodriguez. I am making this statement voluntarily. I, Jose Rivera, used to sell weed for Danny Dred [Ferguson]. I had owed him eighty dollars for two days. Danny Dred was looking for me. He was going around asking people for me. I didn't have the money, so I stood *[sic]* home last night. I came outside because I got forty dollars from my friend about 10 PM or 11 PM, I was walking with my friend and I seen Danny with his girl. He seen me walking. So, he told his girl something. She went to the basement, came back out, handed him something. So, I got scared, because I thought he had a knife or gun. I went into the chicken place because I felt safer there with people and cameras. As I go in the food spot, I sat by the crowd. As I looked through the window, I seen Danny approaching the door. So, my friend hand me the pistol from the side. Danny came in

with his hand in his pocket. He kept yelling and screaming at me. I told him, I had forty dollars. He said, fuck that. He want his money now. Kept reaching in his pocket. He told me come out the store. He didn't know I was armed. He kept screaming at me, with his hand in his pocket, come out the store now. As he walked and I came behind him, as soon as we walked out, he reached again. I got so scared, I fired three shots and ran home. I didn't want this to happen. But his actions put me in fear of being hurt and I reacted."

An assistant district attorney testified that she conducted a videotape of defendant's confession, in which he provided a more elaborate statement, now stating that, on 165th Street, a friend gave him the gun at the same time that Jenkins gave Ferguson "something."

Ebony Williams testified for the defense that she had spent the night of August 1st smoking marijuana with defendant, his girlfriend, and Jenkins. Jenkins left to pick up more marijuana from Ferguson. After a while, she accompanied defendant's girlfriend to find Jenkins, and waited on the corner, across from the chicken restaurant. There, she saw defendant with Eric, who indicated they were going to get something to eat, then saw Jenkins talking with Ferguson, who joined her. She claimed that a truck blocked her and Jenkins's view of the restaurant, and she did not see Ferguson enter it. She and Jenkins were face-to-face, as she looked for her keys, when they heard shots, but they could not see where the shots were from. Williams and Jenkins ran into a building where they remained for about 25 minutes, after which they went to her apartment. Williams

testified that she did not see defendant with a gun.

The court submitted murder in the second degree (intentional murder) and manslaughter in the first degree as a lesser included offense. Given defendant's confession, it submitted a justification charge with respect to the homicide charges. It also charged criminal possession of a weapon in the second degree, as to which culpability was independent from the homicide charges, but denied defendant's application to submit criminal possession of a weapon in the fourth degree as a lesser included offense, on the basis that no reasonable view of the evidence supported that charge. The jury acquitted defendant of the homicide charges, and convicted him of criminal possession of a weapon in the second degree.

I agree with the majority that the verdict was supported by legally sufficient evidence and was not against the weight of the evidence. On these facts, however, the court erred in refusing to charge criminal possession of a weapon in the fourth degree (Penal Law § 265.01[1] [possessing any firearm]), which does not require that defendant had the intent to use it unlawfully, since defendant's statement to the police sets forth a reasonable view of the evidence (CPL 300.50[1]; *People v Glover*, 57 NY2d 61 [1982]) in which he never intended to use the weapon for anything other than a justifiable purpose (*see People v Discala*, 45 NY2d 38, 41-42 [1978]). In *Discala*, the Court noted that:

> "[i]n deciding whether to submit a lesser included offense to the jury, it has been emphasized that '[the] court's appraisal of the persuasiveness of the evidence indicating guilt of the higher count is irrelevant.' Rather, the focus is on whether there is some reasonable basis in the evidence for finding the accused innocent of the higher crime, and yet guilty of the lower one. In other words, it is not for the Trial Judge to speculate as to what will be the ultimate finding of the jury; the court simply determines if there is a reasonable view of the facts which would support a conviction of the lesser crime but not the greater. The evidence must be viewed in the light most favorable to the defendant, and a court must recognize that the jury may decide to accept only part of the prosecution's proof. The net effect of submitting the lesser charge may be that the jury will simply extend mercy, but this is acknowledged to be an 'inevitable consequence of the jury system'" (internal citations omitted).

Significantly, inasmuch as it appears that defendant's use of a weapon was found to be justified as evidence by his acquittal of the homicide charges, a determination that he possessed the weapon with unlawful intent must be based on his intent at a time other than during the justified use of force (*People v Pons*, 68 NY2d 264, 268 [1986]).[1] Clearly, he did not

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[1]As the Court noted in *Pons* (68 NY2d at 267-268):

> "[I]t does not follow that because defendant was justified in the actual shooting of the weapon under the particular circumstances existing at that moment, he lacked the intent to use the weapon unlawfully during the continuum of time that he possessed it prior to the shooting. Whether the People established beyond a reasonable doubt that defendant possessed the weapon during that period 'with intent to use [it] unlawfully against another' (Penal Law § 265.03) was a question for the jury to determine based on the court's charge pertaining to the elements of the crime and to the proof necessary to establish unlawful intent." (Citations omitted).

possess the weapon prior to the incident; it was given to him when Ferguson entered the restaurant in a menacing manner with his hand in his pocket, suggesting that he was armed. The majority makes light of these facts by suggesting that defendant knew that his friend had a readily-available weapon because the two had been together earlier in the day, but this is mere speculation, which in any event could have been rejected by the jury. As for possession after the incident, although Jenkins's testimony provided the People with evidence that defendant unlawfully possessed the gun after the "justifiable" shooting when he threatened to kill Jenkins if she told anyone, the jury was certainly free to reject Jenkins's testimony in favor of that of Williams, who stated that she and Jenkins ran into the apartment where they remained for 25 minutes. Had the jury favored Williams's testimony, there was no other evidence indicating that defendant possessed the weapon after the incident. Drawing all evidentiary inferences in the proponent's favor, criminal possession of a weapon in the fourth degree should have been charged (*People v Devonish*, 6 NY3d 727, 728 [2005]; *People v Henderson*, 41 NY2d 233, 236 [1976]), and the court's refusal requires reversal (*see e.g. People v Cabassa*, 79 NY2d 722, 728-729 [1992], *cert denied* 506 US 1011 [1992]; *People v Martin*, 59 NY2d 704, 706 [1983]; *People v Bayard*, 32 AD3d 328, 330 [2006]).

The majority posits that there is no reasonable view of the evidence supporting a charge for criminal possession of a weapon in the fourth degree by noting that defendant admitted in his confession that he followed the victim out of the restaurant and shot him in the back, and that Jenkins's trial testimony corroborates that the victim did not turn around to face defendant. In his statement, however, defendant states that he possessed the gun solely for self-defense when he feared that Ferguson was going to harm him. Specifically, he stated that

> "[Ferguson] seen me walking. So, he told his girl something. She went to the basement, came back out, handed him something. So, I got scared, because I thought he had a knife or gun. I went into the chicken place because I felt safer there with people and cameras. As I go in the food spot, I sat by the crowd. As I looked through the window, I seen [Ferguson] approaching the door. So, my friend hand me the pistol from the side."

He later explained that his friend gave him the gun at the same time that Ferguson's girlfriend gave him "something," presumably a weapon. In addition, he explained why he went outside:

> "[Ferguson] came in with his hand in his pocket. He kept yelling and screaming at me. I told him, I had forty dollars. He said, fuck that. He want his money now. *Kept reaching in his pocket. He told me come out the store.* He didn't know I was armed. *He kept screaming at me, with his hand in his pocket, come out the store now.* As he walked and I came behind him, *as soon as we walked out, he reached again. I got so scared, I fired three shots and ran home.* I didn't want this to happen" (emphasis added).

And, although Jenkins testified at trial that Ferguson did not

turn around to face defendant, she had earlier testified before the grand jury that Ferguson "turned around and that is when [defendant] pulled out the gun." Since the facts must be viewed in the light most favorable to defendant, I disagree with the majority that no reasonable view of the evidence supports the charge.

Nor does the fact that the pistol was loaded defeat the charge. As applicable at the time of the crime, a person is guilty of criminal possession of a weapon in the second degree pursuant to Penal Law § 265.03 when "with intent to use the same unlawfully against another, such person . . . possesses a loaded firearm." One who possesses a loaded firearm without unlawful intent necessarily "possesses any firearm," Penal Law § 265.01(1), and thus commits fourth-degree possession, but absent that intent, does not commit second-degree possession (*see People v Vaccaro*, 44 NY2d 885, 886 [1978] [by statutory definition criminal possession of a weapon in the fourth degree is a lesser included offense of criminal possession of a weapon in the second degree]; *People v Sotelo*, 176 AD2d 458 [1991], *lv denied* 80 NY2d 838 [1992]). The fact that the pistol was loaded in *Vaccaro* permitted the court to refuse to charge criminal possession of a weapon in the fourth degree as a lesser of possession in the second degree only because defendant was charged with possession in the fourth degree pursuant to Penal

Law § 265.01(2). That section defines possession in the fourth degree as possessing, among other things, a deadly weapon with the intent to use it against another. The term "deadly weapon" is defined as "any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged," (Penal Law § 10.00[12]). Thus, where it is undisputed that the gun was loaded, it would be theoretically impossible to commit the lesser and not the greater (*id.* at 866). But in this case, defendant was not charged with criminal possession of a weapon in the fourth degree pursuant to Penal Law § 265.01(2). He was therefore entitled to the charge pursuant to Penal Law § 260.01(1).

People v Marrero (187 AD2d 281 [1992], *lv denied* 81 NY2d 791 [1993]), cited by the majority, is inapposite. There, the Court denied the request to submit fourth-degree possession because it was not a lesser included offense of third-degree possession. The only difference between those statutes prior to 2006 was that for third-degree possession, the firearm had to be loaded (*see* Penal Law § 265.02[4]). Thus, if it was undisputed that the weapon was loaded, there could be no reasonable view of the evidence that a defendant did not commit the greater crime. Here, by contrast, the difference between fourth-degree possession and second-degree possession also includes unlawful intent. And, as shown above, a reasonable view of the evidence

supports the charge that defendant possessed a firearm without the intent to use it unlawfully.

Defendant further argues that he was entitled to a charge on the additional language in the CJI applicable to situations where there is evidence of an intent to use the firearm justifiably. That charge states:

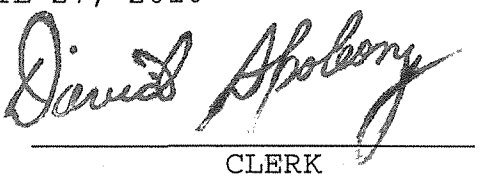
> "The defense of justification does not apply to this crime because that defense applies only to the use of force. You may however, in determining whether or not the defendant had the intent required for this crime consider the following:
>
> "The use of a firearm . . . to engage in conduct that is justifiable under the law is not unlawful. Thus, an intent to use a firearm . . . against another justifiably is not an intent to use it unlawfully.
>
> "Therefore, to find the defendant guilty of this crime, you must find beyond a reasonable doubt that he/she possessed the firearm . . . with the intent to use it against another unlawfully and not solely with the intent to use it justifiably."

(CJI 2d Penal Law Art 265, Intent to Use Unlawfully and Justification; *see id.* at n1, citing *People v Pons*, 68 NY2d 264, as support for the pattern instruction; *People v Richards*, 869 NYS2d 731, 739 [Crim Ct, NY County 2008]). While the CJI indicates this language should be used where the statutory presumption of unlawful intent is charged, which it was not here, there is no indication that this charge should not be used whenever it is applicable. Inasmuch as defendant did not request this charge, however, the issue is not preserved for our review and I decline to review it in the interest of justice. I

also reject defendant's assertion that counsel was ineffective for failing to request this charge, where counsel's representation, on the whole, appears to have been meaningful (*see People v Borrell*, 12 NY3d 365 [2009]).

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

ENTERED: APRIL 27, 2010



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Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1734 In re William A.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

Order, Family Court, Bronx County (Robert R. Reed, J.), entered on or about February 13, 2009, which adjudicated appellant a juvenile delinquent after a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crime of assault in the third degree, and imposed a conditional discharge for a period of six months, unanimously reversed, as an exercise of discretion in the interest of justice, and the petition dismissed, without costs.

Family Court improvidently exercised its discretion in adjudicating appellant a juvenile delinquent under the facts of this case. The fact that the term of the conditional discharge has now expired does not moot this appeal *(see Matter of Bickwid v Deutsch*, 87 NY2d 862 [1995]), as the stigma attached to the

juvenile delinquency adjudication remains (*see Matter of Daniel W.*, 56 AD3d 483 [2008]).

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

ENTERED: APRIL 27, 2010

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2619 The People of the State of New York, Ind. 28271C/05
Respondent,

-against-

John Garabo,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Brenda E. Cooke of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Thomas A. Farber, J.), rendered November 13, 2006, convicting defendant, after a jury trial, of attempted assault in the first degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's acceptance of the testimony of the victim and that of an officer to whom defendant made an incriminating statement, along with its rejection of defendant's testimony.

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

ENTERED: APRIL 27, 2010

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2620 Marilexis Torres, etc., et al., Index 109359/08
Plaintiffs-Respondents,

-against-

Terence Cardinal Cooke Health Care Center,
Defendant-Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellant.

Sinel & Associates, PLLC, New York (Raymond E. Gazer of counsel), for respondents.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered December 15, 2009, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing plaintiff's medical malpractice claims as time-barred, unanimously affirmed, without costs.

The action arises out of plaintiff's decedent's residence at defendant nursing home for approximately 27 months during which he developed numerous pressure sores about his body and other allegedly related conditions. At issue is whether otherwise untimely malpractice claims based on these sores are saved by the continuous treatment doctrine. We find the doctrine to be applicable in view of defendant's own records stating that at the time of the decedent's initial admission, his "pressure ulcer assessment score" was at a "high risk level," thereby suggesting that the decedent had a "condition" that had to be monitored and

treated (*see Nykorchuck v Henriques*, 78 NY2d 255, 258-259 [1991] ["essential to the application of the doctrine is that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit"]). Given this condition and treatment, and given defendant's admission that two of the sores at issue were present at the time of the decedent's final discharge from the facility after the limitations cut-off date, it does not avail defendant that the other sores at issue may have healed before the limitations cut-off date. We have considered defendant's other arguments and find them unavailing.

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

ENTERED: APRIL 27, 2010

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2621 In re Olivia B.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about September 23, 2009, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act which, if committed by an adult, would constitute the crime of menacing in the second degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

Given the seriousness of the underlying offense, in which appellant brought a boxcutter to school and used it to injure a classmate, along with appellant's history of violent behavior, the court properly exercised its discretion in placing appellant on probation. This was the least restrictive dispositional alternative consistent with appellant's needs and the need for

protection of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), and an adjournment in contemplation of dismissal would not have been appropriate under these circumstances.

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

ENTERED: APRIL 27, 2010

David Spolony

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2622 The People of the State of New York, Ind. 432/08
Respondent,

-against-

Kazmel Johnson,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Aaron Ginandes 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 Solomon, J.), rendered on or about April 14, 2009,

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

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

ENTERED: APRIL 27, 2010

CLERK

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

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2625-
2626 Index 600681/99

John Bykowsky,
Plaintiff,

The New York Urban Professionals
Athletic League, Inc.,
Plaintiff-Appellant,

-against-

Irving Eskenazi, et al.,
Defendants-Respondents,

Bruce Radler, et al.,
Defendants.

John Bykowsky, New York, for appellant.

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York (Bruce H. Wiener of counsel), for respondents.

Judgment, Supreme Court, New York County (Judith J. Gishe, J.), entered December 10, 2009, upon a jury verdict, awarding plaintiffs the sum of $1.00 in damages against defendants Basketball City New York, Inc. and Basketball City USA, Inc., and dismissing the complaint as against defendants Eskenazi and Landau, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 24, 2009, which denied plaintiff New York Urban Professionals Athletic League's motion to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury's verdict, awarding plaintiffs zero damages for lost profits resulting from defendants' breach of a stock

purchase agreement, was not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498 [1978]). The record demonstrates that the League's several theories as to its lost profits were speculative. Moreover, the disputed factual issues and any inconsistencies in the witnesses' testimony were placed before the jury, whose resolution of such conflicts is entitled to deference (*see Mazariegos v New York City Tr. Auth.*, 230 AD2d 608, 609-610 [1996]).

Plaintiff's argument that the jury charge contained a harmful error as to the level of proof required to establish lost profits is unpreserved (CPLR 4110-b). Were we to review it, we would find that the charge as a whole properly instructed the jury that damages for lost future profits must "be capable of measurement based upon known reliable factors without undue speculation" (*Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993]).

Nor did the court improperly permit the jury to consider evidence of a setoff against damages, since the stock purchase agreement entitled defendants to dividends if any were distributed.

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

ENTERED: APRIL 27, 2010

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2627 In re Terence Boddie, Index 401320/08
Petitioner-Appellant,

-against-

New York City Housing Authority, etc.,
Respondent-Respondent.

Terence Boddie, appellant pro se.

Sonya M. Kaloyanides, New York (Jeffrey Niederhoffer of counsel), for respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered October 15, 2008, which denied the petition to annul respondent's determination that petitioner was not eligible to be placed on the waiting list for the Section 8 housing assistance voucher program, unanimously affirmed, without costs.

The challenged administrative determination was a form letter, dated May 19, 2008, which informed petitioner that his application was being "discarded" because the Section 8 waiting list had been closed on May 14, 2007, except for an emergency category not applicable to petitioner. That rejection was neither arbitrary nor capricious (*see Matter of McLeon v NYCHA Hope Gardens*, 48 AD3d 686, 687 [2008]). Petitioner concedes he is not within the emergency category, and moreover, he is subject to a lifetime registration requirement under New York's sex offender registration program (*see* 24 CFR 960.204[a][4]), which renders him ineligible for admission to public housing and the

Section 8 program (§ 982.553[a][2][I]). Since petitioner was not qualified for admission to the Section 8 program and had no legitimate claim of entitlement to the requested benefits, there was no violation of Title II of the Americans With Disabilities Act of 1990 (42 USC § 12132; *see Matter of Munsiff v Office of Ct. Admin.*, 31 AD3d 114, 117-118 [2006], *lv denied* 8 NY3d 804 [2007]). Were it not for his regulatory disqualification, he would have had the same access to the program as any other applicant, and accordingly, his due process claim was properly dismissed.

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

ENTERED: APRIL 27, 2010

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2628 The People of the State of New York, Ind. 6606/03
Respondent,

-against-

Kyle Jenkins,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Carol Berkman, J. at suppression hearing; William A. Wetzel, J. at jury trials and sentence), rendered August 18, 2005, convicting defendant, after a jury trial, of attempted robbery in the first degree, and also convicting him, after a second jury trial of the same indictment, of murder in the second degree, and sentencing him to an aggregate term of 22½ years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress his two videotaped statements and the oral and written statements that he gave to two detectives in between. Those statements were sufficiently attenuated from the statements defendant made before he received *Miranda* warnings, since there was a significant break of more than nine hours between the pre-*Miranda* questioning and the first videotaped statement, the interviews were conducted by a completely different set of interrogators, and *Miranda* warnings

were readministered before each interview (*see People v Paulman*, 5 NY3d 122, 130-134 [2005]). Furthermore, defendant's pre-*Miranda* statements were almost entirely exculpatory and gave him no reason to believe it would have be futile to assert his rights. There is also no evidence that the detective who initially questioned defendant deliberately withheld warnings in order to elicit a confession (*compare Missouri v Seibert*, 542 US 600 [2004]); on the contrary, as soon as defendant made a statement that potentially connected him to the murder, the detective immediately advised him of his rights. Finally, the prosecutor's warnings to defendant, after he had already waived his rights several times, reasonably conveyed to defendant his right to have an attorney present for any questioning, and we reject defendant's arguments to the contrary (*see Duckworth v Eagan*, 492 US 195, 203 [1989]).

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

ENTERED: APRIL 27, 2010

David Friedberg

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2629 Andrzej Romanczuk,
Plaintiff-Respondent,

Index 100565/05
590254/06
590146/08

-against-

Metropolitan Insurance and Annuity Company, et al.,
Defendants-Appellants,

Arrow Restoration, Inc., et al.,
Defendants.

[And Other Actions]

White & McSpedon, P.C., New York (Tracey Lyn Jarzombek of counsel), for Metropolitan Insurance and Annuity Company, Rose Associates, Inc. and Rose Associates, LLC, appellants.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Titan Restoration, Inc., appellant.

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

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered March 23, 2009, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of defendants-appellants' liability under Labor Law § 240(1), unanimously affirmed, without costs.

The record demonstrates that the failure of appellants to properly construct and secure the scaffolding, and the failure to provide adequate safety devices was a proximate cause of plaintiff's injury. Appellants' argument that plaintiff and his foreman's conflicting versions of the accident preclude summary

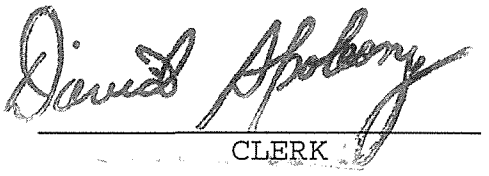
judgment on the issue of liability under section 240(1) is unavailing where, as here, the statute was violated under either version of the accident (*see Ernish v City of New York*, 2 AD3d 256, 257 [2003]; *John v Baharestani*, 281 AD2d 114, 117 [2001]).

The motion court also correctly determined that the plaintiff's own alleged negligence was not the sole proximate cause of his accident, since it is undisputed that plaintiff was using the device he had been provided with in order to access the bulkhead located on the building's roof; that there were insufficient planks on the scaffold for plaintiff to stand on; and that no other safety devices were provided to prevent or protect plaintiff from a possible fall (*see Ben Gui Zhu v Great Riv. Holding, LLC*, 16 AD3d 185 [2005]). Plaintiff's conduct, at most, constituted comparative negligence, which is not a defense

under Labor Law § 240(1) *(see Picano v Rockefeller Ctr. N., Inc.,* 68 AD3d 425 [2009]; *Aponte v City of New York*, 55 AD3d 485 [2008]).

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

ENTERED: APRIL 27, 2010



CLERK

Tom, J.P., Mazzarelli, Saxe, Andrias, DeGrasse, JJ.

2632 The People of the State of New York, Ind. 5003/07
Respondent,

-against-

Claudio Lopez,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered June 23, 2008, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 17½ years, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The matters permitted were probative of defendant's credibility and were not unduly prejudicial. We have considered and rejected defendant's related claims concerning the prosecutor's cross-examination and summation, except that we find the questioning about defendant's familiarity with a particular drug dealer to be harmless error.

The court properly exercised its discretion in clarifying or

directing the rephrasing of some of defense counsel's questions during cross-examination (*see e.g. People v Hinton*, 31 NY2d 71, 76 [1972], *cert denied* 410 US 911 [1973]). The court's interventions involved the form of questions and the necessary foundation for impeachment by way of prior inconsistent statements. Defendant was fully able to impeach the witnesses, and there was no impairment of his right of confrontation (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986])

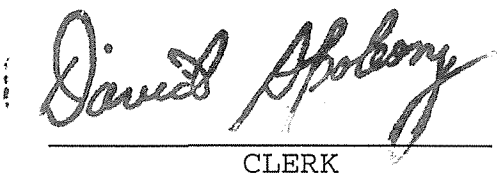
The court properly declined to submit manslaughter in the second degree as a lesser included offense, since there was no reasonable view of the evidence, viewed in the light most favorable to defendant, that he acted with mere recklessness. Defendant's conduct in inflicting a very deep stab wound to the victim's vital organs could only be interpreted as evincing a deliberate design to cause the victim's death, or at least gravely injure him, and the crime was intentional or nothing (*see People v Butler*, 84 NY2d 627, 634 [1994]). While evidence presented on the defense case supported a theory that defendant was justified in stabbing the victim, that evidence did not undermine the inference that the stabbing, even if in self-defense, was at least intended to cause serious physical injury; under defendant's view of the evidence he would have been

entitled to a complete acquittal, not a finding that he acted recklessly.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 27, 2010



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Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2634 Jose Cornelio Najera, Index 112285/05
Plaintiff-Respondent,

-against-

King David Development Co., L.P.,
Defendant-Appellant.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellant.

Trolman, Glaser & Lichtman, PC, New York (Michael T. Altman of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered December 10, 2009, which, in an action by a waiter against an out-of-possession landlord for personal injuries caused by a defective dumbwaiter, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant.

Summary judgment should have been granted in favor of defendant because, under its lease with plaintiff's employer, it did not reserve the right to repair or maintain the dumbwaiter (*see Lopez v 1372 Shakespeare Ave. Hous. Dev. Fund Corp.*, 299 AD2d 230, 231 [2002]). While defendant did reserve the right to reenter to make repairs to "pipes, ducts, cables, conduits, plumbing, vents and wires" to the extent it deemed necessary "for the proper operation and maintenance of the building," there is

no showing that the dumbwaiter affected the operation and maintenance of the building. We would add that Administrative Code of City of NY § 27-998(a), relied on by plaintiff, sets forth inspection and testing interval requirements that, to the extent applicable to dumbwaiters (*see* Administrative Code §§ 27-982, 27-998[e] [all other devices not specifically mentioned shall be inspected "at such intervals as the commissioner may require"]), do not implicate a significant structural or design defect (*see Nameny v East N.Y. Sav. Bank*, 267 AD2d 108, 109 [1999]).

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

ENTERED: APRIL 27, 2010

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2635 The People of the State of New York, Ind. 2923/04
Respondent,

-against-

Marlon Henry,
Defendant-Appellant.

Richard M. Weinstein, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Hannah E.C. Moore of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert Torres, J. at suppression hearing; Michael A. Gross, J. at plea and sentence), rendered July 9, 2007, convicting defendant of two counts of manslaughter in the first degree and three counts of robbery in the first degree, and sentencing him to an aggregate term of 29 years, unanimously affirmed.

The court properly exercised its discretion in denying, without an evidentiary hearing, defendant's motion to withdraw his plea (*see People v Frederick*, 45 NY2d 520 [1978]). The record establishes the voluntariness of the plea. Defendant's assertions of innocence were conclusory and contradicted by his allocution, and his remaining claims were meritless.

Defendant made a valid waiver of his right to appeal, which

forecloses review of his suppression claims. As an alternative holding, we reject those claims on the merits.

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

ENTERED: APRIL 27, 2010

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2636N Jonathan Hernandez, by his Mother and Natural Guardian, Idalia Sanchez, et al., Plaintiffs-Appellants, Index 25216/03

-against-

St. Stephen of Hungary School, Defendant-Respondent.

Philip J. Sporn & Associates, Bronx (Robert J. DiGianni, Jr. of counsel), for appellants.

Leahey & Johnson, P.C., New York (Peter James Johnson, Jr. of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered January 27, 2009, which, to the extent appealable, denied plaintiffs' motion to renew a prior order granting defendant summary judgment dismissing the complaint, and granted defendant's show cause order to preclude plaintiffs from offering deposition testimony as proof on their motion, unanimously affirmed, without costs.

This is an action for negligent supervision of an after-school program where the infant plaintiff was injured in a Wiffle ball game. Plaintiffs failed to establish that the court overlooked or misapprehended the facts or the law, or was otherwise mistaken in its earlier decision (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1992], *lv dismissed* 80 NY2d 1005 [1992]), and in any event, no appeal lies from a denial of

reargument.

Renewal was properly denied when plaintiffs were unable to explain why the purportedly new evidence -- deposition testimony or a supporting affidavit -- was not submitted on the original motion (*see Anthoine v Lord, Bissell & Brook*, 295 AD2d 293 [2002]). In any event, plaintiffs were still unable to offer competent proof of unreasonable, enhanced or unforeseen risks in this activity that would establish a breach of duty to a voluntary participant (*see e.g. Cuesta v Immaculate Conception R.C. Church*, 168 AD2d 411 [1990]), or negligence in defendant's supervision of the activity (*see Siegell v Herricks Union Free School Dist.*, 7 AD3d 607 [2004]).

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

ENTERED: APRIL 27, 2010

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2637N Rosanna Renelique, Index 110758/08
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

Alexander J. Wulwick, New York, for appellant.

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered January 16, 2009, which, in an action for personal injuries sustained in a slip and fall on a floor in defendant's building, denied plaintiff's motion for leave to file a late notice of claim and granted defendant's cross motion to dismiss the complaint, unanimously reversed, on the law, without costs, the motion granted, the cross motion denied and the complaint reinstated.

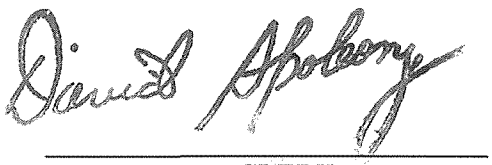
The record shows that plaintiff's fall was witnessed by defendant's employee, who assisted her in getting up from the ground and gave her the telephone number to the management office. The employee also acknowledged that the floor was wet because it was being prepared for waxing.

Plaintiff's excuse for her more than year-long delay in filing a timely notice of claim - that she did not know that defendant owned the building at issue - was not reasonable.

However, the lack of a reasonable excuse is not, standing alone, sufficient to deny an application for leave to serve and file a late notice of claim (*see Weiss v City of New York*, 237 AD2d 212, 213 [1997]), where, as here, defendant's employee witnessed the accident (*see Matter of Ansong v City of New York*, 308 AD2d 333 [2003]), and where defendant cannot show that it was prejudiced by the delay (*see Weiss*, 237 AD2d at 213). Defendant's contention that it had no knowledge of the accident since its employee did not file an accident report because he had no reason to believe that plaintiff had been injured is unavailing where defendant had knowledge of the essential facts constituting the claim (*see* General Municipal Law § 50-e[5]).

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

ENTERED: APRIL 27, 2010



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APR 27 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
John W. Sweeny, Jr.
James M. Catterson
Sheila Abdus-Salaam, JJ.

2018
Index 27640/02

Antonio Martinez,
Plaintiff-Respondent,

-against-

Dr. Alexis E. Te,
Defendant-Appellant.

Defendant appeals from the order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about August 5, 2009, which granted plaintiff's motion to set aside the verdict.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellant.

Law Offices of Mark R. Bower, P.C., New York (Mark R. Bower of counsel), for respondent.

CATTERSON, J.

The trial court's decision to set aside, sua sponte, a jury verdict for the defendant in a medical malpractice trial on the basis of juror confusion was plain error. Consequently for the reasons set forth below, the decision is reversed and the verdict reinstated.

The plaintiff commenced the instant medical malpractice action for injuries allegedly suffered during the defendant's performance of "water induced thermo-therapy" (hereinafter referred to as "WIT") to treat the plaintiff's enlarged prostate. The case was ultimately tried to a jury, which, during deliberations, sent a series of notes.

The first note, at 11:20 AM, asked for the defendant Dr. Te's testimony, and the second note, at 11:50 AM, requested Dr. Te's records. The plaintiff contends that these two notes demonstrated the jury's misapprehension of the distinction between documentary proof and testimony. Dr. Te maintains that the foreman clarified the request in the first note to indicate that the jury actually sought his medical records, which resulted in the second note.

The third note, at 1 P.M., inquired: "are there any exhibits in evidence that refer to the accepted standard of care for the WIT procedure?" The trial court responded: "No, there are no

documents in evidence except for the standard. You have to go to the testimony of any and all doctors who covered that, that area." The plaintiff did not object to this response, or ask that the jury be questioned about the note. Following the court's responses, the jury did not seek further clarification.

At 3:15 P.M., the jury returned a verdict for Dr. Te. During polling, one juror, regarding the second interrogatory (whether Dr. Te departed from accepted standards of care by performing the WIT on plaintiff in view of the size of his middle lobe), responded "yes, because we don't have the actual - well, I say yes and why, because I say no, because we don't have the standard procedures to go for." The court responded "there was a question from the jury asking for anything, any documents setting forth the standard. There were none." The juror responded "[t]here weren't, so." Again, plaintiff sought no clarification of the juror's statements nor made any objections prior to the jury being discharged.

Several months later, the plaintiff moved to set aside the verdict. The plaintiff argued that the proof of liability was "overwhelming," in contrast to Dr. Te's "weak defense." The plaintiff argued that Dr. Te conceded that it was a reasonable conclusion that the "impassable" stricture in the urethra was caused by the hot water therapy. The plaintiff concluded that

this concession weakened the defense, especially in view of Dr. Kaminetsky's evidence that the stricture was in the bulbar urethra and Dr. Cohen's testimony that the stricture was caused by the misplacement of the catheter during the WIT procedure. Hence, the plaintiff argued that the verdict was inconsistent with the weight of the evidence.

The plaintiff also challenged the court's failure to provide a circumstantial evidence charge. The plaintiff claimed that the jury was confused by the absence of a circumstantial evidence charge, so that it did not know how to evaluate evidence regarding the standard of care and that the omission of the charge "fostered" the deficient verdict.

Attached to the plaintiff's reply affirmation in support of the motion was an affidavit by Jorge Price, a member of the jury; apparently the one who had made the statement at the time of the verdict. Mr. Price averred that "the jury had a very hard time understanding the questions" on the verdict sheet. Mr. Price further averred that he thought the jury needed a document or statute that set forth the standard of care, and opined that the verdict would have been for the plaintiff had the jury known what the standard was. Mr. Price further stated that he believed that the plaintiff was entitled to be compensated by Dr. Te, "but that was not what the questions asked." Mr. Price opined that the

jury was confused because the court's instructions did not specify the standard of care and asserted that "I didn't know how to use the evidence we had to answer the questions."

The court granted the motion to set aside the verdict. The court held that it declined to provide a circumstantial evidence charge because there was direct evidence consisting of trial testimony, depositions and expert reports. The court made no findings with respect to plaintiff's weight of the evidence challenge to the verdict. Rather, the court proclaimed that it was "stunned" by the "last question asked by the jury" regarding whether there was a "manual for the operation in question [which] was allegedly disregarded." The court characterized this as "the jury [...] looking for something out of the Vehicle and Traffic Law, and when the job was not made easy, it folded its collective tent" and returned a defense verdict. The court held that in doing so, "the jury did not follow any of the instructions, pre or post trial, to truly try the issues before it." The court concluded that the verdict resulted from "what I called jury confusion."

The court specifically declined to consider the Price affidavit, but then made findings that explicitly "mirrored" Price's assertions. In finding that the jury had been "thoroughly confused," the court cited to Dinino v. D.A.T.

Constr. Corp. (267 A.D.2d 148, 700 N.Y.S.2d 24 (1st Dept. 1999)) and Borovskaya v. Herskovic (300 A.D.2d 331, 751 N.Y.S.2d 312 (2d Dept. 2002)). Furthermore, the court's interpretation of its own response to the third jury note was that the jury, prospectively, "was to review the testimony of the witnesses, in particular the experts, to decide whether there had been a departure." Since the jury returned a quick verdict, the court concluded that the jury had "abdicat[ed]" its responsibility and had "[given] up trying to reach a verdict" and that plaintiff had been deprived of "substantial justice," thus requiring a new trial.

Initially, we note that the bulk of the plaintiff's arguments are unpreserved. The absence of any objection or request for clarification with regard to the court's response to the jury note, or to the verdict (Rodriguez v. Budget Rent-A-Car Sys., Inc., 44 A.D.3d 216, 220, 841 N.Y.S.2d 486, 490 (1st Dept. 2007); Maione v. Pindyck, 32 A.D.3d 827, 829, 821 N.Y.S.2d 110, 112-113 (2d Dept. 2006)), on the basis that the jury was "confused," prior to the jury being discharged, has deprived this Court of an adequate record to review the claim. If the verdict had been questioned at that time, the matter could have been promptly resolved. Hence, the court, in setting aside the verdict on the basis asserted, necessarily deprived Dr. Te of an opportunity to address the claim when it could have been resolved

prior to the jury being discharged.

However, the trial court ruled on a ground not asserted in the plaintiff's motion. Plaintiff argued therein that the jury was deprived of a circumstantial evidence charge, which misled it in evaluating the evidence. The court clearly answered why no circumstantial evidence was provided - this was a direct evidence case. That branch of the court's ruling is correct and resolved the plaintiff's claim connecting the omission of the charge and consequential jury confusion.

Having rejected that claim, this left only the branch of the motion that the verdict was against the weight of the evidence. As to this branch of the motion, the trial court made no findings at all. Since the court made no findings that the verdict was against the weight of the evidence and the claim is unpreserved, we decline to review it.

The court, sua sponte, construed from the fact that the verdict was returned, in the court's characterization, almost immediately after the third jury note (actually, more than two hours had elapsed), that the jury must have failed to carefully consider the evidence. As noted above, the court in its decision interpreted its response to the third jury note as imposing prospective obligations on the jury - that it was required to go back through all the relevant testimony - but such a directive

was not apparent in its response to the third note. Rather, the record reflects that the court had merely informed the jury that whatever evidence defined the standard was to be found in the testimony, and that there were no documents that referenced the appropriate standard of care.

The court connected the jury's purported abdication of its responsibility to its further finding that the jury was confused. The court buttressed this finding with the unclear statement by a single juror during polling (as to which plaintiff made no objection, and sought no clarification), which was not joined by any other juror. No other basis for the alleged confusion by the jury, in toto, was set forth in the record or in the order and decision under review. The court rejected the juror affidavit, but nonetheless found that the juror's assertions mirrored its own "misgivings." The court thus vacated the verdict solely on the basis of its own speculation and surmise. It is beyond dispute that courts should refrain from speculating about the jury's deliberative processes. Bustamonte v. Westinghouse El. Co., 195 A.D.2d 318, 600 N.Y.S.2d 35 (1st Dept. 1993). There was no record basis for the court's conclusion that the jury was confused, and, additionally, that it abdicated its responsibility. Contrary to the court's conclusion that the jury did not "try" to reach a verdict, the jury, in fact, reached a

unanimous verdict, even if quickly.

There was a basis in the record for the jury to conclude that Dr. Te had not departed from the standard of care by performing the WIT procedure. The testimony consisted of a battle of experts. The jury obviously credited Dr. Te's very precise, detailed, testimony regarding the standards pertinent to the WIT procedure, rather than the plaintiff's expert's more general opinion evidence that the procedure should not have been performed. It is axiomatic that the verdict should be set aside only if it cannot be sustained by any fair interpretation of the evidence. Artusa v. Costco Wholesale, 27 A.D.3d 499, 811 N.Y.S.2d 761 (2d Dept. 2006).

Furthermore, the court's conclusion that the jury was confused, even if it had not been speculative, would afford very limited relief. Before a new trial is ordered on the basis of juror confusion, it must be shown that the jury was "substantially confused" by the verdict sheet and the charge and thus was unable to make a proper determination upon adequate consideration of the evidence. Harmon v. BIC Corp., 16 A.D.3d 953, 954, 792 N.Y.S.2d 656, 658 (3d Dept. 2005) (internal quotation marks and citation omitted). Whether or not the jury was confused presents factual issues, rather than a solely legal issue which otherwise might avoid preservation requirements.

Beltz v. City of Buffalo, 61 N.Y.2d 698, 472 N.Y.S.2d 604, 460 N.E.2d 1089 (1984). We must necessarily rely on the factual record which was developed. Cf. Baker v. Bronx Lebanon Hosp. Ctr., 53 A.D.3d 21, 859 N.Y.S.2d 35 (1st Dept. 2008). There is no indication on this record that the jurors, collectively, were substantially confused and abdicated their responsibilities to consider the evidence. Artusa, 27 A.D.3d at 500, 811 N.Y.S.2d at 762. Juror affidavits should not be used to impeach a jury verdict absent extraordinary circumstances. Mosher v. Murell, 295 A.D.2d 729, 731, 744 N.Y.S.2d 61, 64 (3d Dept. 2002), lv. denied, 98 N.Y.2d 613, 751 N.Y.S.2d 168, 780 N.E.2d 979 (2002). These circumstances are not present herein.

In the present case, the single question in the third note did not manifest jury confusion. Id. Rather, it is clear from the record that the jury was satisfied with the court's response to the jury note and needed no further clarification. See Zawadzki v. 240 E. 76th St. Condominium, 290 A.D.2d 551, 736 N.Y.S.2d 610 (2d Dept. 2002). Finally, the three notes, when read seriatim, reflected no confusion by the jury; in particular, the court correctly answered the third jury note and there were no further requests by the jury for clarification, underscoring the absence of confusion by the jury that would have resulted in a defective verdict. See People v. Malloy, 55 N.Y.2d 296, 302,

449 N.Y.S.2d 168, 171, 434 N.E.2d 237, 240; People v. Dean, 162 A.D.2d 699, 557 N.Y.S.2d 409 (2d Dept. 1990), lv. denied, 76 N.Y.2d 855, 560 N.Y.S.2d 995, 561 N.E.2d 895 (1990).

Accordingly the order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about August 5, 2009, which granted plaintiff's motion to set aside the verdict, should be reversed, on the law, the motion denied and the verdict reinstated.

All concur.

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

ENTERED: APRIL 27, 2010

CLERK