SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 18, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1365N 546-552 West 146th Street LLC, et al., Index 603041/06
Plaintiffs-Respondents,

Harlem I LLC, et al.,
Plaintiffs,

-against-

Rachel L. Arfa, et al.,
Defendants-Appellants,

Gadi Zamir, et al.,
Defendants.

Schlam Stone & Dolan LLP, New York (David J. Katz of counsel), for appellants.

Balber Pickard Maldonado & Van Der Tuin, P.C., New York (John Van Der Tuin of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about June 8, 2009, which denied defendants-appellants' motion for indemnification of legal expenses incurred in this action, unanimously reversed, on the law, with costs, the motion granted, and the matter remanded for calculation of such expenses.

This Court affirmed the dismissal of the complaint in this action based on plaintiff limited liability companies' lack of

standing (54 AD3d 543 [2008], *lv dismissed in part, denied in part* 12 NY3d 840 [2009]). That claims for the same alleged wrongdoing remain pending in a parallel action brought by the investors does not impair defendants' entitlement to the indemnification they seek. We interpret the indemnification provision (§ 6.8) in the LLC operating agreements, that substantially tracks the statute authorizing payment of expenses to managers regarding "any and all claims and demands whatsoever" (Limited Liability Company Law § 420), to require indemnification upon the resolution of the action or proceeding for which indemnification is sought. To make defendants wait until all of the related claims against them are resolved would eviscerate the right to indemnification (*see generally Stockman v Heartland Indus. Partners, L.P.*, 2009 WL 2096213, *11, 2009 Del Ch LEXIS 131, *42-46 [Del Ch 2009]). The award of indemnification need not await a finding that defendants were free of misconduct. The cases plaintiffs rely upon for that proposition merely happen to involve trials in which there was evidence of wrongdoing (*cf. Diamond v Diamond,* 307 NY 263 [1954]; *People v Uran Min. Corp.*, 13 AD2d 419 [1961]).

Upon remand, there is no need to allocate the expenses because the amount of legal services did not depend on the different capacities of the various defendants, but on plaintiffs' status. We decline to address whether the

indemnified legal expenses should include those incurred in filing the motion for indemnification or in prosecuting this appeal, because the issue was not fully briefed.

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

ENTERED: FEBRUARY 18, 2010

CLERK

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

1687 One Hundred Grand, Inc., Index 570709/05
Petitioner-Respondent,

-against-

Karen Chaplin, formerly known as,
Karen Rochon,
Respondent-Appellant.

The Law Offices of Joseph Milano, P.C., New York (Joseph Milano of counsel), for appellant.

Borah, Goldstein, Altschuler Schwartz & Nahins, P.C., New York (Paul N. Gruber of counsel), for respondent.

Order of the Appellate Term of the Supreme Court, First Department, entered on or about May 12, 2008, reversing the judgment of the Civil Court of the City of New York, New York County (Barbara Jaffe, J.), entered on or about February 22, 2006, which, after a non-jury trial, dismissed the petition, and remanding the matter to Civil Court for a calculation of additional rents owed by tenant in accordance with the Appellate Term's decision and for entry of judgment accordingly, unanimously affirmed, without costs.

In this commercial nonpayment proceeding, the relevant provisions of the landlord's offering plan and the parties' lease were ambiguous, i.e., "reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]), as to how "additional rent" for increased building expenses was to be calculated for the commercial space. Thus, Appellate Term

properly looked to evidence of the parties' course of conduct, including the landlord's annual billing for and the tenant's payment of additional rent since the inception of the tenancy in the mid-1980's, showing that the "base year" methodology had been utilized to compute additional rent (*see Eighty Eight Bleecker Co., LLC v 88 Bleecker St. Owners, Inc.*, 34 AD3d 244 [2006]).

We reject the tenant's claim on appeal that the landlord failed to satisfy a condition precedent for collecting additional rents from her because it did not provide annual detailed accountings of the building's expenses. The landlord's annual bills to the tenant provided notice of each component of additional rent sought, i.e. a percentage of the expenses borne by the building, and the differential between the base year and relevant year for each component, in the computation of tenant's total amount of additional rent due for that year. The record also demonstrated that the tenant was provided with a detailed accounting of the building's expenses at some point after it had been requested.

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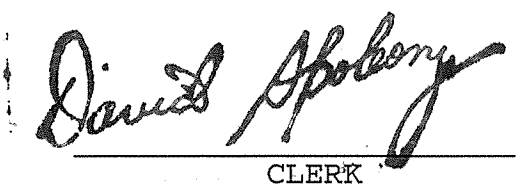
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 18, 2010



CLERK

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2044 Harriet Abramson, Index 23121/03
Plaintiff-Respondent,

-against-

Eden Farm, Inc.,
Defendant-Appellant,

Hys Market Corp., et al.,
Defendants.

Kim, Patterson & Sciarrino, P.C., Bayside (Nicholas J. Sciarrino of counsel), for appellant.

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

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered December 24, 2008, which denied defendant Eden Farm's motion for summary judgment dismissing the complaint as to it, unanimously affirmed, without costs.

Plaintiff, a 69-year-old woman, tripped over a cracked portion of the public sidewalk abutting a store leased by Eden Farm from the third-party defendant landowner. In support of its motion for summary judgment, Eden Farm demonstrated that it did not create the alleged defect through any special use of the sidewalk or otherwise (*see Weiskopf v City of New York*, 5 AD3d 202 [2004]), and that it is not a landowner and therefore is not subject to a statutory obligation to maintain the sidewalk in

"reasonably safe condition" (*see* Administrative Code of City of NY § 7-210; *Cook v Consolidated Edison Co. of N.Y., Inc.*, 51 AD3d 447, 448 [2008]). However, while Eden Farm relied on provisions of its lease which required it to clean the sidewalk and make non-structural repairs to the premises, it entirely failed to address another provision which required it, at its own expense, to "make all repairs and replacements to the sidewalks and curbs adjacent" to the premises, or the legal issue of whether the lease was so "comprehensive and exclusive" as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *Giarratani v We're Assoc., Inc.*, 29 AD3d 946, 947-948 [2006]; *compare Taubenfeld v Starbucks Corp.*, 48 AD3d 310 [2008], *lv denied* 10 NY3d 713 [2008]). Thus, defendant did not demonstrate an absence of a duty of care owing to the plaintiff pedestrian.

Further, since the deposition witness provided by defendant was an employee of the store with no knowledge of the lease or defendant's obligations thereunder, and no discovery has been had

from the landowner, the grant of summary judgment was premature (*see* CPLR 3212[f]; *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 293-294 [1999]).

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

ENTERED: FEBRUARY 18, 2010

CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2168 The People of the State of New York, Ind. 4093/07
Respondent,

-against-

Joseph Joshua,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered December 18, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also conclude that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The credible evidence, including, among other things, the officer's testimony that defendant initiated the transaction and otherwise acted as part of a team of drug sellers, completely negated

defendant's agency defense (*see People v Herring*, 83 NY2d 780, 782 [1994]; *People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], *cert denied* 439 US 935 [1978]; *People v Vaughan*, 300 AD2d 104, [2002], *lv denied* 99 NY2d 633 [2003]).

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

ENTERED: FEBRUARY 18, 2010

CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2169-
2169A-
2169B 853 Seventh Avenue Owners, LLC, Index 109432/02
Plaintiff-Appellant, 603031/08

-against-

W & HM Realty Co., LLC etc.,
Defendant-Respondent.

- - - - -

W & HM Realty Co., LLC,
Petitioner-Respondent,

-against-

853 Seventh Avenue Owners, LLC,
Respondent-Appellant.

Cozen O'Connor, New York (Menachem J. Kastner of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Barry H. Berke of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered June 8, 2009, which denied plaintiff 853's motion to modify a prior order declaring that the impact of the rent stabilization and rent control laws should not be considered in appraising land defendant W & HM leased to 853, unanimously affirmed, with costs. Order (same court and Justice), entered June 11, 2009, which, in a related special proceeding, granted W & HM's petition to confirm an appraisal award, unanimously affirmed, with costs. Order (same court, Justice and entry date), which denied 853's cross petition to vacate that award,

unanimously affirmed, with costs.

This Court has previously rejected 853's claim that in determining the value of -- and, in turn, the rent for -- property it leases from W & HM, the appraisers should consider the impact of the rent control and rent stabilization laws (18 AD3d 241). Our finding there was based on the clear language in the lease before us that "[t]he net annual rent during each renewal term shall be an amount equal to 6% of the appraised value of the land . . . exclusive of any buildings or improvements thereon and this Lease." The opinion of the Court of Appeals in *936 Second Ave. L.P. v Second Corporate Dev. Co., Inc.* (10 NY3d 628 [2008]) does not constitute a change in the law and does not warrant a modification of our prior ruling. In that case, where the determination of rent for the net lease was to be based on "the value of the demised premises together with all buildings and improvements thereon including any and all additions and improvements erected by Tenant" (*id.* at 631-632), the Court found that the net lease itself was to be taken into account in determining the rent. Since the wording of the lease here at issue specifically excludes buildings or improvements, as well as the lease itself, from the determination of value, the finding in *936 Second Ave.* is of no effect (*see New York Overnight Partners v Gordon*, 88 NY2d 716 [1996]).

We have considered 853's remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 18, 2010

CLERK.

Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2171-
2171A In re Lovely M.,
Appellant,

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

Michael McL.,
Petitioner,

Tracey M.,
Respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Brenda Soloff of counsel), Law Guardian.

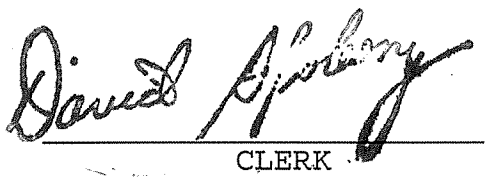
Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about May 27, 2009, which directed that DNA testing be performed on petitioner and the subject child in connection with petitioner's unopposed paternity petition, unanimously reversed, on the law, without costs, further dissemination of any results of testing performed pursuant to the order hereby prohibited, and the matter remanded to Family Court for a hearing on whether DNA testing would be in the best interests of the child. Appeal from order, same court and Judge, entered on or about June 25, 2009, which denied a motion by the attorney for the child to vacate the aforesaid order and enter an order of filiation declaring petitioner to be the child's legal father, unanimously dismissed, without costs, as academic.

The court erred in ordering DNA testing without first

conducting a hearing to determine whether DNA testing would be in the child's best interests (*see* Family Court Act § 532[a]; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 329-330 [2006]; *Matter of Darlene L.-B. v Claudio B.*, 27 AD3d 564 [2006]). We find the existing record too fragmentary to permit the conclusion that DNA testing would not be in the child's best interests.

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

ENTERED: FEBRUARY 18, 2010



CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2173 In re Juan Arroyo, et al., Index 110750/08
Petitioners,

-against-

Shaun Donovan, as Commissioner
of the New York City Department of
Housing Preservation and Development,
et al.,
Respondents.

Joan L. Beranbaum, New York (Richard S. Cempa of counsel), for petitioners.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for Shaun Donovan, respondent.

Fingerit & Fingerit, LLP, New York (Eric B. Schultz of counsel), for Woodstock Terrace Mutual Housing Corp., respondent.

Determination of respondent Department of Housing Preservation and Development (HPD), dated April 24, 2008, which, after a hearing, granted respondent Woodstock Terrace Mutual Housing Corp.'s request for a certificate of eviction, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Jane S. Solomon, J.], entered November 6, 2008) dismissed, and the stay of eviction vacated, without costs.

HPD's determination that the subject apartment is not petitioners' primary residence is supported by substantial evidence, including the facts that they own a home in Florida and

that petitioner Juan Arroyo's driver's license and car registration were issued by the State of Florida (*see* 28 RCNY 3-02[n][4]; *Matter of O'Quinn v New York City Dept. of Hous. Preserv. & Dev.*, 284 AD2d 211 [2001]; *Matter of Studley v New York City Dept. of Hous. Preserv. & Dev.*, 277 AD2d 101 [2000]). Petitioners submitted no documentation in support of their allegation that their grandchild, who is listed on the income affidavit as an occupant of the apartment, is home-schooled (*see* Regulations of the Commissioner of Education [8 NYCRR] § 100.10 detailing reporting requirements). Moreover, neither petitioners' and their witnesses' testimony nor the documentary evidence was sufficient to refute the finding that petitioners did not reside in the subject apartment for the required 183 days per year (28 RCNY 3-02[n][4][iv]).

Petitioners were provided with sufficient notice of the charges against them (*see* 28 RCNY 3-18[a][3]). They were not entitled to an opportunity to cure their nonprimary residence (*see* 28 RCNY 3-18[b]; *Matter of O'Quinn*, 284 AD2d at 212).

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

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

ENTERED: FEBRUARY 18, 2010

CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2174 Superb General Contracting Co., Index 118230/99
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

SMB General Contracting Corp., et al.,
Defendants.

Agovino & Asselta, LLP, Mineola (Peter L. Agovino of counsel), for appellant.

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

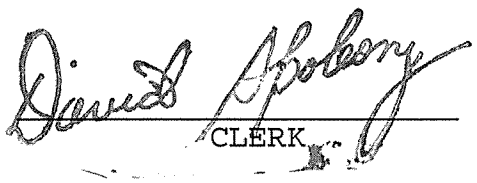
Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 4, 2009, which, in an action by a contractor against the City to recover delay damages incurred in the performance of a subcontract involving the rehabilitation of City-owned housing, inter alia, granted the City's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff, a subcontractor hired by the construction manager to perform the rehabilitation, was not in privity of contract with the City as property owner (*see Kelly Masonry Corp. v Presbyterian Hosp. in City of N.Y.*, 160 AD2d 192, 193 [1990]), and therefore cannot recover delay damages against the City as owner where the incorporated prime contract specifically provided that the construction manager was an independent contractor and

not an agent or representative of the City (*cf. id.*). In any event, assuming privity, delay damages are expressly excluded by section 3.6(f) of the subcontract, which provides instead that full compensation for delay was to be in the form of an extension of time to complete the work, which it is undisputed plaintiff received (*see Lasker-Goldman Corp. v City of New York*, 221 AD2d 153, 154 [1995], *lv dismissed* 87 NY2d 1055 [1996]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: FEBRUARY 18, 2010



CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2175 The People of the State of New York, Ind. 2875/05
Respondent,

-against-

Erik Ramales,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered March 29, 2006, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 5 years, unanimously affirmed.

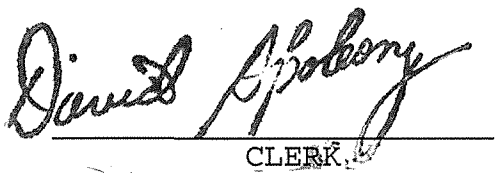
Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also conclude that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. A witness provided a detailed account of defendant's active participation in the shooting. The jury had a rational, nonspeculative basis to find that this testimony was reliable, and that another prosecution witness who gave a different version

of the incident was mistaken (*see People v Fratello*, 92 NY2d 565, 573-575 [1998], *cert denied* 526 US 1068 [1999]; *People v Jackson*, 65 NY2d 265, 272 [1985]).

The court properly declined to sentence defendant as a youthful offender. Since defendant was convicted of an armed felony, youthful offender treatment would require a showing of mitigating circumstances (CPL 720.10[2][a][ii];[3]), and we do not find that such circumstances were present. In any event, given the seriousness of the crime, youthful offender treatment was not warranted.

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

ENTERED: FEBRUARY 18, 2010



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Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2176 Mazzocchi Wrecking Inc., Index 115232/07
Plaintiff-Respondent,

-against-

East 115th Street Realty Corp.,
Defendant-Appellant.

Aboulafia Law Firm LLC, New York (Alyssa E. Litman and Matthew S. Aboulafia of counsel), for appellant.

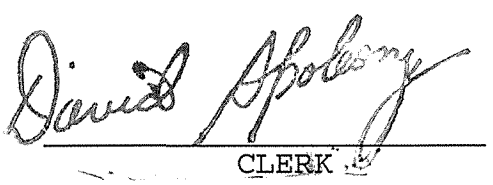
Franzblau Dratch, P.C., New York (Brian M. Dratch of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 30, 2009, which granted plaintiff's motion for summary judgment, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiff's motion, based solely on the claim for breach of contract, was unsupported by an affidavit of a person with personal knowledge. The movant thus failed to meet its prima facie burden of proof, rendering the motion insufficient and lacking in probative value (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 31-32 [1979], *affd* 49 NY2d 924 [1980]).

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

ENTERED: FEBRUARY 18, 2010



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Andrias, J.P., Catterson, Renwick, Manzanet-Daniels, JJ.

2178 Duljo Bogdanovic, et al., Index 111578/03
Plaintiffs-Respondents,

-against-

The City of New York,
Defendant,

New York City Transit Authority, et al.,
Defendants-Appellants.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellants.

Tumelty & Spier, LLP, New York (Michael J. Andrews of counsel), for respondents.

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered November 10, 2008, which, to the extent appealed from, as limited by the briefs, awarded plaintiff $250,000 for future lost earnings, unanimously affirmed, without costs.

We see no reason to reduce the damages awarded to plaintiff for future earnings for a period of 20 years, where the medical evidence established that plaintiff would only be able to work part-time as a result of his injuries, and where the damages awarded by the jury were less than half the sum projected in uncontradicted testimony by plaintiff's economist (*cf. Flores v*

Parkchester Preserv. Co., L.P., 42 AD3d 318 [2005], *lv denied*, 10 NY3d 714 [2008]).

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

ENTERED: FEBRUARY 18, 2010

CLERK

Andrias, P.J., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2179 In re Stephanie S., and Another,

Children Under the Age of
Eighteen Years, etc.,

Ruben S.,
Respondent-Appellant,

Administrator for Children's Services,
Petitioner-Respondent.

Kenneth M. Tuccillo, Hastings-On-Hudson, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about September 18, 2008, which, after a fact-finding determination that respondent father neglected the subject children, inter alia, released 10-month old Stephanie to his custody under the supervision of petitioner Administration for Children's services for a period of 12 months, and four-year-old Kimberly to her non-respondent biological father under a similar supervisory arrangement, unanimously affirmed, without costs.

A preponderance of the evidence, including respondent's own testimony, established that he exposed the children to actual harm, or at least the imminent danger of harm, by his failure to ensure that the children's mother was regularly attending a

court-ordered drug treatment program and that she remain drug-free, and by repeatedly allowing the children to remain alone with the mother when he was at work, despite specific directives to the contrary (*see* Family Court Act § 1012[f][i][B]; *Matter of Anthony C.*, 59 AD3d 166 [2009]; *Matter of Ashante M.*, 19 AD3d 249 [2005]; *see also Matter of Breeyanna S.*, 52 AD3d 342, 343 [2008], *lv denied* 11 NY3d 711 [2008]). Respondent's argument that the agency assumed the role of primary caretaker of the children is unavailing both in light of their continued residence with him and "in light of the duty the Family Court Act places on a parent to ensure his own children's safety" (*Ashante M.* at 249).

We have considered respondent's remaining arguments, including that the court improperly introduced his out-of-court statements, and find them unavailing.

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

ENTERED: FEBRUARY 18, 2010

CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2182 Arnab Mukhopadhyay, et al., Index 101772/08
Plaintiffs-Appellants,

-against-

Genesis Corp., etc.,
Defendants-Respondents.

Leonard Eli Bronner, Mineola, for appellants.

Winget, Spadafora & Schwartzberg, LLP, New York (Melissa L. Morais of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered October 20, 2009, which, in an action by a job seeker and his wholly owned corporation against an employment agency for negligent and fraudulent misrepresentation, upon defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(5), dismissed the complaint pursuant to CPLR 3211(a)(7), unanimously affirmed, with costs.

We note that plaintiffs do not challenge the motion court's treatment of defendant's motion to dismiss on the ground of res judicata as a motion to dismiss on the ground of failure to state a cause of action. The complaint alleges that the individual plaintiff organized the corporate plaintiff, and then quit his job and sustained various damages, because of defendant's fraudulent or negligent misrepresentation as to the existence of a job offer. Insofar as brought on behalf of the corporate plaintiff, the action was properly dismissed because of the

existence of a contract between it and defendant allegedly promising particular employment (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389-390 [1987]; *Krantz v Chateau Stores of Canada*, 256 AD2d 186, 187 [1998]). With respect to the individual plaintiff, the complaint fails to state a cause of action because, while it sufficiently alleges that the alleged misrepresentation was not a casual statement and that defendant otherwise had a duty to speak with care (*see Kimmell v Schaefer*, 89 NY2d 257, 263-265 [1996]), it fails to allege facts sufficient to show that the alleged misrepresentation was incorrect at the time it was made (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1996]).

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

ENTERED: FEBRUARY 18, 2010

CLERK

Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2185 The People of the State of New York, Ind. 4076/07
Respondent,

-against-

Jesus Vega,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Simpson Thacher & Bartlett LLP, New York (Heather L. Shaffer of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 27, 2008, as amended June 4, 2008, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of 10 years, unanimously affirmed.

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

The court properly declined to submit robbery in the third degree as a lesser included offense, since there was no reasonable view of the evidence, viewed most favorably to defendant, that he robbed the victim but acted without an accomplice (*see People v Negron*, 91 NY2d 788 [1998]). "There was no reason for the jury to credit the victim . . . in general, but

conclude that [he] invented the involvement of a second robber" (*People v Camara*, 44 AD3d 492, 492 [2007], *lv denied* 9 NY3d 1031 [2008]). Furthermore, according to the victim, the second robber played an integral role in the crime. In order to find that defendant robbed the victim but acted alone, the jury would have been required to speculate that the robbery was committed in some alternative manner not described in any testimony. Thus, if the jury had discredited the victim's testimony, defendant would have been entitled to a complete acquittal, not a conviction of third-degree robbery. The same would be true had the jury discredited the testimony of the victim while crediting that of the police officers; the police testimony about events that occurred immediately after the theft would not have established a forcible taking.

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

ENTERED: FEBRUARY 18, 2010

CLERK

Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2187-
2187A

Index 18787/06
21823/06
6131/07
13619/07
13620/07
15298/07

Enez Williams, etc., et al.,
Plaintiffs,

-against-

Baldor Specialty Foods, Inc., et al.,
Defendants.

- - - - - -

[And Another Action]

- - - - - -

Harvey L. Greenberg,
Plaintiff-Respondent,

-against-

Baldor Specialty Foods, Inc., et al.,
Defendants-Appellants.

- - - - - -

[And Another Action]

- - - - - -

Jennifer Turner,
Plaintiff,

-against-

Milea Leasing Corp., et al.,
Defendants-Appellants,

Pleasure Ride Corp.,
Defendant,

Executive Motor Tours, Inc.,
Defendant-Respondent.

- - - - - -

[And Another Action]

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants.

Joseph T. Belevich, Garden City, for Harvey L. Greenberg, respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for Executive Motor Tours, Inc., respondent.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered February 3, 2009, which denied the motion by defendants Baldor Specialty Foods and Emil Castillo Grullon for summary judgment dismissing plaintiff Greenberg's complaint, unanimously reversed, on the law, without costs, the motion granted, and the Greenberg complaint dismissed. The Clerk is directed to enter judgment accordingly. Appeal from order, same court (Lucy Billings, J.), entered August 24, 2009, which granted Greenberg's motion for summary judgment on liability against Baldor and Emil Castillo Grullon, and also granted the cross motion by defendant Executive Motor Tours for summary judgment dismissing all claims and cross claims against it in the action by plaintiff Turner, unanimously dismissed, without costs, as academic in light of the foregoing.

By submitting an affirmed report from their medical expert, appellants made a prima facie showing of entitlement to summary judgment with regard to whether Greenberg had suffered any serious physical injury, and Greenberg failed to submit any

evidence to contradict the expert's findings (*see generally Pommells v Perez*, 4 NY3d 566 [2005]).

Greenberg's 90/180-day claim should have been dismissed because appellants submitted Greenberg's bill of particulars and deposition testimony, which provided that Greenberg had been confined to bed and home and missed work for only two months following the accident (*see Knox v Lennihan*, 65 AD3d 615, 616 [2009]). Greenberg's affidavit in opposition to the motion, in which he claimed he was unable to work for four months, was tailored to avoid the consequences of his testimony, and constitutes feigned evidence that should be rejected (*see Nicholas v New York City Hous. Auth.*, 65 AD3d 925 [2009]).

Regarding Greenberg's claim of psychological injury as a result of the subject accident (*see Chapman v Capoccia*, 283 AD2d 798, 799 [2001]), appellants made a prima facie showing of entitlement to summary judgment by submitting their expert's report. While Greenberg did submit his own expert's report, opining that he had suffered PTSD as a result of the accident, that the condition was likely to be chronic and permanent and had rendered him partially disabled, and that he would need treatment for the rest of his life, he failed to present any contemporaneous objective medical evidence of his injury (*see Mullings v Huntwork*, 26 AD3d 214, 216 [2006]).

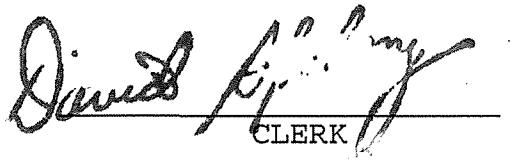
Concerning the second order on appeal, in light of our dismissal of his complaint, the issue of liability with respect to Greenberg has been rendered academic.

M-165 - Williams v Baldor Specialty Foods, Inc., et al.,

Motion seeking a stay of trial denied as academic.

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

ENTERED: FEBRUARY 18, 2010



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Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2188 The People of the State of New York, Ind. 2337/08
Respondent,

-against-

Domingo Suriel,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (David P. Stromes of counsel), for respondent.

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered April 30, 2009, convicting defendant, after a jury trial, of two counts of criminal possession of a controlled substance in the third degree, and sentencing him to concurrent terms of 2 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the credibility determinations made by a judicial hearing officer and adopted by the court (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Defendant was arrested on the basis of the officers' observation of drugs in open view. We do not find implausible the police account of defendant's hasty and unsuccessful attempt to hide a bag of drugs during a vehicular stop.

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

People v Danielson, 9 NY3d 342, 348-349 [2007]). We similarly find no basis to disturb the jury's credibility determinations.

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

ENTERED: FEBRUARY 18, 2010

CLERK

Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2189 Juana Ramos, as Mother and Natural Guardian of Richard Calderon, et al., Plaintiffs-Appellants, -against- The City of New York, et al., Defendants-Respondents, Raul Del Cruz, et al., Defendants. Index 103363/06

Alexander J. Wulwick, New York, for appellants.

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

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered May 11, 2009, which, in an action for personal injuries sustained when infant plaintiff slipped on a wet baseball outfield while chasing a ball during a summer recreational program conducted by defendant Public School Athletic League, granted the motion of defendants City of New York and the Board of Education of the City of New York (collectively City) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

The record demonstrates that no issue of fact refutes the City's prima facie showing that plaintiff, an experienced teenage athlete, assumed the risk of falling when he continued playing

baseball on a visibly wet field after seeing others on the field lose their footing. Nor is there any evidence that the City unreasonably increased that risk (*see Benitez v NY City Bd. of Educ.*, 73 NY2d 650 [1989]; *Fintzi v New Jersey YMHA-YWHA Camps*, 97 NY2d 669, 670 [2001]; *Hernandez v Castle Hill Little League*, 256 AD2d 241 [1998]).

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

ENTERED: FEBRUARY 18, 2010

CLERK

Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2190 In re Alexander B.,

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

Myra R., also known as Myra B.,
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

Nancy Botwinik, New York, for appellant.

Law Office of Jeremiah Quinlan, Hastings-on-Hudson (Daniel Gartenstein of counsel), for respondent.

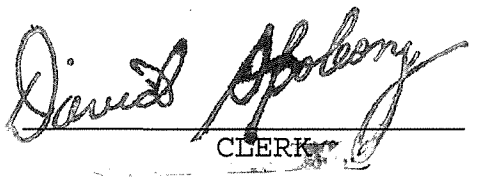
Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 12, 2009, which, insofar as appealed from, following a fact-finding determination of permanent neglect, terminated respondent mother's parental rights to the subject child and committed the child's guardianship and custody to the Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that despite the agency's scheduling of frequent service plan reviews and conferences, provision of referrals for mental health services, and other diligent efforts to encourage respondent's compliance with a meaningful service plan, respondent, inter alia, failed to complete a mental health

evaluation or course of therapy (*see Matter of Racquel Olivia M.*, 37 AD3d 279 [2007], *lv denied* 8 NY3d 812 [2007]; *Matter of Gina Rachel L.*, 44 AD3d 367 [2007]; *Matter of Lady Justice I.*, 50 AD3d 425 [2008]), and failed to gain insight into the reasons for the child's placement (*see Matter of Nathaniel* T., 67 NY2d 838, 841-842 [1986]). A preponderance of the evidence shows that the child is thriving in his foster home, where he lives with his biological sister, and that it is otherwise in his best interests to terminate respondent's parental rights (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]).

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

ENTERED: FEBRUARY 18, 2010



Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2191 Eric R. Vera, Index 340532/07
Plaintiff-Respondent,

-against-

Mohammed Islam, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Steven N. Feinman of counsel), for Pierre-Paul Kesner and Mist Hacking Corp., appellants.

Bamundo, Zwal & Schermerhorn, LLP, New York (Ben Bartolotta of counsel), for respondent.

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered July 31, 2009, which denied defendants' motions for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d), unanimously affirmed, without costs.

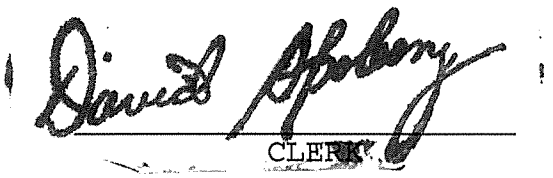
Assuming that defendants established their prima facie entitlement to summary judgment by showing that plaintiff did not suffer a serious injury (*see e.g. Rossi v Alhassan*, 48 AD3d 270 [2008]), plaintiff met his burden in opposition by submitting affirmed MRI reports of a radiologist and an affirmed report of his treating physician, which raised issues of fact as to whether he suffered serious injuries caused by the accident. The MRI reports provide objective evidence of disc herniations and bulges in the cervical and lumbar spine, and the physician asserted that he performed objective tests quantifying decreased ranges of

motion in the cervical and lumbar spine, both shortly after the accident and three years later, and that the injuries and resulting limitations were caused by the accident (*see Colon v Bernabe*, 65 AD3d 969, 970 [2009]; *Hernandez v Rodriguez*, 63 AD3d 520 [2009]).

The conclusions of defendant's radiologist that the observed disc changes in plaintiff, who was 30 years old at the time of the accident, were normal or unrelated to the accident were sufficiently rebutted by the plaintiff's radiologist (*see Frias v James*, __ AD3d __, 2010 NY Slip Op 301 [1st Dept 2010]; *June v Akhtar*, 62 AD3d 427, 428 [2009]).

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

ENTERED: FEBRUARY 18, 2010



CLERK

Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2192-
2193 Index 111837/03

Amanda Shapira,
Plaintiff-Appellant,

-against-

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

Edward T. Chase, Mount Vernon, for appellant.

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

Russo, Keane & Toner, LLP, New York (John A. Corring of counsel), for Gaetano Competrillo, Souleymane Diallo and Fixture Cab Corp., respondents.

Order, Supreme Court, New York County (Carol E. Huff, J.), entered September 21, 2009, which granted defendants' motions to dismiss the complaint, and order, same court and Justice, entered October 16, 2008, which denied plaintiff's motion for a new trial, unanimously affirmed, without costs.

Plaintiff's failure to present objective evidence of physical limitations attributable to the disc herniations seen on her MRIs is fatal to her claim of serious injury to her spine (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). As to her claim of significant disfigurement as a result of a nasal fracture, plaintiff's contention that the trial court gave her too short a continuance to obtain the hospital records that would document the fracture is unavailing, since the record demonstrates that

the absence of competent evidence at trial was due either to a deliberate tactical decision by her counsel not to procure records that were readily available or to a lack of due diligence on his part (*see Matter of Steven B.*, 6 NY3d 888 [2006]).

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

ENTERED: FEBRUARY 18, 2010

CLERK

Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2194 UBS Securities LLC, et al., Index 650097/09
Plaintiffs-Respondents,

-against-

Highland Capital Management, L.P.,
Defendants-Appellant,

Highland CDO Opportunity Master
Fund, L.P., et al.,
Defendants.

Lackey Hershman, L.L.P., Dallas, TX (Paul B. Lackey, of the Texas Bar, admitted pro hac vice, of counsel), for appellant.

Cadwalader, Wickersham & Taft LLP, New York (Gregory A. Markel of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered October 8, 2009, which, insofar as appealed from, denied defendant Highland Capital Management, L.P.'s (Highland) motion to dismiss the complaint as against it, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of Highland dismissing the complaint.

Dismissal of plaintiffs' indemnification claim against Highland is warranted, since the agreements between the parties contain no promise on the part of Highland to undertake liability with respect to the investment losses suffered by plaintiffs, or to ensure or guarantee the performance of defendant off-shore funds' obligations to bear the risk of investment losses. Absent

facts alleging that Highland otherwise breached the Engagement Letter, the indemnification provision contained in said letter was not triggered (*see generally Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]).

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

ENTERED: FEBRUARY 18, 2010

CLERK

Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2195 Discovision Associates, Index 601859/07
Plaintiff, 591099/07

-against-

Fuji Photo Film Co., Ltd., et al.,
Defendants.

- - - -

Fujifilm Corporation,
Third-Party Plaintiff-Appellant,

-against-

Prodisc Technology, Inc.,
Third-Party Defendant,

Ritek Corporation, et al.,
Third-Party Defendants-Respondents.

Hogan & Hartson, LLP, New York (Eric J. Lobenfeld of counsel), for appellant.

Allegaert Berger & Vogel LLP, New York (Cornelius P. McCarthy of counsel), for respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Herman Cahn, J.), entered August 19, 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 order so appealed from be and the same is hereby affirmed for the reasons stated by Herman Cahn, J., with costs and disbursements.

ENTERED: FEBRUARY 18, 2010

CLERK

Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2196 Gregory Healy, Index 314802/04
Plaintiff-Appellant,

-against-

Desiree Healy,
Defendant-Respondent.

Gregory Healy, appellant pro se.

Steven Greenfield, West Hampton Dunes, for respondent.

Order, Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered December 8, 2008, which granted plaintiff's motion to accept and implement a report of the Special Referee recommending a downward modification of his spousal maintenance and child support obligations, but limited any credit for pre-modification payments to the period between March 23, 2007 and October 31, 2008, unanimously modified, on the law, to allow plaintiff a credit against future payments of spousal maintenance in the amount of any overpayments made between February 2, 2005 and October 21, 2008 of which he can submit written proof, and otherwise affirmed, without costs.

On a prior appeal, this Court reversed the motion court's award of spousal maintenance and child support, which had been made retroactive to February 2, 2005, on the ground that the award had been improperly calculated (51 AD3d 551 [2008]). On remand, the Special Referee issued a report recommending a

prospective downward modification of maintenance and support, as well as a credit for any pre-modification excess payments of maintenance that plaintiff could document in writing. In accepting and implementing the report, however, the motion court limited the credit for pre-modification excess spousal maintenance payments to the period between March 23, 2007 and October 31, 2008. Thus, the court let stand its original award with respect to the balance of the period during which plaintiff paid maintenance, despite this Court's determination as a matter of law that the award had been improperly calculated.

Plaintiff failed to preserve his argument that the Referee should also have allowed a credit for pre-modification excess child support payments (*see Matter of Treider v Lamora*, 44 AD3d 1241, 1243 [2007], *lv denied* 9 NY3d 817 [2007]).

M-310 - *Gregory Healy v Desiree Healy*

Motion seeking to vacate stay and for poor person relief denied as academic, without costs.

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

ENTERED: FEBRUARY 18, 2010

Friedman J.P., Sweeny, Nardelli, Freedman, JJ.

2198 In re Oanfa Quan, Index 102419/09
Petitioner-Appellant,

-against-

New York City Department of Housing Preservation and Development, et al.,
Respondents-Respondents.

Cornicello & Tendler, LLP, New York (Jay H. Berg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for Municipal respondent.

Kellner Herlihy Getty & Friedman, LLP, New York (Charles Krausche of counsel), for Chinatown Apartments, Inc., respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered July 13, 2009, which denied petitioner's application to annul the determination of respondent New York City Department of Housing Preservation and Development (HPD) denying petitioner succession rights to the subject Mitchell-Lama apartment, and dismissed the proceeding, unanimously affirmed, without costs.

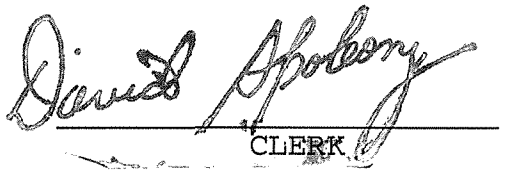
The determination that petitioner did not sustain her burden of establishing her entitlement to succession rights to her grandmother's apartment had a rational basis (*see Matter of Hochhauser v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288 [2008]; *Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406 [2007]). Although petitioner did submit, inter alia, income affidavits and tax returns listing the

subject apartment as her address, in rejecting the application, HPD was entitled to consider the inconsistencies contained in other documents filed during the relevant time period, including where petitioner provided an address other than the subject apartment as her place of residence (*see* 28 RCNY 3-02[n][4]; *Hochhauser*, 48 AD3d at 289).

Contrary to petitioner's contention, she was not entitled to an evidentiary hearing since the regulation under which she claimed succession rights does not provide for a hearing (*see* 28 RCNY 3-02[p]). The record shows that petitioner utilized the statutory protections and was afforded all the due process to which she was entitled under the circumstances (28 RCNY 3-02 [p][8][ii]; *Pietropolo*, 39 AD3d at 407).

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

ENTERED: FEBRUARY 18, 2010



Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2199-
2199A Index 303955/07

Atlantic Development Group, LLC,
Plaintiff-Appellant,

-against-

296 East 149th Street, LLC,
Defendant-Respondent.

Gilbride Tusa Last & Spellane, LLC, New York (Sal Meli of counsel), for appellant.

Damian L. Albergo, Hackensack, NJ, for respondent.

Order, Supreme Court, New York County (Howard H. Sherman, J.), entered on or about February 24, 2009, which granted defendant's motion for summary judgment on its first counterclaim to keep the down payment as liquidated damages for plaintiff's breach of contract and, on defendant's second counterclaim, to the extent of setting down for hearing defendant's claim for legal fees and expenses, and denied, sub silentio, plaintiff's cross motion for summary judgment, unanimously modified, on the law, summary judgment denied to defendant on its second counterclaim, and otherwise affirmed, without costs. Appeal from decision, denominated "decision and order" (same court and Justice), entered on or about December 18, 2008, which directed settlement of an order, unanimously dismissed, without costs, as taken from a nonappealable paper.

Defendant established prima facie entitlement to judgment as

a matter of law on its first counterclaim by submitting documentary evidence that it was ready, willing and able to perform on the time-is-of-the-essence closing date, and that plaintiff failed to proceed with closing. In response, plaintiff failed to raise a triable issue of fact. Accordingly, defendant is entitled to retain the down payment as liquidated damages in accordance with the contract of sale (*Rivera v Konkol*, 48 AD3d 347 [2008]).

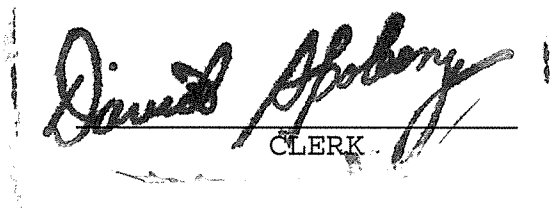
Contrary to plaintiff's contention, the Holdover Agreement between defendant and a tenant at the premises did not violate the terms of the contract, which specifically provided that the property was to be conveyed subject to a restaurant lease and accompanying surrender agreement. That surrender agreement permitted defendant to extend the tenant's occupancy past the original surrender date. The subsequent agreement extending the tenant's occupancy past the surrender date did not extend or renew the underlying lease.

Defendant was not entitled to judgment on its second counterclaim for legal fees and expenses. "[A]ttorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement

between the parties, statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). Here, attorneys' fees were not authorized by agreement, statute or court rule.

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

ENTERED: FEBRUARY 18, 2010



Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2200 Allstate Insurance Company, et al., Index 600509/03
Plaintiffs-Respondents,

-against-

Belt Parkway Imaging, P.C., et al.,
Defendants-Appellants,

Parkway Magnetic Resonance
Imaging, Inc., et al.,
Defendants.

Hession Bekoff Cooper & LoPiccolo, LLP, Garden City (Craig B. Sanders of counsel), for appellants.

Cadwalader, Wickersham & Taft LLP, New York (William J. Natbony of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 22, 2009, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for a protective order striking the discovery and inspection sought by defendants Belt Parkway Imaging, Diagnostic Imaging, Metroscan Imaging, Parkway MRI and Rabiner, unanimously affirmed, with costs.

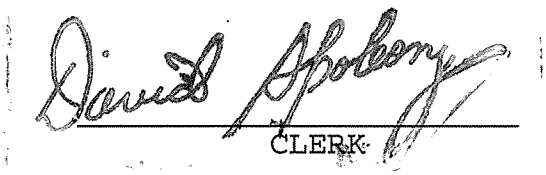
After an in camera review (*see Masterwear Corp. v Bernard*, 298 AD2d 249, 250 [2002]), the court properly found that the documents relating to a confidential proposed settlement that was never finalized were neither material nor necessary to the defense of the action (*see Matter of New York County Data Entry Worker Prod. Liab. Litig.*, 222 AD2d 381 [1995]). Our own review

confirms that the documents contain no indication of any attempt to influence a witness to give false testimony (*cf. Warrick v Capabilities, Inc.*, 299 AD2d 622, 623 [2002]), or suggest any other basis on which they might be discoverable.

We have considered appellants' remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 18, 2010



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny
James M. McGuire
Leland G. DeGrasse
Helen E. Freedman, JJ.

1042-1042A
Index 17248/07

x

Christos Tselebis
Plaintiff-Appellant,

-against-

Ryder Truck Rental, Inc., et al.,
Defendants,

Tom Cat Bakery, Inc., et al.,
Defendants-Respondents.

x

Plaintiff appeals from an order of the Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 17, 2008, which, to the extent appealed from as limited by the briefs, denied his motion for summary judgment, and order, same court and Justice, entered on or about January 16, 2009, which, upon reargument, adhered to the prior ruling.

Ginsburg & Misk, Queens Village (Gerard N. Misk of counsel), for appellant.

Lewis Johs Avallone Aviles, LLP, Melville (Brian J. Greenwood of counsel), for respondents.

DeGRASSE, J.

This matter involves a two-vehicle accident at an intersection controlled by a traffic light. While driving a truck in a westerly direction, defendant Melendez collided with plaintiff, who was riding his motorcycle in a northerly direction. Plaintiff testified that he had no recollection of the accident. Melendez, however, testified that he entered the intersection against a red light and did not see plaintiff prior to the impact. The motion court denied plaintiff's motion for summary judgment, citing questions of fact as to his own negligence. The court adhered to its decision upon plaintiff's motion for reargument. This was error.

As a preliminary matter, Supreme Court correctly rejected plaintiff's argument that his alleged memory loss entitled him to a lesser degree of proof under *Noseworthy v City of New York* (298 NY 76 [1948]). In the absence of medical evidence establishing the loss of memory and its causal relationship to defendants' fault, the question of a lesser degree of proof cannot be considered (*see Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 335 [1986]). Nevertheless, summary judgment in favor of plaintiff is warranted by the proof before the court. Melendez's admission that he entered the intersection while the traffic light was red constituted a prima facie showing of liability on his part (*cf.*

Diasparra v Smith, 253 AD2d 840 [1998]). The proffer of brake failure by Melendez and his employer, defendant Tom Cat Bakery, as a cause of the accident, is insufficient to raise a triable factual issue with respect to their liability. A defendant claiming brake failure must make a two-pronged showing that the accident was caused by an unanticipated problem with the vehicle's brakes, and that he exercised reasonable care to keep them in good working order (*O'Callaghan v Flitter*, 112 AD2d 1030 [1985]). These defendants have failed to meet the first prong in light of Melendez's testimony of problems he experienced with the truck's brakes prior to the accident.

Plaintiff is entitled to summary judgment on the issue of liability despite the fact that his own negligence might remain an open question. A plaintiff's culpable conduct no longer stands as a bar to recovery in an action for personal injury, injury to property or wrongful death. Under CPLR 1411, such conduct merely acts to diminish the plaintiff's recovery in proportion to the culpable conduct of the defendants. This statute, enacted in 1975, substituted the notion of comparative fault for the common-law rule that barred a plaintiff from recovering anything if he or she was responsible to any degree for the injury (Alexander, McKinney's CPLR Practice Commentaries C1411:1). Here, plaintiff's own negligence, if any, would have

no bearing on defendant's liability. Stated differently, it is not plaintiff's burden to establish defendants' negligence as the sole proximate cause of his injuries in order to make out a prima facie case of negligence (*see Kush v City of Buffalo,* 59 NY2d 26, 32-33 (1983]). To establish a prima facie case, a plaintiff "must generally show that the defendant's negligence was *a substantial cause* of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.,* 51 NY2d 308, 315 [1980] [emphasis added]).

We note that opinions by this Court and others suggest that freedom from comparative negligence is a required component of a plaintiff's prima facie showing on a motion for summary judgment (*see e.g. Palmer v Horton,* 66 AD3d 1433 [2009]; *Cator v Filipe,* 47 AD3d 664 [2008]; *Thoma v Ronai,* 189 AD2d 635 [1993], *affd* 82 NY2d 736 [1993]). These opinions cannot be reconciled with CPLR 1411 if the statute is to be given effect. *Canh Du v Hamell* (19 AD3d 1000 [2005]) is distinguishable because it was a vacatur of a determination that a defendant's negligence was the sole proximate cause of an accident, a finding we do not purport to make. Parenthetically, CPLR 1412 makes culpable conduct claimed in diminution of damages under section 1411 an affirmative defense to be pleaded and proved by the party asserting it. In this regard, Melendez and Tom Cat offer only speculation in

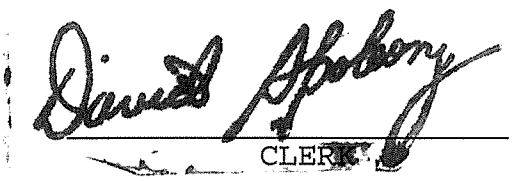
support of their assertion that plaintiff failed to use reasonable care to avoid the collision.

Accordingly, the order of Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 17, 2008, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, should be reversed, on the law, without costs, the motion granted on the issue of liability, and the matter remanded for a trial on damages, to encompass the issues of plaintiff's culpable conduct and the extent to which his recovery should be diminished in proportion thereto. Appeal from order, same court and Justice, entered on or about January 16, 2009, which, upon reargument, adhered to the prior ruling, should be dismissed, without costs, as academic.

All concur.

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

ENTERED: FEBRUARY 18, 2010



CLERK