SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 25, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2219 The People of the State of New York, Respondent, Ind. 3189/06

-against-

Benigno Barreto,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered February 15, 2008, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second felony offender, to a term of 7 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 victim's credible testimony negated the defense of justification by establishing that defendant was the initial aggressor. Moreover, under the version of the facts contained in

defendant's testimony, even if he was initially justified there was no justification for his continued use of deadly physical force to slash the victim's neck; according to defendant, by that time he had already disarmed his assailant and placed the situation under control.

Defendant did not preserve his challenge to the court's justification charge, and we decline to review it in the interest of justice. As an alternative holding, we find that the justification charge, viewed as a whole, sufficiently conveyed the principle that if the People did not disprove the defense of justification beyond a reasonable doubt, defendant was entitled to an acquittal as to all counts (*see People v Palmer*, 34 AD3d 701, 703 [2006], *lv denied* 8 NY3d 848 [2007]). The charge could not have misled the jury with regard to the relationship between the charges and the justification defense. On the record before us, although defendant claims his counsel was ineffective in failing to object to the charge, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Regardless of whether counsel should have asked the court to charge the jury in accordance with defendant's present claim, defendant has not established that he was prejudiced (*see People v White*, 66 AD3d 585, 586-587 [2009]).

The court properly exercised its discretion when, in response to a note from the deliberating jury requesting a definition of assault in the second degree, it reread the elements of that crime and treated lack of justification as one of the essential elements. Since the court was not obligated to go beyond the jury's request, it properly declined to provide a full charge on justification (*see People v Almodovar*, 62 NY2d 126, 131-132 [1984]).

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

ENTERED: FEBRUARY 25, 2010

David Spolony
CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2220 In re Citizens Emergency Committee to Preserve Preservation, Petitioner-Respondent, Index 103373/08

-against-

Robert B. Tierney, Chair of the New York City Landmarks Preservation Commission, et al., Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Susan Choi-Hausman of counsel), for appellants.

Whitney North Seymour, Jr., New York, for respondent.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered November 21, 2008, which granted the petition challenging respondents' failure to take any action on certain requests for landmark designation and directed the promulgation of new procedures for expediting such requests, unanimously reversed, on the law, without costs, the petition denied and this article 78 proceeding dismissed.

To establish standing, an association or organization such as petitioner "must show that at least one of its members would have standing to sue" (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). In other words, petitioner must show that one or more of its members -- as distinct from the general public -- has suffered an injury in fact, and must demonstrate that the injury falls within the zone of interests

protected by the legal authority being invoked (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 771-774 [1991]). In environmental or preservation matters, standing may be established by proof that agency action will directly harm the petitioner's members in their use or enjoyment of the natural resources or area in question (*see Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297 [2009]; *Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Planning Commn. of City of N.Y.*, 259 AD2d 26, 32 [1999]).

Petitioner failed to demonstrate standing to sue. While the petition alleges that its members are dedicated to preservation, "interest" and "injury" are not synonymous (*see Matter of New York State Psychiatric Assn., Inc. v Mills*, 29 AD3d 1058, 1059 [2006], *lv denied* 7 NY3d 708 [2006]). A general -- or even special -- interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances of the case (*see Save the Pine Bush*, 13 NY3d at 305-306; *Matter of Heritage Coalition v City of Ithaca Planning & Dev. Bd.*, 228 AD2d 862, 864 [1996], *lv denied* 88 NY2d 809 [1996]). The petition does not allege that petitioner's members have been affected differently from any other members of the public. To the contrary, it alleges that petitioner's members and members of the public are similarly affected by the Commission's action.

Even were we to find that petitioner has standing, the court erred in granting mandamus, as there is no statutory requirement that the Commission adhere to a particular procedure in determining whether to consider a property for designation (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]; *Saslow v Cephas*, 198 AD2d 53 [1993], *lv denied* 83 NY2d 757 [1994]). Indeed, the Commission's regulations on "Calendaring" provide that the Commission "*may*, upon the adoption of a motion, calendar an item to be considered for landmark designation" (63 RCNY § 1-02, emphasis added). We have previously rejected claims similar to that made here, recognizing the Commission's broad discretion in controlling its calendar without the necessity of creating a public record in that respect (*see Matter of Landmark West! v Burden*, 15 AD3d 308, 309 [2005], *lv denied* 5 NY3d 713 [2005]). Contrary to Supreme Court's finding, respondents have articulated reasonable bases for the Commission's handling of the specific properties and districts cited in the petition, with an explanation for delays in the designation process. Accordingly, the court erred in holding the

Commission's conduct arbitrary and capricious with respect to five of the properties (*see generally Matter of Teachers Ins. & Annuity Assn. of Am. v City of New York*, 82 NY2d 35, 44 [1993]).

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

ENTERED: FEBRUARY 25, 2010

David Apolony
CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2221 In re Rivercross Tenants' Corp., Index 111433/08
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent.

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

Gary R. Connor, New York (Sheldon D. Melnitsky of counsel), for respondent.

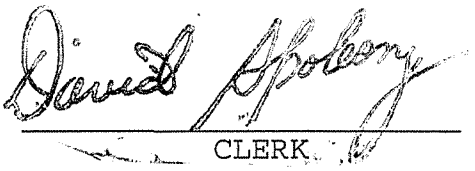
Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 12, 2008, denying the petition seeking, inter alia, to annul the determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated July 16, 2008, which unilaterally increased the maximum surcharge schedule for over-income tenants at petitioner Rivercross to 30% and increased the maintenance charges by 2.1%, and dismissing the proceeding, unanimously reversed, on the law, without costs, and the petition granted to the extent of annulling DHCR's determination and remanding the matter for further proceedings.

No deference should be accorded DHCR's determination unilaterally imposing an increased surcharge schedule upon Rivercross, where the language of the Private Housing Finance Law is clear that the schedule of surcharges is to be promulgated by the housing company "with the approval" of DHCR (Private Housing

Finance Law § 31[3]; *see Vink v New York State Div. of Hous. & Community Renewal*, 285 AD2d 203 [2001]; *see also Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]).

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

ENTERED: FEBRUARY 25, 2010



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Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2222 Jose Rivera, Index 112770/05
Plaintiff-Appellant,

-against-

Honey Express Cab Corp., et al.,
Defendants-Respondents.

Law Office of Jeffrey M. Okun, P.C., New York (Jeffrey M. Okun of counsel), for appellant.

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

Order, Supreme Court, New York County (Paul Wooten, J.), entered February 10, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to raise an issue of fact in opposition to defendants' prima facie showing that he did not suffer a serious injury of either a permanent or a nonpermanent nature. While his experts quantified his losses in range of motion in 2007 and 2008 and opined that he suffered permanent injuries that were caused by the subject car accident, none of the experts provided range of motion assessments contemporaneous with the 2003 accident (*see Mullings v Huntwork*, 26 AD3d 214, 216 [2006]). Moreover, none of the experts addressed plaintiff's 1986 back injury (*see Pommells v Perez*, 4 NY3d 566, 574-575, 579-580 [2005]).

The motion court properly rejected the unsworn report by

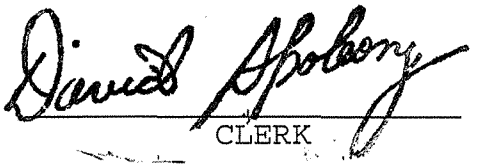
plaintiff's chiropractor (*see Shinn v Catanzaro*, 1 AD3d 195, 197-198 [2003]), which in any event provided no range of motion assessments contemporaneous with the accident.

As to plaintiff's 90/180-day claim, his bill of particulars and deposition testimony indicated that he was not confined to bed and home and did not miss any work following the accident. However, in his affidavit in opposition to the motion, plaintiff failed to raise a question of fact.

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

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

ENTERED: FEBRUARY 25, 2010



CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2223 Ian J. Gazes, etc., Index 112072/07
Plaintiff-Appellant,

-against-

John C. Bennett,
Defendant-Respondent.

Eisner & Mirer, P.C., New York (Nathaniel K. Charny of counsel), for appellant.

Housman & Associates, P.C., Tarrytown (Mark E. Housman of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered December 8, 2008, which granted defendant's motion to dismiss the complaint and denied plaintiff's request to make late service of the summons and complaint, unanimously reversed, on the law, without costs, the motion denied, the complaint reinstated, and defendant directed to accept service thereof.

Plaintiff brought this malpractice action against defendant in connection with his representation of the debtor and trustee in a wrongful termination action (*see Horan v New York Tel. Co.*, 309 AD2d 642 [2003]). Plaintiff's time to commence this action and serve a summons and complaint expired on September 13, 2007, six months after the dismissal of an earlier action arising out of the same transactions (*see* CPLR 205[a]). Commencement was timely, but attempted service on September 12, 2007 was defective because the mailing component of service was sent to defendant's

place of work in an envelope indicating it was from a law firm, an error attributable to the process server. The denial of plaintiff's request that defendant be compelled to accept late service of the pleadings was contained in a final order, and is thus appealable as of right (*see* CPLR 5701[a][2]).

A court may "compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay" (CPLR 3012[d]). Plaintiff submitted a reasonable excuse for delay in proper service -- namely, the process server's error -- which was attributable to counsel and constituted excusable law office failure (*see* CPLR 2005).

Plaintiff set forth a meritorious action, and the delay was excusable in light of its brevity and the absence of any pattern of default; defendant should have been compelled to accept late service pursuant to CPLR 3012(d) (*see Nason v Fisher*, 309 AD2d 526 [2003]). This is especially so in the absence of any prejudice to defendant, who was actually and timely -- although not properly -- served with the complaint (*see Lisojo v Phillip*, 188 AD2d 369 [1992]; *see also* CPLR 2001, 2004), and in the

absence of any indication that plaintiff intended to abandon his claim (*see Nolan v Lechner*, 60 AD3d 473 [2009]).

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

ENTERED: FEBRUARY 25, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2224 In re Jayvon Nathaniel L., etc.,

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

Natasha A.
Respondent-Appellant,

Leake & Watts Services, Inc.,
Petitioner-Respondent.

Robin G. Steinberg, The Bronx Defenders, Bronx (Florian Miedel of counsel), for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Ronald G. Fisher, Bronx, Law Guardian.

Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about July 17, 2008, which, to the extent appealed from, upon a finding that respondent mother permanently neglected and severely and repeatedly abused the subject child, terminated respondent's parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The evidence at the dispositional hearing supports the determination that it was in the best interests of the child to terminate respondent's parental rights so as to facilitate the child's adoption by his foster parents, with whom he has lived for most of his life and developed a close relationship, and who

have tended to his psychiatric and developmental needs (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]). The circumstances presented do not warrant a suspended judgment (*see Matter of Shaka Efion C.*, 207 AD2d 740, 741 [1994]).

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

ENTERED: FEBRUARY 25, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2225 The Jay Goldman Master Limited Partnership, Plaintiff-Appellant-Respondent, Index 102305/09

-against-

53rd Street and Madison Avenue Tower Development LLC, Defendant-Respondent-Appellant.

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for appellant-respondent.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered November 13, 2009, which, insofar as appealed from, granted plaintiff tenant's motion for a *Yellowstone* injunction only in connection with its claim that defendant owner had not substantially and timely completed the "Owner's Initial Work" (OIW) required under the subject commercial lease, resolved certain fact issues regarding the OIW, and denied those branches of owner's cross motion seeking a "countervailing stay" and dismissal of tenant's cause of action for actual eviction, unanimously modified, on the law, to vacate the court's findings of fact relating to the OIW, and otherwise affirmed, without costs.

Under the plain terms of the lease, owner's delivery of the combined notice of substantial completion/floor designation,

dated October 29, 2008, designating December 1, 2008 as the intended date of substantial completion, commenced a 15-day period at the end of which tenant's initial rent would be due regardless of any disputes as to whether owner had substantially completed the OIW. Tenant's lease obligations to countersign the floor designation notice and make payment of the initial rent were independent of owner's obligation to substantially complete the OIW in a timely manner. The motion court therefore correctly found that tenant had defaulted on its obligation to countersign the floor designation notice and make payment of the initial month's rent, and properly limited the issues of fact pertinent to the *Yellowstone* declaration sought, to whether owner had substantially and timely completed the OIW. For purposes of the *Yellowstone* preliminary injunction, however, it was not necessary to resolve any such issues of fact (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514-515 [1999]). Nor should the motion have resolved any such issues of fact in connection with owner's cross motion to dismiss in the absence of documentary evidence demonstrating that certain contested items of OIW in fact had been timely completed by December 1, 2009. Accordingly, we modify to vacate the motion court's findings of fact relating to owner's compliance with its OIW obligations. We also reject owner's argument that tenant's substantial completion objections should be limited to those

raised in its motion for a *Yellowstone* injunction, in view of tenant's references, without limitation, to the OIW as detailed in the complaint and lease, both of which were annexed to the motion.

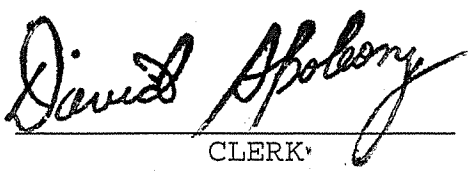
Owner is not entitled to a "countervailing stay" in the event of a finding that it had failed to timely complete the OIW. Landlords do not face the type of forfeiture protected by *Yellowstone* relief, and owner cites no authority extending such relief to landlords.

Tenant's cause of action for actual eviction was properly sustained upon allegations that owner's wrongful failure to complete the OIW caused tenant's physical ouster from the premises (*see Sapp v Propeller Co. LLC*, 5 AD3d 181 [2004]). Owner's assertion that tenant never took possession raises an issue of fact inappropriate for determination at the pleading stage.

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

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

ENTERED: FEBRUARY 25, 2010



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Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2226 In re Kaheem G.,

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

Randall S. Carmel, Syosset, for appellant.

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

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about March 13, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the first degree, criminal possession of a weapon in the fourth degree, and menacing in the second degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously modified, on the law, to the extent of reducing the finding as to robbery in the first degree to robbery in the third degree, reducing the finding as to menacing in the second degree to menacing in the third degree, and vacating the finding as to criminal possession of a weapon in the fourth degree and dismissing that count of the petition, and otherwise affirmed, without costs.

The evidence did not establish any of the charges requiring

the presence of a dangerous instrument, as defined in Penal Law § 10.00(13). The court found the device which appellant used to intimidate the victims to be a slingshot, rather than a "confetti popper," as appellant described it in his testimony. There is no basis to disturb this factual determination. Nonetheless, there was no evidence that the slingshot was loaded or otherwise operable. While a slingshot that is loaded with a rock or other hard projectile may certainly be a dangerous instrument, an empty slingshot is not. Here, the evidence did not establish that appellant's slingshot "under the circumstances in which it [was] used, attempted to be used or threatened to be used, [was] readily capable of causing death or other serious physical injury" (Penal Law § 10.00 [13]). However, the evidence established all the elements of third-degree robbery and third-degree menacing, including the intent element for each of those crimes, and we reject appellant's arguments to the contrary.

Even with this modification, we conclude that the 18-month placement is the least restrictive alternative consistent with appellant's needs and the need for protection of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: FEBRUARY 25, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2227 In re Arnold Schroeder, Index 110733/09

For an Order Appointing Directors to the
Wendy & Emery Reves Foundation, Inc.,
A Not-For-Profit Corporation Organized
Under the Laws of the State of New York.

- - - - - - - -

Wendy & Emery Reves Foundation, Inc., et al.,
Movants-Respondents,

Arnold Schroeder, et al.,
Respondents-Appellants.

Dickstein Shapiro LLP, New York (Peter J. Kadzik of counsel), for appellants.

Akin Gump Strauss Hauer & Feld LLP, New York (Nancy Chung of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 15, 2009, which granted movants' motion to vacate an order appointing petitioner Arnold Schroeder and two other individuals to act as interim directors of a New York not-for-profit corporation, unanimously affirmed, with costs.

The challenged order was granted ex parte upon petitioner's representations that he had determined, after diligent inquiry, that the corporation's original directors were dead and no successor directors had ever been appointed, and that the application was urgent because assets to which the corporation was entitled would shortly escheat under foreign law unless the

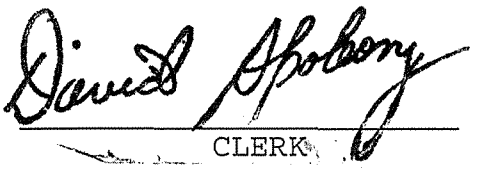
corporation had active directors to receive them (*see Matter of Botjer [Fisher Found.]*, 9 AD2d 208, 209-210 [1959], *affd* 8 NY2d 817 [1960]). After learning of this order, movants sought to vacate it, submitting corporate documents showing that representatives of institutions, including movants, that had received substantial charitable donations from the corporation's founding member during her lifetime had been elected directors of the corporation. Petitioner did not challenge the authenticity of these documents, and argued instead that movants had not been validly elected, had been inactive and negligent in managing the corporation, had created a new entity to receive assets to which the corporation was entitled, and had exercised undue influence on the corporation's founder, who was his mother. These arguments have no bearing on the point that the petition would not have been granted, at least not ex parte, had these documents been before the court (CPLR 5015[a][2]). Further warranting vacatur is evidence that petitioner failed to disclose these documents to the court after learning of them (CPLR 5015[a][3]; *see Oppenheimer v Westcott*, 47 NY2d 595, 603 [1979]), and that petitioner has taken a position adverse to the corporation in certain foreign proceedings involving his mother's estate. We are satisfied that the result, which leaves in control of the corporation representatives of institutions that were favored by

the corporation's founder, is equitable (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

The motion court also properly rejected petitioner's request to convert the proceeding into some type of plenary action or proceeding in which his accusations against movants can be resolved. A proceeding challenging the election of directors of a not-for-profit corporation may be brought only pursuant to Not-for-Profit Corporation Law § 618 by a member of the corporation upon notice to all interested parties (*see Esformes v Brinn*, 52 AD3d 459, 462 [2008]). Furthermore, the instant proceeding, which sought only limited equitable relief, is not an appropriate vehicle for resolving disputes relating to the disposition of the assets of petitioner's mother's estate.

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

ENTERED: FEBRUARY 25, 2010



CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2228 Byong Yol Yi, Index 6860/07
Plaintiff-Respondent,

-against-

Mateo Canela,
Defendant-Appellant.

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

Kerner & Kerner, New York (Kenneth T. Kerner of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucy Billings, J.), entered on or about July 10, 2009, which denied defendant's motion for summary judgment dismissing the complaint for lack of serious injury, unanimously modified, on the law, to dismiss the 90/180-day claim and the claim for permanent loss of use, and otherwise affirmed, without costs.

Defendant met his initial burden of proof, even though only one of his doctors addressed plaintiff's MRIs and neither of them addressed the reports of plaintiff's chiropractor (*see DeJesus v Paulino*, 61 AD3d 605, 607 [2009]; *see also Chintam v Fenelus*, 65 AD3d 946, 947 [2009]). Defendant made a prima facie showing of entitlement to summary judgment on plaintiff's 90/180-day claim by pointing to plaintiff's deposition testimony that he was not confined to bed and home and returned to work within the first 90

days following his accident (*see e.g. Alloway v Rodriguez*, 61 AD3d 591, 592 [2009]).

In opposition, plaintiff raised a triable issue of fact except as to his 90/180-day and permanent loss claims. Although one of defendant's doctors opined that the changes shown in plaintiff's cervical and lumbar discs were age related, plaintiff's doctor opined that there was a causal relationship between the subject accident and plaintiff's neck and back pain (*see Colon v Bernabe*, 65 AD3d 969, 970 [2009]; *Norfleet v Deme Enter., Inc.*, 58 AD3d 499, 500 [2009]). Plaintiff did not rely solely on MRIs showing bulging and herniated discs, as his doctor also performed straight-leg raising tests, which constitute "objective evidence of serious injury" (*Brown v Achy*, 9 AD3d 30, 32 [2004]). While plaintiff's doctor did not quantify all the limitations in plaintiff's ranges of motion, his report was sufficient on a qualitative basis (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 353 [2002]). The affirmed report of plaintiff's doctor was admissible, even though it relied in part on the unsworn reports of another doctor who read plaintiff's MRIs (*see Rivera v Super Star Leasing, Inc.*, 57 AD3d 288 [2008]; *see also Pommells v Perez*, 4 NY3d 566, 577 n 5 [2005]).

Defendant's arguments that plaintiff's doctor did not show limitations in plaintiff's spine contemporaneous with the 2006 accident and that there was a gap in treatment are unpreserved,

and we decline to consider them (*see e.g. Chintam*, 65 AD3d at 947; *Alicea v Troy Trans., Inc.*, 60 AD3d 521, 521-522 [2009]).

Plaintiff failed to raise a triable issue of fact as to his 90/180-day claim. He testified that he was not confined to bed and home and that he returned to work within the first month after the accident (*see Colon*, 65 AD3d at 971; *Alicea*, 60 AD3d at 522). He also failed to raise a triable issue of fact as to his claim that he sustained a permanent loss of use of a body organ, member, function or system. Such loss must be total (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]), and the report of plaintiff's doctor showed that plaintiff sustained limitations, but not a total loss of use.

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

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

ENTERED: FEBRUARY 25, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2229 The People of the State of New York, Ind. 5252/05
Respondent,

-against-

Eduardo Starks,
Defendant-Appellant.

The Legal Aid Society, New York (David Crow of counsel), and Akin Gump Strauss Hauer & Feld LLP, New York (Sunish Gulati of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Micki Scherer, J. at suppression motion; Eduardo Padro, J. at nonjury trial and sentence), rendered September 18, 2006, convicting defendant of two counts of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. "The circumstantial evidence warranted the conclusion that the [electronic transfer cards] constituted stolen property in that [they] had been stolen either by common-law trespassory taking or by acquiring lost property, as defined in Penal Law § 155.05(2)(b)" (*People v Meador*, 279 AD2d 327, 328 [2001], *lv denied* 96 NY2d 865 [2001]), and that defendant knew they were stolen and intended to benefit himself or impede the owners' recovery (*see id.*). A "defendant's

knowledge that property is stolen may be proven circumstantially, and the unexplained or falsely explained recent exclusive possession of the fruits of a crime allows a [trier of fact] to draw a permissible inference that defendant knew the property was stolen" (*People v Landfair*, 191 AD2d 825, 826 [1993], *lv denied* 81 NY2d 1015 [1993]). Contrary to defendant's argument on appeal, the explanation for his possession of the cards contained in his statement to the police was far from innocent. In particular, it was highly unlikely that defendant "found" the two cards at different times and places. Furthermore, even if defendant found the cards, the evidence compels the conclusion that he did not take, and had no intention of taking, any measures, reasonable or otherwise, to return either card to its owner (*see* Penal Law § 155.05[2][b]). We have considered and rejected defendant's remaining arguments concerning the sufficiency and weight of the evidence.

Defendant's suppression claims, including those asserting failures of proof at the hearing, are unpreserved (*see e.g. People v Shomo*, 265 AD2d 184 [1999], *lv denied* 94 NY2d 907 [2000], *cert denied* 530 US 1280 [2000]), and we decline to review them in the interest of justice. The suppression court did not "expressly decide[]" (CPL 470.05[2]) the particular issues raised on appeal (*see People v Turriago*, 90 NY2d 77, 83-84 [1997]). Moreover, the rulings the court made were not made in response to

a protest by a party (*see People v Colon*, 46 AD3d 260, 263 [2007]). As an alternative holding, we also reject defendant's claims on the merits.

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

ENTERED: FEBRUARY 25, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2230 The People of the State of New York, Ind. 963/08
Respondent,

-against-

Yorrie Abrahams,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about March 31, 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: FEBRUARY 25, 2010

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

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2231 Melissa Devivo, Index 402080/05
Plaintiff,

-against-

Samson A. Adeyemo,
Defendant,

The City of New York,
Defendant-Respondent,

Apollo Theater Foundation, Inc.,
Defendant-Appellant.

Katz & Rychik, P.C., New York (Abe M. Rychik of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

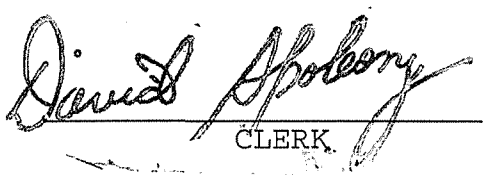
Order, Supreme Court, New York County (Karen S. Smith, J.), entered July 21, 2009, which, in an action for personal injuries sustained when plaintiff was hit by a car and allegedly caused by the negligence of City police officers in configuring a barricade at a public event, granted defendant City's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

The officers' alleged negligence cannot support municipal liability as it involved discretionary acts in managing pedestrian and vehicular traffic undertaken in furtherance of

public safety (*McLean v City of New York*, 12 NY3d 194, 203 [2009]; *Balsam v Delma Eng'g Corp.*, 90 NY2d 966, 968 [1997]; *Lamot v City of New York*, 62 AD3d 572 [2009]).

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

ENTERED: FEBRUARY 25, 2010



CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2234 Regina D. Beazer, Index 113276/05
Plaintiff-Respondent,

-against-

Fraser M. Webster, et al.,
Defendants-Appellants.

Kay & Gray, Westbury (Lynn Golder of counsel), for appellants.

Robert D. Rosen, Roslyn, for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered December 3, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to meet their prima facie burden of establishing that plaintiff did not suffer a serious injury under Insurance Law § 5102(d). Defendants' experts did not address or attempt to distinguish the objective findings of plaintiff's MRI, the EMG/NCV scan, and the other evidence of serious injury (*see Patterson v Rivera*, 49 AD3d 337 [2008]). Defendants' failure to indicate the objective tests used to determine the range of motion in plaintiff's cervical spine was fatal to their efforts

to establish a prima facie case for summary dismissal (*Offman v Singh*, 27 AD3d 284 [2006]).

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

ENTERED: FEBRUARY 25, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2235N In re Sherry Lynn Champion, Index 260127/09
Petitioner-Respondent,

-against-

Metropolitan Transit Authority, et al.,
Respondents,

MTA New York City Transit, et al.,
Respondents-Appellants.

Steven S. Efron, New York (Renee L. Cyr of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 29, 2009, which granted petitioner's motion for pre-action discovery to the extent of directing that respondents provide certain discovery and inspection of evidence within 30 days of service of a copy of the order, and continuing the stay in the order to show cause prohibiting respondents from altering, changing, repairing, servicing, modifying, moving, selling or in any other way disposing of any vehicle(s) and/or plow(s) utilized by respondents for any snow removal operations on the date of the hit and run motor vehicle accident at or near the subject intersection, unanimously modified, on the law, to strike the direction that respondents produce items 2(d), (e), (f), (g), (h), (j), (k), (m) and (n), limit the production of items 2(b), (c) and (o) to materials concerning the designated area between

the hours of 9 a.m. and 11 a.m., and vacate the stay, and otherwise affirmed, without costs.

While petitioner has alleged sufficient facts to support her claim that respondents were negligent in operating the motor vehicle that caused her injury, she has failed to allege any facts supporting her negligent maintenance claim. Petitioner's requests for items 2(d), (e), (f), (g), (h), (j), (k), (m) and (n) serve no purpose other than to determine whether facts exist to support a cause of action related to a defect in the motor vehicle or the attached plow, which is not an appropriate use of CPLR 3102(c) (*see Holzman v Manhattan & Bronx Surface Tr. Operating Auth.*, 271 AD2d 346, 347-348 [2000]). Because petitioner has not offered facts sufficient to support a negligent maintenance claim or any other claim that would require respondents' vehicles and plows to be produced or inspected, the IAS court's stay should be vacated.

Petitioner's requests for items 2(b), (c) and (o) are material and necessary to petitioner's viable negligent operation claim, because they will assist her in identifying prospective defendants, particularly the operator of the motor vehicle, and in framing her complaint (*see Christiano v Port Auth. of N.Y. & N.J.*, 1 AD3d 289, 289 [2003]). However, the order was overly broad with respect to those items, because there was no time

limitation (*id.*). Since petitioner sought disclosure regarding an accident that allegedly occurred around 10:00 a.m., the order should be modified as indicated above.

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

ENTERED: FEBRUARY 25, 2010

CLERK

Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

549 Art Capital Group, LLC, et al., Index 600245/08
Plaintiffs-Respondents,

-against-

Beth Sara Neuhaus,
Defendant-Appellant.

Miller & Wrubel P.C., New York (Joel M. Miller of counsel), for appellant.

Wollmuth Maher & Deutsch LLP, New York (Jennifer L. Rudolph of counsel), for respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered December 1, 2008, which denied defendant's motion to dismiss the complaint, reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in defendant's favor.

Plaintiffs are in the business of providing financial and consulting services to art owners, for the purpose of enhancing the liquidity of works of art held by individual owners and art galleries. This action stems from the fact that plaintiffs' former employees, Christopher Krecke and Andrew Rose, now compete with plaintiffs through entities they have formed. Three years before this action was commenced, plaintiffs sued Krecke, Rose and their entities, alleging various torts plus claims for declaratory relief and an accounting. In that still pending action, it is alleged, among other things, that Krecke and Rose

defrauded and engaged in unfair competition with plaintiffs. All of the instant complaint's seven causes of action, which include aiding and abetting breach of fiduciary duty, fraud and conspiracy to defraud, and aiding and abetting fraud are based upon defendant's role as an attorney retained by Rose for the purpose of starting his new business venture with Krecke. Plaintiffs allege that Krecke and Rose needed to secure the aid and assistance of legal counsel in order to carry out the conspiracy against them. Accordingly, defendant is alleged to have substantially facilitated and advanced the Krecke-Rose conspiracy to defraud and unfairly compete with plaintiffs.

The issue on this appeal is whether the complaint sets forth any basis for defendant's liability for the alleged conduct of Krecke and Rose.

> In general, all who aid and abet the commission of a trespass are liable . . . But where one acts only in the execution of the duties of his calling or profession, and does not go beyond it, and does not actually participate in the trespass, he is not liable, though what he does may aid another in its commission.

(*Ford v Williams*, 13 NY 577, 584 [1856].)

Moreover, it is recognized that public policy demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients (*Hahn v Wylie*, 54 AD2d 629 [1976]). As to

defendant's specific conduct, plaintiffs allege that she gave Krecke and Rose indispensable legal advice and counsel, documented and negotiated loan transactions between their competing entities and plaintiffs' current and prospective clients, and provided legal services to secure office space for Krecke and Rose. Guided by *Ford*, we find that plaintiffs' causes of action are not viable because all of the aforementioned acts fall completely within the scope of defendant's duties as an attorney. The five quotes from the complaint cited by the dissent do not warrant a contrary conclusion inasmuch as they do not even suggest that defendant acted in any capacity other than as an attorney.

Even apart from *Ford* and *Hahn*, this Court has held that a viable tort claim against a professional requires the underlying relationship between the parties to be one of contract or the bond between them so close as to be the functional equivalent of contractual privity (*Jacobs v Kay*, 50 AD3d 526 [2008], *citing Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417 [1989]). The existence of such a relationship is not alleged here. Moreover, Rule 1.2(d) of the Rules of Professional Conduct (22 NYCRR 1200.2[d]), also cited by the dissent, does not bear upon the sufficiency of plaintiffs' claims. Standing alone, an ethical violation will not create a duty giving rise to a

cause of action that would otherwise not exist at law (*Shapiro v McNeill*, 92 NY2d 91, 97 [1998]).

Also, the dissent merely begs the question by invoking Judiciary Law § 487, authority plaintiffs do not cite. That statute provides for criminal and civil liability for an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." The "indication of fraud and collusion" discerned by the dissent falls short of an allegation that defendant tortiously acted outside the scope of her role as an attorney. By illustration, the tenor of the complaint is revealed by its following language: "In order to accomplish the aforementioned conspiracy, Krecke and Rose needed to secure the aid and assistance of legal counsel," and "Beth Neuhaus' legal advice and counsel was substantial and indispensable to Krecke and Rose." The "advice of counsel with respect to a client's course of conduct, even if pleaded as 'condonation,' does not thereby and without more metamorphose into a cause of action by a third party against that counsel" (*Pearl v 305 E. 92nd St. Corp.*, 156 AD2d 122 [1989]). It is also of no moment that discovery has not been conducted. Plaintiffs have not asserted that facts essential to justify opposition to the motion may have existed but could not be stated (*see* CPLR 3211[d]).

Plaintiffs' claims of fraud, conspiracy to defraud and aiding and abetting fraud are deficient for an additional reason. The elements of fraud are a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). In this case, plaintiffs do not allege that any misrepresentations were made to them.

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

ACOSTA, J. (dissenting in part)

I believe that plaintiffs have stated a viable cause of action for aiding and abetting a breach of fiduciary duty, and aiding and abetting fraud.

Plaintiffs are in the business of providing financial and consulting services to individual art owners and art galleries. Apart from engaging in art sales, purchases and advisory services, plaintiffs also offer recourse and nonrecourse asset-based loans to individuals, galleries and other businesses, using their art assets as collateral in securing the loan or as a component of the collateral package.

Nonparty Christopher Krecke was an employee of plaintiff Art Capital and served as its chief financial officer and chief operating officer. He also served as the chief financial officer and chief operating officer of plaintiff ACG Credit, and as president of plaintiff Fine Art Finance. Krecke administered the loans for each of ACG Credit's lending clients, as well as managing and developing key banking and credit relationships. Nonparty Andrew C. Rose was a consultant for Art Capital Group, and was managing director of ACG Credit. Rose's employment and consulting arrangement was terminated on December 28, 2004.

According to the complaint, while Rose was consulting for Art Capital, he "started planning to compete secretly against plaintiffs and appropriate ACG Credit's corporate loans and

plaintiffs' business opportunities for himself and Krecke." On or about October 2004, Rose formed a company called Art Capital Holdings, Inc., "to provide financial consulting services and established e-mail accounts with 'artcapitalgroup.com' domain names."

After Rose was terminated, Krecke continued his employment with plaintiffs for an additional three months. The complaint alleges that during that time, Krecke helped Rose conceal the efforts of the competing business. Krecke resigned from his employment with plaintiffs on April 1, 2005, and reported for employment with Rose three days later. It is further alleged that during that three-month period, "Krecke and Rose facilitated the transfer of numerous lending clients and prospective clients to Rose's new company."

On or about January 26, 2005, defendant, an attorney, met with Krecke and Rose at her office, and was retained as Rose's legal counsel. It is alleged that she "knowingly and deliberately enabled, assisted, and counseled Krecke and Rose to unfairly compete with Plaintiffs, to defraud Plaintiffs, and to disregard the fiduciary duties they each owed to Plaintiffs." It is further alleged that defendant "worked on loan transactions with Krecke and Rose with counterparties that were borrowers of, potential clients of, or had signed term sheets with Plaintiffs," assisted in "appropriat[ing] many loan transactions away from

Plaintiffs, and otherwise . . . interfere[d] with Plaintiffs' ongoing and prospective business relationships."

The complaint makes specific reference to a loan extended by Rose's and Krecke's new company to plaintiffs' largest borrower, Berry-Hill Galleries (BH), in violation of an existing loan agreement between BH and plaintiffs. It alleges that defendant represented Rose and Krecke in the transaction and assisted them in concealing it from plaintiffs by using a shell company, Coram Capital, to receive the loan, removing references to BH's address from the loan documents and concealing the fact that art work that had already been pledged as collateral to ACG Credit was used to secure the loan. In addition, the complaint alleges that defendant provided unspecified legal services to Krecke and Rose in connection with loans made to three of plaintiffs' borrowers.

The complaint further alleges that defendant concealed her involvement with Krecke and Rose by disclaiming any wrongdoing with respect to certain loan transactions in the ensuing litigation by plaintiffs against Krecke and Rose.[1] Additionally, the complaint alleges that defendant helped to wrongfully divert business from plaintiffs by assisting Rose and Krecke in securing financing with SageCrest, plaintiffs' lender.

Plaintiffs brought the instant action in June 2008. In

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[1]Prior to the commencement of the instant action, plaintiffs commenced an action against Krecke and Rose and their newly formed companies.

August, defendant moved, pre-answer, to dismiss the complaint or, in the alternative, to stay the action pending the outcome of the action against Krecke and Rose. The motion court denied defendant's motion, and this appeal ensued. Defendant argues that the complaint should be dismissed because there is no privity between herself and plaintiffs, barring a claim on the legal advice she provided to her clients. She thus asserts that by documenting and negotiating the loan transactions, she was providing legal services within the scope of her authority as an attorney, conduct that cannot give rise to liability to third parties.

An attorney is generally not liable to third parties for the acts of her clients if the attorney has acted in good faith (*Weisman, Celler, Spett & Modlin v Chadbourne & Park*, 271 AD2d 329, 330 [2000], *lv denied* 95 NY2d 760 [2000]). An attorney, however, "may be held liable to third parties for wrongful acts if guilty of fraud or collusion or of a malicious or tortious act" (*Kahn v Crames*, 92 AD2d 634, 635 [1983]; *see also Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384 [1992]). I do not disagree with the majority's citing to the general rule. Where, however, as here, there is an indication of fraud and collusion, I believe it was error to dismiss the complaint in its entirety (*see also* Judiciary Law § 487 [providing for a civil cause of action against an attorney based

on the attorney's intent to deceive]; *Mokay v Mokay*, 67 AD3d 1210 [2009]).

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [2003]). A defendant knowingly participates in the breach of fiduciary duty when she provides "substantial assistance" to the primary violators, which occurs "when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur" (*id.* at 126).

Here, accepting the facts as alleged in the complaint as true, and according plaintiffs the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), plaintiffs properly stated a claim for aiding and abetting a breach of fiduciary duty. Specifically, they alleged that even though defendant knew that Rose was a former employee of Art Capital and that Krecke continued to be employed by Art Capital in a fiduciary relationship, she still helped Rose and Krecke take business away from plaintiffs by securing financing for them and helping negotiate a loan that violated the terms of existing agreements between plaintiffs and their borrowers. Plaintiffs specifically alleged that defendant assisted Krecke and Rose with

the BH transaction, knowingly transferring artwork to Coram Capital, BH's alter ego, even though she knew that artwork had already been pledged as collateral to plaintiffs (*see Operative Cake Corp. v Nassour*, 21 AD3d 1020 [2005]).

Plaintiffs likewise adequately stated a cause of action for aiding and abetting fraud by alleging the facts in sufficient detail to afford defendant the requisite notice, particularly since the relevant surrounding circumstances lie peculiarly within her knowledge (*Knight Sec. v Fiduciary Trust Co.*, 5 AD3d 172, 173-174 [2004]). The complaint alleges that defendant, as attorney for Rose, knew of the fraud by Rose and Krecke, and defendant advanced its commission by providing substantial assistance in advancing loans to clients that were secured by collateral already pledged to plaintiffs (*see Goldson v Walker*, 65 AD3d 1084 [2009]). Specifically, the complaint alleges that defendant had actual knowledge that the transaction with BH (plaintiffs' biggest borrower, as noted), was in violation of its loan agreement with plaintiffs. The complaint further alleges that defendant aided and abetted Krecke and Rose in concealing the loan from plaintiffs by using a shell company to receive the loan and removing the references to BH's address from the loan documents, thus concealing the fact that artwork already pledged as collateral to ACG Credit was used to secure the loan.

Accordingly, in my opinion, the court erred in dismissing these two causes of action.

Notwithstanding defendant's position that her role as an attorney advising her client insulates her from liability, based on these facts there remains a question of whether she simply acted zealously on behalf of her client, or whether she engaged in activity that crossed that line.[2] We have drawn that line at the point where a lawyer begins to be a participant in the unethical or criminal conduct of her client (*see e.g. Bankers Trust Co.*, 187 AD2d at 385). The duty of zealous representation cannot be absolute. At bottom, lawyers are guardians of the public good, albeit with a responsibility to play their role to advance the ethical and noncriminal interests of their clients. New York courts have long recognized this. The majority cites *Ford v Williams* (13 NY 577, 584 [1856]) for the proposition that "where one acts only in the execution of the duties of his calling or profession, and *does not go beyond it, and does not actually participate in the trespass*, he is not liable" (emphasis

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[2] Rule 1.2(d) of New York State's Rule of Professional Conduct provides that "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client" (22 NYCRR 1200.2[d]).

added)[3]. That, however, is precisely the point. At this procedural juncture, where discovery has not taken place, and plaintiffs have adequately pleaded that defendant provided substantial assistance to Krecke and Rose in breaching a fiduciary duty to plaintiffs and advancing a fraud, I would reinstate those causes of action.

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

ENTERED: FEBRUARY 25, 2010

CLERK

[3] The court affirmed the judgment of Supreme Court which, after a jury trial, found that defendant attorney was not liable as a trespasser. Rather, the attorney transmitted the instructions of his clients that the sheriff seize specific property, and did not actively participate in the tortious seizure.

Andrias, J.P., Sweeny, McGuire, Acosta, JJ.

992 The People of the State of New York, Respondent, Ind. 4949/01

-against-

William Lopez,
Defendant-Appellant.

Speiser & Heinzmann, White Plains (Joseph C. Heinzmann, Jr. of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

Judgment, Supreme Court, New York County (Rosalyn H. Richter, J.), rendered December 19, 2001, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 4½ to 9 years, unanimously affirmed.

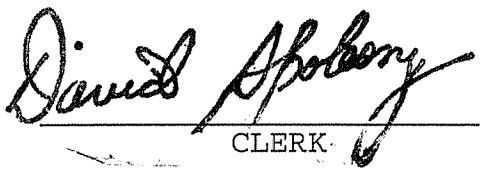
The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). From an observation post, the police saw defendant provide drugs to an apprehended buyer in return for money. There is no basis for disturbing the jury's credibility determinations, including its rejection of defendant's testimony, which was the sole basis of his agency defense.

The court properly exercised its discretion in denying

defendant's mistrial motion based on claimed improprieties in the prosecutor's summation, since the court's prompt and thorough curative instructions were sufficient to prevent the challenged remarks from causing any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]).

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

ENTERED: FEBRUARY 25, 2010



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Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Román, JJ.

1581 Maurice Thomas, et al., Index 303860/07
Plaintiffs-Appellants,

-against-

Janet Thomas,
Defendant-Respondent,

Columbia Home Loans, LLC,
Defendant.

Lorna A. McGregor, Bronx, for appellants.

Law Offices of Thomas Weiss, P.C., West Hempstead (Thomas Weiss of counsel), for respondent.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered June 10, 2008, which, to the extent appealed from, as limited by the briefs, granted defendant Janet Thomas's motion to dismiss, for failure to state a cause of action, plaintiffs' claim for a constructive trust, reversed, on the law, without costs, the motion denied, and the complaint reinstated to the extent it seeks imposition of a constructive trust on the property in dispute.

Plaintiffs allege in their complaint that defendant Janet Thomas[1] orally agreed to temporarily take title to real property owned by them. They claim that they were financially unqualified to refinance the property and that Janet Thomas offered, in

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[1] Defendant Janet Thomas does not appear to be related to plaintiffs Maurice Thomas and Sharon Thomas.

exchange for a payment of $5,000, to hold the property in her name and apply for a new mortgage. They also allege that she agreed to then transfer the property back to plaintiffs after their financial position improved. Plaintiffs assert that, after they transferred the property to her and the mortgage was successfully refinanced, Janet Thomas refused to transfer it back to them. Indeed, they claim that Janet Thomas has taken steps to further encumber the property and to transfer it to a third party. The complaint asserts a cause of action denominated as one "pursuant to New York State [Real Property and Proceedings Law] Article 15[2]," and a cause of action for "equitable relief." Plaintiffs seek as relief an order placing the property in a constructive trust for plaintiffs' benefit and conveying the property back to plaintiffs.

After interposing her answer, Janet Thomas moved to dismiss the complaint pursuant to CPLR 3211(a)(7). She argued that the agreement between the parties was unenforceable as violative of the statute of frauds because it was never reduced to writing. In support of the motion, Janet Thomas submitted an affidavit in which she admitted the existence of the agreement. She claimed, however, that plaintiffs had failed to make mortgage payments, that the property was in foreclosure, and that her own credit had

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[2] RPAPL Article 15 is entitled "Action to Compel the Determination of a Claim to Real Property."

been adversely affected. Janet Thomas further stated in the affidavit that she had known plaintiffs for over ten years. Finally, Janet Thomas specifically refuted plaintiffs' allegation that she was paid $5,000 in consideration for her agreement to take title to the property. Rather, she claimed, the payment represented money owed to her by a "partner" program. The partner program, she explained, is a system whereby people, most of Jamaican origin, pool their cash. At the time of the transaction at issue, Janet Thomas stated, Sharon Thomas was responsible for the program's intake and payout of funds.

In opposition to the motion, plaintiffs argued that the parties' partial performance of the agreement took it out of the purview of the statute of frauds pursuant to General Obligations Law § 5-704. However, in granting Janet Thomas's motion, the IAS court apparently rejected this argument. It based its decision to dismiss the complaint entirely on the absence of a writing memorializing the parties' agreement.

A strong argument exists that, contrary to Supreme Court's conclusion, the statute of frauds is not a bar to plaintiffs' claim. That is because Janet Thomas admitted in her affidavit that she agreed to the arrangement proposed by plaintiffs (*see Cole v Macklowe*, 40 AD3d 396, 399 [2007] ["the statute was not enacted to enable defendants to interpose it as a bar to a contract fairly and admittedly made."]) However, while they made

such an argument below, plaintiffs have abandoned it on appeal (*see McHale v Anthony*, 41 AD3d 265, 266-267 [2007]). Rather, plaintiffs argue that, notwithstanding the statute of frauds, the court should have found that plaintiffs made out a claim for a constructive trust on the property. They assert that the complaint supports such a cause of action because the complaint alleges a confidential relationship between the parties, a promise by Janet Thomas upon which plaintiffs relied, and the unjust enrichment of Janet Thomas (*see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). Janet Thomas responds that the complaint does not allege any of the elements necessary to establish a cause of action for a constructive trust.

Because the instant motion is pursuant to CPLR 3211, the complaint "is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Applying this standard, plaintiffs have stated a cause of action for a constructive trust. As a preliminary matter, it is accepted that a constructive trust over real property can be imposed even where an underlying agreement is not in writing (*see Sharp*, 40 NY2d at 122). The complaint clearly alleges that Janet Thomas promised to transfer the property back to plaintiffs. It

can be inferred that plaintiffs relied on that promise, or they would have not made the transfer. That plaintiffs meant to convey in their complaint that Janet Thomas would be unjustly enriched without judicial intervention can be similarly assumed.

While it is not clearly spelled out in the complaint that plaintiffs and Janet Thomas had a confidential relationship, Janet Thomas's affidavit, submitted in support of her motion, provides sufficient information to draw such an inference. Specifically, the affidavit volunteers the existence of the partner program and the fact that, until shortly before the transaction at issue, the parties were co-venturers in a quasi-banking enterprise, however informal that enterprise may have been. This is sufficient to infer that the parties had fiduciary responsibilities to one another which elevated the relationship from one of mere acquaintances to a "confidential" one. We disagree with the dissent's position that we may not consider Janet Thomas's affidavit. On a CPLR 3211 motion a plaintiff's affidavit "may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976]). It follows, a fortiori, that admissions in a defendant's affidavit may similarly be used to ascertain whether a plaintiff has a valid cause of action.

We have not applied a rigid standard when identifying relationships that can be the predicate for imposition of a

constructive trust. For example, in *Panetta v Kelly* (17 AD3d 163 [2005], *lv dismissed* 5 NY3d 783 [2005]), the plaintiff and her business partner paid for a cooperative apartment that they intended to use for business purposes, but asked a "family friend" of the business partner to hold the shares. When the partner's friend refused to cooperate in selling the apartment, the plaintiff sought a constructive trust over the shares. Affording the plaintiff "the benefit of all favorable inferences," we found an issue of fact to exist as to whether plaintiff and the partner's "family friend" enjoyed a confidential relationship. In *Forbes v Clarke* (194 AD2d 393 [1993]), we again demonstrated flexibility in determining whether a confidential relationship existed, upholding a verdict imposing a constructive trust where the parties' relationship was merely described as being "undoubtedly close." The Second Department has been similarly liberal in its characterization of such relationships. For example, in *Brand v Lipton* (274 AD2d 534 [2000]), it affirmed the denial of a motion to dismiss a cause of action for a constructive trust where the parties were "lifelong friends" who shared season tickets for a football team. Thus, the allegations here concerning the parties' relationship, including those in Janet Thomas's affidavit, are sufficient to

survive a motion to dismiss. Accordingly, we reverse the order and reinstate the complaint, to the extent it seeks imposition of a constructive trust on the property in dispute.

All concur except DeGrasse and Román, JJ. who dissent in a memorandum by Román, J. as follows:

ROMÁN, J. (dissenting)

Since I believe that the majority misconstrues well settled law, applicable to motions to dismiss pursuant to CPLR §3211(a)(7), I dissent.

This is an action for breach of an oral agreement, for unjust enrichment and for imposition of a constructive trust. The complaint alleges that plaintiffs transferred real property, located in Bronx County, to defendant Janet Thomas. It is further alleged that according to an oral agreement, Janet Thomas was to reconvey the property to plaintiffs. The complaint alleges that while Janet Thomas has owned the property she has not paid any bills associated therewith and that the bills have been in fact paid by plaintiffs. In support of her motion to dismiss the complaint, Janet Thomas submits an affidavit wherein she chronicles the extent of her relationship with plaintiff Sharon Thomas, averring that they met through a mutual friend. Thereafter, Janet Thomas joined a "partner" program, administered by Sharon Thomas, whereby she and others pooled their money for redistribution - in essence a communal method of saving money. In an affidavit submitted by Sharon Thomas, she confirms the extent of her relationship with Janet Thomas and further states that the transfer of the property to Janet Thomas was made with the understanding that it would be reconveyed to the plaintiffs.

When deciding a motion to dismiss a complaint, pursuant to

CPLR 3211(a)(7), all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*id.*). In opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the complaint (CPLR 3211[c]; *Cron v Hargro Fabrics,* 91 NY2d at 366; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [2009]). If an affidavit is submitted for that purpose, it should be given its most favorable intendment (*Cron v Hargro Fabrics,* 91 NY2d at 366).

A complaint seeking imposition of a constructive trust must allege four elements (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*Panetta v Kelly*, 17 AD3d 163, 165 [2005], *lv dismissed* 5 NY3d 783 [2005]; *Crown Realty Co. v Crown Hgts. Jewish Community Council*, 175 AD2d 151 [1991]).

Here, as the majority concedes, the complaint and plaintiffs' papers in opposition to the motion to dismiss are bereft of any assertions as to the existence of either a confidential or a fiduciary relationship. A liberal reading of the complaint and Sharon Thomas's affidavit evinces that at best,

Janet Thomas and the plaintiffs were acquaintances, bound together by the instant transaction and an unrelated savings program. No reading of the complaint or Sharon Thomas's affidavit shows that the relationship was one of trust and confidence, the hallmark of a confidential or a fiduciary relationship (*see Sharp v Kosmalski*, 40 NY2d 119, 121-122 [1976]).

Accordingly, plaintiffs fail to state a cause of action for constructive trust, the only cause of action they address on appeal. To the extent that the majority comes to a different conclusion, it does so by misconstruing the applicable law.

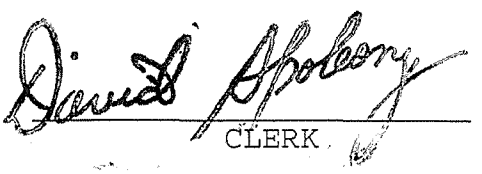
While a plaintiff can cure pleading defects by submitting an affidavit, it does not follow that any such defects in a plaintiff's pleadings can be cured by a defendant's submissions, affidavit or otherwise. Here the majority finds that the existence of a confidential relationship by virtue of an affidavit submitted by Janet Thomas in support of her motion to dismiss the complaint. While the majority's position finds some support in *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976], where the court held that affidavits can be used to correct pleading defects in a complaint, without ever stating whose affidavits could be so considered, in *Leon* and then again in *Cron*, the Court of Appeals, while citing *Rovello*, nevertheless implicitly narrowed the holding in *Rovello*, stating that "[i]n

opposition to such a motion [one pursuant to CPLR 3211], a *plaintiff* may submit affidavits 'to remedy defects in the complaint' and 'preserve inartfully pleaded but potentially meritorious claims'" (*Cron v Hargro Fabrics*, 91 NY2d at 366, citing *Rovello v Orofino Realty Co., Inc.*, 40 NY2d at 635-636 [emphasis added]). Thus, it is only a plaintiff's affidavit which can be used to remedy a defect in the complaint (*id.*; *see Leon v Martinez*, 84 NY2d at 88; *Amaro v Gani Realty Corp.*, 60 AD3d at 492; *see also Fitzgerald v Federal Signal Corp.*, 63 AD3d 994, 995 [2009]).

Therefore, to the extent that Janet Thomas' affidavit alludes to what the majority characterizes as a confidential relationship, this does not avail plaintiffs and cannot cure the defect in plaintiffs' complaint. The use of an affidavit in this manner is simply not supported by law. Moreover, the majority assumes that Janet Thomas' affidavit, pleads the existence of a confidential or fiduciary relationship, and I do not believe that it does.

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

ENTERED: FEBRUARY 25, 2010



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Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2013 Lincoln Place, LLC, Index 603055/00
Plaintiff,

-against-

RVP Consulting, Inc., et al.,
Defendants.
- - - - - -
Robert Peters, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Michael E. Pekofsky, Esq.,
Third-Party Defendant-Respondent.

The Law Firm of Allen Bodner, New York (Allen Bodner of counsel), for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Jennifer Alampi of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 2, 2009, which denied third-party plaintiffs' motion for summary judgment and granted third-party defendant's cross motion for summary judgment dismissing the third-party complaint, unanimously affirmed, with costs.

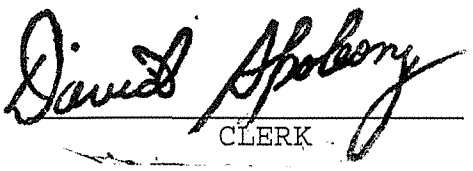
The third-party complaint alleging legal malpractice is time-barred, the action having been commenced more than three years after the malpractice was committed (CPLR 214[6]; *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994]). Third-party defendant Pekofsky negotiated a lease on behalf of third-party plaintiffs RVP Consulting and Robert Peters (collectively,

Peters), as tenants, in 1997. He then assigned the lease, rather than designating a lessee, thereby causing Peters, pursuant to the terms of the lease, to remain liable for the full performance of all the tenant's obligations thereunder. In 1998, the assignee defaulted in its rent obligations, triggering Peters's liability for the outstanding rent. This action was not commenced until 2002.

Contrary to Peters's contention, an adjudication of the meaning of Pekofsky's 1997 letter was not a prerequisite to the existence of an actionable injury. Indeed, while Peters may not have been aware until 2001 or 2002 that Pekofsky's actions could result in liability, it is not the date on which Peters learned that malpractice had occurred, but the date on which the malpractice was committed, that is relevant (*West Vil. Assoc. Ltd. Partnership v Balber Pickard Battistoni Maldonado & Ver Dan Tuin, PC*, 49 AD3d 270, 270 [2008]). Peters's subjective belief that Pekofsky had designated a lessee rather than assigning the lease is of no consequence.

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

ENTERED: FEBRUARY 25, 2010



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Mazzarelli, J.P., Acosta, Renwick, Freedman, JJ.

2136 Peter O'Malley, Index 115283/05
Plaintiff-Respondent,

-against-

Phil Campione,
Defendant-Appellant.

J. Anklowitz, Sayville, for appellant.

Reiss Eisenpress, LLP, New York (Matthew Sheppe of counsel), for respondent.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered October 10, 2008, after a nonjury trial, which awarded plaintiff damages and directed the entry of a judgment against defendant in the principal amount of $52,900, unanimously reversed, on the law, without costs, and the complaint dismissed. The Clerk is directed to enter judgment dismissing the complaint.

The evidence at trial established that plaintiff paid defendant $52,900 to remodel his apartment and that certain of the work defendant performed was defective. The proper measure of damages for the defective work is the cost to remedy the defect (*Bellizzi v Huntley Estates*, 3 NY2d 112 [1957]). While plaintiff's wife's testimony established that two contractors had been retained to perform certain repairs and that repair estimates had been obtained from two other contractors, plaintiff presented no evidence indicating the cost of the repairs or the amounts of the estimates. Since plaintiff thus failed to meet

his burden of proving the extent to which he was harmed, he may not recover damages for the harm (*Berley Indus. v City of New York*, 45 NY2d 683, 686 [1978]).

We note that, contrary to defendant's argument, advanced for the first time in his appellate reply brief, while the fact that he did not have a home improvement license at the time that the work was performed (*see* Administrative Code of City of NY § 20-387) bars him from enforcing the contract (*see Sutton v Ohrbach*, 198 AD2d 144 [1993]), as the trial court found, it is not a bar to plaintiff's recovery of restitution for payments made (*see e.g. Brite-N-Up, Inc. v Reno*, 7 AD3d 656 [2004]; *Goldstein v Gerbano*, 158 AD2d 671 [1990]).

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

ENTERED: FEBRUARY 25, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, Román, JJ.

2236 The People of the State of New York, Ind. 4799/05
Respondent,

-against-

Carnell Drayton,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered March 30, 2006, convicting defendant, after a jury trial, of grand larceny in the fourth degree and fraudulent accosting, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

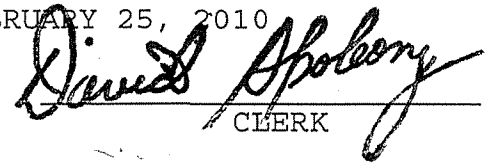
The court properly denied defendant's motion to suppress identification testimony. The record supports the court's findings that the photo array and lineup were not unduly suggestive. In each instance, defendant and the other participants were reasonably similar in appearance, and any difference was not sufficient to create a substantial likelihood that defendant would be singled out for identification (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The fact that defendant was the only person in the photo array, and almost the only person in the lineup, wearing a

white shirt did not render these procedures unduly suggestive, even though the victim's description of one of the perpetrators included a reference to a white shirt. A white shirt is an extremely common article of clothing that did not figure prominently in the description and was unlikely to attract the victim's attention (*see e.g. People v Gilbert*, 295 AD2d 275, 277 [2002], *lv denied* 99 NY2d 558 [2002]). We have considered and rejected defendant's remaining challenges to the identification procedures.

When, on cross-examination at trial, a police officer revealed uncharged criminal activity by defendant, this testimony was responsive to defense counsel's questions; moreover, defense counsel never objected to the officer's responses on cross-examination, and he continued to elicit similar information. Defense counsel only objected to the prosecutor's elicitation of further details on redirect examination. To the extent there was any error in the scope of redirect examination that the court permitted, we find it to be harmless, particularly since the testimony at issue was essentially similar to the testimony the officer had already given on cross-examination.

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

ENTERED: FEBRUARY 25, 2010



CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, JJ.

2237 Ashon Leftenant, Index 16416/07
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

Jerald D. Kreppel, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Briganti-Hughes, J.), entered on or about May 5, 2009, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The complaint seeks damages for false arrest, wrongful imprisonment, malicious prosecution, violation of constitutional rights under 42 USC § 1983, and negligent hiring, training and supervision of police officers. Although plaintiff's affidavit denied involvement in a drug transaction, it did not deny the essential facts as to what the officer testified he had observed, or that plaintiff did possess the specified drug paraphernalia and a sum of cash. Inasmuch as the officer's observations established probable cause for arrest (*see Lui Yi v City of New York*, 227 AD2d 453 [1996]), defendant had a complete defense to the claims of false arrest, false imprisonment and malicious prosecution (*Batista v City of New York*, 15 AD3d 304 [2005]),

notwithstanding the subsequent dismissal of the criminal charges (*Arzeno v Mack*, 39 AD3d 341 [2007]). The complaint fails to allege bad faith by the officers with respect to false arrest (*id.* at 342), or actual malice with respect to malicious prosecution (*Jenkins v City of New York*, 2 AD3d 291 [2003]). The actions and statements of the District Attorney, whose office was nonetheless acting within the scope of its official duties (*Arzeno*, 39 AD3d at 342), could not be imputed to the municipal defendant, an entirely different entity (*see Warner v City of New York*, 57 AD3d 767, 768 [2008]).

The claim asserted under 42 USC § 1983 must be dismissed for failure to allege that the challenged acts resulted from official municipal policy or custom (*Monell v Department of Social Servs. of City of N.Y.*, 436 US 658, 690-691 [1978]). And since the officers were acting within the scope of their employment, which plaintiff does not dispute, the claim of negligent hiring, training and supervision must also fail (*Ashley v City of New York*, 7 AD3d 742 [2004]).

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

ENTERED: FEBRUARY 25, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, Román, JJ.

2238-
2238A

Ruby Cole, et al.,
Plaintiffs-Respondents-
Appellants/Respondents,

Index 302277/07

-against-

1015 Concourse Owners Corp., et al.,
Defendants-Appellants-
Respondents/Appellants,

Andrew M. Cuomo, Attorney General of
the State of New York,
Defendant.

Agins, Siegel, Reiner & Bouklas, LLP, New York (Richard H. Del Valle of counsel), for appellants-respondents/appellants.

Lopez Romero & Montelione, P.C., New York (Richard J. Montelione of counsel), for respondents-appellants/respondents.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered November 20, 2008, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint seeking, inter alia, declaratory relief, unanimously affirmed, with costs. Appeal from order (same court and Justice), entered on or about July 2, 2009, which reduced the undertaking to be posted to secure the preliminary injunction granted in the November 20, 2008 order, unanimously dismissed, without costs, as abandoned.

In 1998, defendant M 1015 G.C. purchased all the unsold cooperative shares in defendant 1015 Concourse Owners Corp., amounting to some 80% of outstanding shares, from the sponsor's

designated successor. M1015 was itself never designated a holder of unsold shares or successor to the sponsor. Consistent with provisions in the offering plan and amendments, plaintiffs, who were tenant shareholders of most of the remaining 20% of the co-op, brought this action to compel M1015 to, inter alia, sell the unsold shares and turn over majority control of the co-op's board of directors.

At least since 1991, the Attorney General, as promulgator of the regulations governing formation and administration of co-ops in New York, has taken the position that a bulk purchaser of unsold shares "will be deemed to be a sponsor." (*See also* 13 NYCRR § 18.3[c][2], promulgated in November 2006, providing that if a sponsor "makes a bulk sale of all or some of its unsold shares, the transferee is bound by [the] sponsor's representation regarding its commitment to sell units as they become vacant.") The Attorney General's rational interpretation of regulations promulgated by his office is entitled to deference (*see Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180, 181 [2006]). Since M1015 indisputably acquired 80% of the co-op's shares in a bulk purchase from the sponsor's successor, it is deemed a sponsor, and thus bound by the sponsor's obligations. Furthermore, the co-op's offering plan and proprietary lease make clear that M1015 is in fact a holder of unsold shares (*see Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 59 [2005]), even though it was never

formally designated as such and has never complied with regulations governing holders of unsold shares.

Plaintiffs have shown a likelihood of success on the merits, irreparable injury in the form of potential destruction of their cooperative lifestyle, and a balancing of the equities in their favor. We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 25, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, Román, JJ.

2239 In re Arlenys B., and Another,

Children Under the Age
of Eighteen Years, etc.,

Aneudes B.,
Respondent-Appellant,

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

Michael S. Bromberg, Sag Harbor, for appellant.

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

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered March 5, 2009, which, upon a finding of respondent's sex abuse of his sister-in-law, and derivative neglect with respect to his daughter, released respondent's sister-in-law to the custody of her non-respondent mother and released the daughter to the custody of respondent and non-respondent mother, with one year of supervision by Administration for Children's Services (ACS), upon the condition that respondent enter a sex offender program, receive a mental health evaluation, cooperate with ACS referrals and comply with an order of protection, unanimously affirmed, without costs.

As neglect proceedings are civil in nature, "the usual rules of criminal evidence do not apply" (*Matter of Nicole V.*, 71 NY2d 112, 117 [1987]), and "[t]he Family Court must balance the due

process rights of an article 10 respondent with the mental and emotional well being of the child" (*Matter of Q.-L.H.*, 27 AD3d 738, 739 [2006]). Here, respondent's due process rights were not violated when his sister-in-law, who was 13 years old at the time of the alleged abuse, was permitted to testify via video conferencing. The record shows that the child's initial testimony, given in open court and in respondent's presence, was interrupted because it was inaudible. The child's psychologist, who recommended that the child testify outside of respondent's presence, confirmed that the child had been intimidated by respondent's gaze and that her initial testimony caused her emotional distress, manifested by sleeping difficulties and an increase in thoughts about her abuse. Family Court properly considered the foregoing together with respondent's right to be present for the child's testimony in utilizing live, two-way video, which allowed all parties to observe the child's testimony and demeanor, gave respondent's counsel an opportunity to cross-examine her, and allowed the court to make a record of her testimony (*see Matter Q.-L.H.*, 27 AD3d at 739; *Matter of Hadja B.*, 302 AD2d 226 [2003]).

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

ENTERED: FEBRUARY 25, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, Román, JJ.

2242 The People of the State of New York, Ind. 5591/07
Respondent,

-against-

Rahsaan Johnson,
Defendant-Appellant.

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

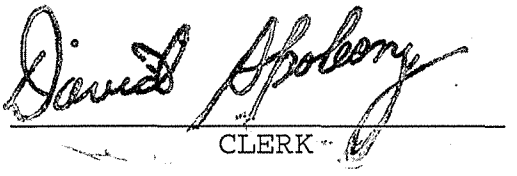
Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James A. Yates, J.), rendered on or about June 26, 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: FEBRUARY 25, 2010



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

Andrias, J.P., Saxe, Sweeny, Freedman, Román, JJ.

2244 Juanita Francis, Index 106841/06
Plaintiff-Respondent,

-against-

107-145 West 135th Street Associates,
Limited Partnership,
Defendant-Appellant.

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

Edelman, Krasin & Jaye, PLLC, Carle Place (Stuart L. Kitchner of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered February 10, 2009, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff asserts that a protruding metal grate covering a heater on a stairwell landing in defendant's apartment building caught the back of her pants, causing her to fall down the stairs. We reject defendant's argument that it is entitled to summary judgment based on plaintiff's deposition testimony that she had previously observed the protruding metal and knew that the building had an elevator that could have been used instead of the stairs. First, plaintiff's testimony that she had frequently observed the protruding metal on many frequent visits to the building does not establish, as a matter of law, that the alleged danger was open and obvious, and we note that there is no

evidence as to how far the metal protruded from the heater (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 [2004]). Second, while an open and obvious danger negates the duty to warn and is relevant to the issue of comparative negligence, it does not negate the duty to maintain the premises in a reasonably safe condition (*see id.* at 72-73; *Caicedo v Cheven Keeley & Hatzis*, 59 AD3d 363 [2009]), and we cannot say, as a matter of law, that the stairwell was in a reasonably safe condition.

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

ENTERED: FEBRUARY 25, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, Román, JJ.

2245 Jose Verdugo, et al., Index 100232/04
Plaintiffs-Appellants-Respondents,

-against-

Seven Thirty One Limited Parnership, et al.,
Defendants-Respondents-Appellants.

Annette G. Hasapidis, South Salem, for appellants-respondents.

Fabiani Cohen & Hall, LLP, New York (Joseph J. Rava of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Carol Edmead, J.), entered September 3, 2008, which, to the extent appealed from, as limited by the briefs, granted so much of plaintiffs' motion as sought a) to estop defendant Bovis from denying that on the day of the accident it violated New York City Administrative Law §§ 27-1009(a) and 27-1018, and b) to dismiss the fourth and fifth affirmative defenses of defendant Seven Thirty One (731) that injury resulted from the acts of another or independent contractor, and denied so much of plaintiffs' motion as sought a) to estop defendant Bovis from denying liability for the accident, b) to dismiss the "act of God" affirmative defense of defendants Bovis and 731, c) to dismiss Bovis' fourth and fifth affirmative defenses, and d) for summary against Bovis, unanimously modified, on the law, the "act of God" affirmative defense dismissed, 731's fourth and fifth affirmative defenses reinstated, and otherwise affirmed, without costs.

On a December midday in 2003, plaintiff Jose Verdugo was struck and injured by a large piece of plywood as he walked on Lexington Avenue. It is uncontested that the plywood blew from a construction area at about the 52nd floor of the building at 731 Lexington Avenue, owned by 731. Bovis was the construction manager, and defendant North Side was a subcontractor responsible for floor construction, which included the pouring of concrete into wooden forms.

After a hearing before the Environmental Control Board, at which Bovis was represented by counsel, an administrative law judge found Bovis in violation of sections of the Building Code having to do with general safety (New York City Administrative Code § 27-1009[a]) and storage of material in elevated open areas (§ 27-1018). Bovis was collaterally estopped from denying these violations in the later court proceedings (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 502-504 [1984]). But while these violations were some evidence of negligence, the issue of whether that negligence was a substantial cause of Jose Verdugo's injury was not before the Environmental Control Board, and the ALJ's ruling did not estop Bovis from contesting liability before a jury (*see Elliott v City of New York*, 95 NY2d 730 [2001]; *Huerta v New York City Tr. Auth.*, 290 AD2d 33 [2001], *appeal dismissed* 98 NY2d 643 [2002]).

The "act of God" affirmative defense should have been

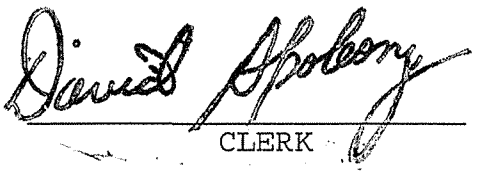
dismissed. The existence of 30 mph winds, which purportedly caused the plywood to become airborne in the first place, was not an "unusual, extraordinary and unprecedented event" (*Prashant Enters. v State of New York*, 206 AD2d 729, 730 [1994]; *see Williams v 520 Madison Partnership*, 38 AD3d 464 [2007]). Furthermore, defendant's meteorologist's claim of wind gusts over 70 mph was unsupported by data or methodology, and thus lacked sufficient foundation (*see Martin v RP Assoc.*, 37 AD3d 1017, 1019 [2007]; *Moss v City of New York*, 5 AD3d 312 [2004]).

Because former §§ 27-127 and 27-128 of the Building Code set forth only nonspecific and general obligations of a building owner (*Ram v 64th St.-Third Ave. Assoc., LLC*, 61 AD3d 596 [2009]), 731 was entitled to its affirmative defense of "acts of another or independent contractor" (*see Morris v Pavarini Constr.*, 9 NY3d 47, 50 [2007]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). Moreover, plaintiffs failed to meet their burden of showing that Bovis had a nondelegable duty of supervising how plywood forms were stacked on the 52nd floor, or that the making of concrete forms on a high-rise construction site is inherently dangerous work (*see generally Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663 [1992]), and thus the same

"independent acts" defense should be available to Bovis. That being the case, the court properly denied summary judgment against Bovis on the issue of liability.

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

ENTERED: FEBRUARY 25, 2010



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Andrias, J.P., Saxe, Sweeny, Freedman, Román, JJ.

2246 In re Yonathan A.,

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

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

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

Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about May 6, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crime of forcible touching, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and imposed a period of supervised probation. The court adopted the least restrictive dispositional alternative consistent with appellant's needs and those of the community, given the seriousness of the underlying sexual conduct, along with appellant's truancy (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Although appellant was already receiving therapy,

probation supervision was necessary because the supervision available under an ACD would have been inadequate, in both scope and duration, to ensure compliance.

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

ENTERED: FEBRUARY 25, 2010

CLERK

Saxe, J.P., Sweeny, Freedman, Román, JJ.

2247 Law Offices of Michael Lamonsoff, Index 115131/05
Plaintiff-Respondent,

-against-

Segan, Nemerov & Singer, P.C.,
Defendant-Appellant.

Diamond & Diamond, LLC, New York (Stuart Diamond of counsel), for appellant.

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

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered November 14, 2008, which, in an action between attorneys involving the division of a contingency fee earned on settlement of the underinsured portion of the client's claim, confirmed the report of the Special Referee allocating 93% of the fee to plaintiff incoming counsel and 7% to defendant outgoing counsel, unanimously affirmed, without costs.

The client was injured while a passenger in a car that was involved in a one-car, out-of-state accident. Outgoing counsel argues that having performed the work necessary to obtain the $25,000 offer under the driver's policy, which exhausted the limits of the driver's policy, it performed all the preparatory work that was necessary for incoming counsel's $1,470,000 settlement of the underinsured claim under the client's policy. We reject that argument and find ample support in the record for the Special Referee's implicit finding that outgoing counsel's

work contributed very little to the underinsured settlement (*see Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705 [1985]; *cf. Diakrousis v Maganga*, 61 AD3d 469 [2009]).

While outgoing counsel prepared a summons and complaint against the driver and sent it to a process server, the next day, after the driver's carrier offered its $25,000 policy and confirmed that there was no excess coverage, outgoing counsel instructed the process server not to serve the driver, and advised the client that the offer should not be accepted without first obtaining the underinsured carrier's consent so as not to jeopardize the underinsured claim that outgoing counsel intended to make. It was incoming counsel, however, that contacted the underinsured carrier's adjuster, who had the authority to give such consent, unlike outgoing counsel, that merely contacted the driver's broker. And it was incoming counsel that resolved the adjuster's concern with underinsured coverage issues, such as whether the driver was a member of the client's household and whether there was additional coverage on other vehicles owned by the driver's family, both conditions to obtaining the underinsured carrier's consent to settlement of the claim against the driver.

Furthermore, unlike outgoing counsel's requests for medical records, incoming counsel's requests were effective, and unlike outgoing counsel, incoming counsel substantiated its

investigation of the possibility of a products liability case. Although the action commenced by incoming counsel against the driver may not have been necessary, and although incoming counsel initially sought the wrong type of arbitration against the wrong insurer, these do not appear to have involved undue expenditures of time. We note the parties' stipulation that incoming counsel was to have no claim to the one-third contingency fee on the $25,000 offer.

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

ENTERED: FEBRUARY 25, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, Román, JJ.

2249 Beauty Plus Stores, II, Inc., Index 111604/07
Plaintiff-Appellant,

-against-

404 6th Avenue Realty Corp.,
Defendant-Respondent.

Meyer, Suozzi, English & Klein P.C., Garden City (Michael J. Antongiovanni of counsel), for appellant.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (John D. D'Ercole of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered December 9, 2008, which, in an action for, inter alia, breach of lease and tortious interference with prospective business relations, granted defendant landlord's motion for summary judgment dismissing plaintiff tenant's complaint, unanimously affirmed, with costs.

Defendant was within its rights under the lease to refuse its consent to a proposed sublease with an entity engaged in the business of selling cell phones and related products, where the parties' prime lease limits use of the premises to "beauty supplies and related sales." "A landlord has a legal right to control the uses to which his building may be put by appropriate lease provisions, which to be effective must be enforced" (*Qwakazi, Ltd. v 107 W. 86th St. Owners Corp.*, 123 AD2d 253, 254 [1986], *lv denied* 68 NY2d 609 [1986]. There is utterly no merit

to plaintiff's argument that because cell phones and related accessories have a fashion component, they fall under the category of "beauty" (*cf. id.* [lease provision limiting use to "sale of comic books, toys, posters, books solely" does not permit sale and rental of video cassettes on theory that all such items share "the element of entertainment value"]).

As the lease itself provided reason for defendant's refusal to consent to the sublease, it does not avail plaintiff to assert that such refusal was "unreasonably, maliciously and wrongfully" withheld so that defendant could directly lease another property to the proposed subtenant (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190-191 [2004] [interference with business relations must be criminal, tortious or for the sole purpose of inflicting harm]).

We have considered plaintiff's other arguments, including that defendant waived any objection to use of the premises for the sale of cell phones, and find them to be without merit.

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

ENTERED: FEBRUARY 25, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, Román, JJ.

2250 In re Andrew Arnold, Index 260282/08
Petitioner-Appellant,

-against-

New York State Division of
Human Rights,
Respondent,

Beth Abraham Health Services, Inc., et al.,
Respondents-Respondents.

Andrew Arnold, appellant pro se.

Jones Day, New York (Terri L. Chase of counsel), for Beth Abraham Health Services, Inc., Yoni Kono, Maureen Connolly and Keri Frazier-White, respondents.

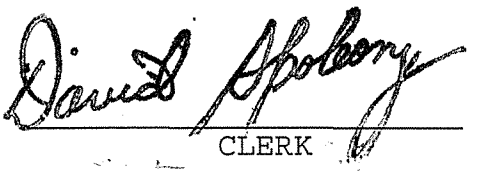
Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered January 6, 2009, which granted the motion of respondents Beth Abraham Health Services, Kono, Connolly and Frazier-White to deny the petition in its entirety, unanimously affirmed, without costs.

In challenging his termination of employment, petitioner introduced his complaint to the New York State Division of Human Rights with an allegation that his employers discriminated against him based on his age. In this Court, his argument is captioned as gender-based discrimination. Nevertheless, his complaint throughout this proceeding has specified only that he was terminated for jury service. The alleged violation of an employee's right to be absent from work for jury duty (Judiciary

Law § 519) does not give rise to a private right of action (*Gomariz v Foote, Cone & Belding Communications*, 228 AD2d 316 [1996]).

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

ENTERED: FEBRUARY 25, 2010



CLERK

FEB 25 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
Richard T. Andrias
Eugene Nardelli
Rosalyn H. Richter, JJ.

1638
Ind. 403832/05
590447/07

Sianna Singh,
Plaintiff-Respondent,

-against-

United Cerebral Palsy of
New York City, Inc., et al.,
Defendants-Appellants,

City of New York,
Defendant.

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United Cerebral Palsy of
New York City, Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Miric Industries Incorporated, et al.,
Third-Party Defendants-Appellants.

Appeals from an order of the Supreme Court, New York County (Debra A. James, J.), entered February 13, 2009, which, to the extent appealed from, denied defendants United Cerebral Palsy of New York City, Inc. and United Cerebral [*sic*] of New York City Community Mental Retardation Services Company, Inc.'s motion for summary judgment dismissing the complaint, or, in the alternative, for conditional summary judgment on their common-law indemnification claims against third-party defendants Miric Industries Incorporated and Reliable Door Corp.; denied Miric's cross motion for summary judgment dismissing plaintiff's complaint and the third-party complaint; and denied Reliable's cross motion for summary judgment dismissing the third-party complaint.

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen and Curt Schiner of counsel), for United Cerebral Palsy appellants/respondents.

Cohen, Kuhn & Associates, New York (James V. Sawicki of counsel), for Miric Industries Incorporated, appellant.

Law Offices of Charles J. Siegel, New York (Christopher A. South of counsel), for Reliable Door Corp., appellant.

Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), and Cassisi & Cassisi, P.C., Mineola, for respondent.

RICHTER, J.

On December 5, 2003, plaintiff Sianna Singh was walking with a colleague in an enclosed walkway between two buildings owned and occupied by defendants United Cerebral Palsy of New York City, Inc. and United Cerebral [*sic*] of New York City Community Mental Retardation Services Company, Inc. (collectively UCP). The automatic swinging doors leading into the second building were open as plaintiff approached. Plaintiff's colleague, who was walking one or two steps ahead of plaintiff, walked through the doors without incident. As plaintiff walked through, the doors allegedly closed and hit her on her right and left shoulders, causing injury. According to plaintiff, the automatic doors' motion sensor, which was mounted over the top of the doors, was defective because it failed to detect her as she walked through the doorway.

It is undisputed that UCP's maintenance staff was not responsible for doing repairs on the automatic doors or the sensor mechanism. Instead, UCP contacted defendant/third-party defendant Miric Industries Incorporated on an as-needed basis to

perform work at the building.[1] If Miric received a call about the doors, Miric called third-party defendant Reliable Door Corp. to actually perform the work. Although Reliable's witness did not recall making any repairs on the doors, an invoice dated May 14, 2002 indicates that Reliable adjusted the motion sensor on that date.

Plaintiff alleges that UCP had both actual and constructive notice of the alleged defect in the automatic doors and was otherwise negligent in failing to conduct regular inspections of the doors. In particular, plaintiff contends that UCP failed to maintain proper alignment of the electronic beam that causes the doors to open and close. In addition, plaintiff invokes the doctrine of res ipsa loquitur, contending that this type of accident would not normally occur absent negligence. UCP commenced a third-party action against Miric and Reliable, asserting claims for contribution or indemnification or both.

UCP moved for summary judgment dismissing plaintiff's complaint or in the alternative for conditional summary judgment on its common-law indemnification claims against Miric and

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[1]Although the case caption that appears on the record on appeal does not designate Miric as a defendant, the record contains a second amended verified complaint naming Miric as a defendant and plaintiff's brief states that plaintiff brought a direct claim against Miric and that Miric was therefore a direct defendant as well as a third-party defendant.

Reliable. Miric cross-moved for summary judgment dismissing the complaint and the third-party complaint as against it, and Reliable cross-moved for summary judgment dismissing the third-party complaint as against it. Supreme Court denied all the motions. We modify to the extent of granting Miric's cross motion for summary judgment.

A property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it (*Mandel v 370 Lexington Ave., LLC*, 32 AD3d 302, 303 [2006]). To charge a defendant with constructive notice, the defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant's employees to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

UCP met its burden of showing that it neither created nor had actual or constructive notice of the alleged defect in the doors' sensor mechanism, and plaintiff failed to raise an issue of fact in opposition (*see Narvaez v New York City Hous. Auth.*, 62 AD3d 419 [2009], *lv denied* 13 NY3d 703 [2009]; *Clark v New York City Hous. Auth.*, 7 AD3d 440 [2004]). Sam Radoncic, UCP's building services director, testified at his deposition that he was responsible for addressing complaints about the doors.

Radoncic, who passed through the doors several times each week, never observed them malfunction in any way. Nor in the five years before plaintiff's accident did anyone inform Radoncic of any incidents where the doors closed on someone.

Although plaintiff claims to have observed problems with the automatic doors at some time prior to her accident, she conceded that she never complained to her supervisor or to the maintenance personnel at UCP. Likewise, there is no evidence that plaintiff's coworkers, who, according to plaintiff, "got stuck" between the doors, made any complaints about those incidents (*see Levine v City of New York*, 67 AD3d 510 [2009]).

Plaintiff's claim that UCP was negligent in failing to conduct regular inspections of the motion sensor is unavailing. The duty of a property owner to reasonably inspect premises arises in situations distinct from the facts here, such as where a statute imposes the duty (*see Watson v City of New York*, 184 AD2d 690 [1992]; *Showverer v Allerton Assoc.*, 306 AD2d 144 [2003]) or where an object capable of deteriorating is concealed from view (*see Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 501 [2007], *lv denied* 9 NY3d 809 [2007]). Moreover, although plaintiff's expert identified the defect as the inadequate positioning of the sensor, there was no showing that a routine inspection would have uncovered that specific problem

(*see Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 800 [2003] ["failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect" (internal quotation marks and citation omitted)]). Thus, we decline to find, under these circumstances, that UCP had a duty to regularly inspect the sensor mechanism.

Nevertheless, we conclude that plaintiff raised issues of fact as to the applicability of the doctrine of res ipsa loquitur. In order to submit a case to a trier of fact based on this theory of negligence, a plaintiff must establish that the event (1) was of a kind that "ordinarily does not occur in the absence of someone's negligence; (2) [was] caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) [was not] due to any voluntary action or contribution on the part of the plaintiff" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006] [internal quotation marks and citations omitted]). UCP does not dispute that the first factor was satisfied. Nor does it point to any proof in the record that plaintiff contributed in any way to the accident.

UCP focuses on the second factor, arguing that the sensor mechanism was not within its exclusive control because Reliable was responsible for performing repair work on the doors. However, res ipsa loquitur does not require sole physical access

to the instrumentality causing the injury and can be applied in situations where more than one defendant could have exercised exclusive control (*Banca Di Roma v Mutual of Am. Life Ins. Co., Inc.*, 17 AD3d 119, 121 [2005]). In addition, there was no exclusive maintenance contract between UCP and Reliable; rather Reliable performed work on the doors on an as-needed basis. We find that the fact that Reliable may have occasionally performed repair services on the sensor mechanism does not, as a matter of law, remove the sensor from UCP's exclusive control (*see Stone v Courtyard Mgt. Corp.*, 353 F3d 155, 160 [2d Cir 2003]).

Thus, this case stands in stark contrast to *Hodges v Royal Realty Corp.* (42 AD3d 350 [2007]), an elevator accident case in which we declined to apply res ipsa loquitur against a building's managing agent. We found that the agent did not have exclusive control over the elevator since the building owner, by way of a written service contract, had ceded all responsibility for the daily operation, repair and maintenance of the elevator to an outside company. Since there is no such exclusive service contract here, an issue of fact exists as to UCP's exclusive control of the sensor mechanism.

Finally, UCP argues that it lacked exclusive control because the doors were used by the public on a daily basis and anyone walking through them could have done something to affect the

doors' sensor. In *Ianotta v Tishman Speyer Props., Inc.* (46 AD3d 297, 299 [2007]), we declined to dismiss a similar res ipsa loquitur claim in an elevator door-strike case because the infrared device controlling the door was out of the public's access. Likewise, here, since the motion sensor was located on top of the automatic doors, there is no real likelihood that the public could have altered it (*see Pavon v Rudin*, 254 AD2d 143 [1998] ["The appropriate target of inquiry is whether the broken component itself was generally handled by the public, not whether the public used the larger object to which the defective piece was attached."]). Because issues of fact exist as to the applicability of the doctrine of res ipsa loquitur, UCP is not entitled to summary judgment dismissing the complaint.[2]

The court correctly denied UCP's and Reliable's respective motions for summary judgment on the third-party complaint because there are triable issues of fact as to whether plaintiff's accident was due to Reliable's negligence (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]; *Mendez v Union Theol. Seminary in City of N.Y.*, 17 AD3d 271, 272 [2005]). The evidence in the record shows that Reliable was the only entity that performed any

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[2] *Marszalkiewicz v Waterside Plaza, LLC* (35 AD3d 176 [2006]) does not require a contrary result. In that case, there was no indication what the defective component was or whether it was outside the public's reach.

work on the doors. Although Reliable's witness could not recall whether the company repaired the doors before plaintiff's accident, a work invoice shows that, in May 2002, Reliable adjusted the motion sensor, the very instrument in issue here. In light of this evidence and plaintiff's testimony that she had observed problems with the doors prior to her accident, Reliable's negligence, or lack thereof, cannot be determined as a matter of law.

However, the court should have granted Miric's cross motion for summary judgment because there was no proof that Miric performed work on the automatic doors. Nor was there any showing that Miric agreed to oversee the quality of or inspect Reliable's work. Miric's role was merely to make a phone call to Reliable. Simply put, there is no evidence that Miric in any way caused or contributed to plaintiff's injuries.

We have considered the parties' remaining contentions and find them without merit.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered February 13, 2009, which, to the extent appealed from, denied UCP's motion for summary judgment dismissing the complaint or in the alternative for conditional summary judgment on its common-law indemnification claims against Miric and Reliable, denied Miric's cross motion for summary

judgment dismissing plaintiff's complaint and the third-party complaint, and denied Reliable's cross motion for summary judgment dismissing the third-party complaint, should be modified, on the law, to grant Miric's cross motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint and third-party complaint as against Miric.

All concur.

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

ENTERED: FEBRUARY 25, 2010

CLERK