SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 8, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2276 & M-5991 Claude Williams, Plaintiff-Respondent, Index 117924/04

-against-

Cindy Hooper, et al., Defendants-Appellants.

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Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellants.

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

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Judgment, Supreme Court, New York County (Judith J. Gishe, J.), entered April 27, 2009, after a jury trial, awarding plaintiff $1.8 million for past and future pain and suffering, reversed, on the law, without costs, the judgment vacated and the matter remanded for a new trial on liability.

Even assuming that the jury reasonably could find that a bus struck plaintiff after its driver ran a red light at the intersection of Madison Avenue and 125th Street while proceeding

north, the evidence unquestionably established that plaintiff was struck while he was in Madison Avenue itself, not on the sidewalk on the east side of the avenue, some seven feet north of the crosswalk. The jury could not rationally have found fault on the part of the bus driver unless it accepted plaintiff's theory that the bus was traveling "too close" to the curb as it approached the bus stop. The notion that the bus was "too close," however, is founded solely on the testimony of plaintiff's expert, that a bus driver pulling up to a bus stop should "[g]ive [her]self a cushion of space, six [feet] a lane" before pulling over to the curb. The expert's opinion about this safety cushion was supported by nothing (*see Jones v City of New York*, 32 AD3d 706, 707 [2006] [rejecting expert's opinion regarding ostensible safety practice because "no support was offered for th(e) assertion, either in the form of a published industry or professional standard or in the form of evidence that such a practice had been generally accepted in the relevant industry"]). But as defendant Transit Authority failed to object to the expert's testimony, the point must be conceded to

plaintiff for purposes of this appeal.[1] It should be stressed, however, that there is *no* evidence that the bus was closer than two feet, seven inches from the curb when plaintiff was struck. Even more importantly, plaintiff's own theory of the case, a theory that is compelled by the physical evidence and is consistent with the testimony of independent witnesses, was that plaintiff was hit immediately after he stepped off the sidewalk and into the path of the bus on Madison Avenue. As is discussed below, it is indisputable, moreover, that plaintiff stepped off without looking when he was about seven feet north of the crosswalk.

Although plaintiff points to inconsistencies in the statements given by the driver, those inconsistencies are not affirmative proof of her negligence (*see Barnes v City of New*

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[1]On appeal, plaintiff's sole argument is that "this 'cushion of space' doctrine is clearly supported" by *Bello v New York City Tr. Auth.* (50 AD3d 511 [2008]). *Bello* does not provide a shred of support for the expert's opinion. In *Bello*, we held that the jury could conclude that a bus driver should have been alert to the possibility that "one of the rowdy children on the sidewalk, who were pushing each other, would push another person into the bus" (*id.* at 511). As the Transit Authority observes, "*Bello* and its solicitousness for the limited capacities of a child has nothing to say to a case revolving around the irresponsibility of a mature adult." *Bello* cannot rationally be thought to support the expert's sweeping opinion that such a safety cushion should be observed in all circumstances.

York, 44 AD3d 39, 47 [1st Dept. 2007] [Sullivan, J.]). In his brief, plaintiff refers to "damning conclusions" regarding the driver's conduct contained in an investigatory report prepared by a Transit Authority supervisor. It is clear, however, that the portions of the report to which plaintiff refers were not admitted into evidence. No mention of those conclusions was made by any of the parties during their summations. If the findings were in evidence, it is simply inconceivable that plaintiff's counsel nonetheless made no mention of them.

The first reason we should reverse is that plaintiff should not have received the benefit of a jury charge under the *Noseworthy* doctrine (*Noseworthy v City of New York*, 298 NY 76 [1948]). That instruction, which permits a plaintiff to prevail on a lesser degree of proof, is borne of necessity. It mitigates the unfairness of effectively foreclosing recovery by a plaintiff who is otherwise unable to present a case because of amnesia stemming from the very accident or event for which he seeks to hold the defendant liable. But the potential unfairness to the defendant from a *Noseworthy* charge also is apparent and deserving of the law's solicitude. As we have held, "It is only where the memory loss has effectively prevented a plaintiff from describing the occurrence that invocation of the [*Noseworthy* doctrine] is

warranted" (*Jarrett v Madifari*, 67 AD2d 396, 403 [1979]). In ruling that a *Noseworthy* instruction should not have been given, we stated as follows:

> "[O]n this record it is clear that plaintiff . . ., although he apparently suffers from a memory defect, is not entitled to application of this [the *Noseworthy*] rule. Patently, said plaintiff testified in some detail at an examination before trial as to the occurrence and in much less detail at the trial. His answers, embodied in his deposition, were read at trial. Thus, in large measure, plaintiff was able to give to the trial court his version of the occurrence . . . Whether that description proceeds by way of trial testimony or testimony at an examination before trial is irrelevant" (*id.*).

Similarly, in *Jarvis v LaFarge N. Am., Inc.* (52 AD3d 1179 [2008]), the Fourth Department held that the trial court properly denied the *Noseworthy* instruction requested by the plaintiff motorcyclist, who "was unable to recall the details of the accident" (*id.* at 1180) because of the retrograde amnesia he sustained (*id.* at 1181). The court stressed that "[a]ny gaps in plaintiff's recollection of the accident could be pieced together from plaintiff's trial testimony and the testimony of nonparty eyewitnesses" (*id.* [internal quotation marks and brackets omitted]).

Given plaintiff's deposition testimony, the *Noseworthy*

instruction was a manifest error. He recalled that the weather that day was "[f]air," that the accident occurred at 9:15 and that he had parked his car and crossed the street to call a friend at a telephone booth with two phones right behind a mailbox on the east side of Madison; in addition to recalling the location of the accident, he recalled that he had been unable to reach his friend, got his money back and turned to the left while he was on the sidewalk; he recalled that when he turned he was on the sidewalk and "[t]hat is when the bus hit me, struck me inside the head." Asked if he saw the bus before it hit him, he answered, "No." Asked where he was looking when he was hit, his recollection enabled him to testify, "I was looking straight. I don't know." Asked again, he was able to testify, "When the bus hit me, I was looking – when it hit me, I was looking straight." By "straight," he meant "across the street." When asked, "did you see what portion of the bus came into contact with you?," he first answered, "The mirror. The mirror struck me." But when asked, "Did you actually see the mirror come into contact with you?," he expressed no uncertainty and answered, "No. When I turned, made one step back to my left, that is when I saw the bus. It struck me on the side of the head." Thus, he even recalled seeing the bus at virtually the moment of impact. He

was unequivocal that it was the mirror that hit him, "It struck me, you know, side of the head." Asked if he walked into the side of the bus, his answer was "No." In response to specific questions, he recalled that he did not hear a horn honk before he was hit and that he had not stepped off the curb.

But although that deposition testimony is alone sufficient to compel the conclusion that plaintiff was not entitled to a *Noseworthy* instruction (*see Jarrett*, 67 AD2d at 403, *supra* [whether the plaintiff's description of the occurrence "proceeds by way of trial testimony or testimony at an examination before trial is irrelevant"]), there is much more. Plaintiff also testified at a General Municipal Law § 50-h hearing, at which he gave essentially the same testimony about the accident itself, about where he was (on the sidewalk) and what hit him (the mirror) and about not hearing the bus, expressing uncertainty only about whether it was the mirror on the left or the right side of the bus. That plaintiff professed at trial not to recall whether he was completely on the sidewalk or partly on the street is of no moment. It does not negate the fact that his deposition and § 50-h testimony demonstrate that he "was able to give to the trial court his version of the occurrence" (*id.*).

At trial, too, plaintiff was able to present his version of

the events. Asked how the accident occurred, he recalled seeing the mirror just before he was struck: "All I saw is just the mirror of the bus when it came back and knocked me down." He was able to recall what he had been doing just before he was hit: after using the phone, he "stepped back to the curb, close to the curb." Indeed, he recalled that he "was back up close to the curb . . . real close to the curb." Moreover, he recalled that he had been standing between the mailbox and the telephones. In addition, his recollection also was good enough for him to tell the jury that he had not consumed any alcohol that day and had not stopped anywhere to drink alcohol. Thus, plaintiff was not unable to muster any response to the testimony of the triage nurse, consistent with the contemporaneous notes he prepared after plaintiff was taken to the hospital, that plaintiff had told him he was intoxicated.

Although the concurrence cites *Sala v Spallone* (38 AD2d 860 [1972]), that decision only exposes another fatal defect in plaintiff's position. In *Sala*, the Second Department held that a *Noseworthy* instruction should be given "if the jury is satisfied, from the medical and other evidence presented, that [the plaintiff] suffers from a loss of memory that makes it *impossible* for him to recall events at or about the time of the accident and

that the injuries he received as a result of the accident were a substantial factor in causing his memory loss" (*id.* [emphasis added]). Here, it plainly was not impossible for plaintiff to recall events at or about the time of the accident. The neurologist who testified on behalf of plaintiff certainly never so testified. Nor did he offer anything remotely like an opinion that the prior testimony given by plaintiff was unreliable on account of the injuries he sustained. In fact, when asked to explain the diagnosis of "anterio/retrograde amnesia," the neurologist testified only that "anterio/retrograde amnesia is you don't remember things that happened *subsequent* to the accident – *after* the accident" (emphasis added). We might indulge the assumption that the jury nonetheless realized that this testimony mistakenly described only the anteriograde amnesia component of the diagnosis and that plaintiff's retrograde amnesia referred to an inability to remember events occurring before the accident. But even so, the jury heard no evidence that plaintiff's memory had been impaired so as to render unreliable his hearing and deposition testimony about the events prior to the accident. And, of course, when he gave that testimony, plaintiff never testified that he thought that the

details that he recalled might be wrong because of his injuries.[2]

The trial court concluded that the instruction was proper in significant part because the core of the account plaintiff gave at his deposition and § 50-h testimony was contradicted by the physical evidence. That is, and as plaintiff's counsel acknowledged in his opening statement, plaintiff could not have been struck by the mirror because it was too high up to have come into contact with plaintiff's head. According to the trial court, a *Noseworthy* instruction was warranted because of the "competent medical evidence that plaintiff did have amnesia and his version of the events was at odds with most of the eyewitnesses as well as not detailed." Even putting aside the infirmity noted above in the testimony about plaintiff's amnesia, the trial court erred because plaintiff did testify in detail about the occurrence. The trial court's finding to the contrary is manifestly wrong. As noted, plaintiff's testimony that he was struck by the mirror of the bus is what was at odds with the

[2]For these additional reasons, the *Noseworthy* instruction was a clear error. We need not consider whether it also was erroneous because of the testimony of the nonparty eyewitnesses (*Jarvis*, 52 AD3d at 1181, *supra* ["Any gaps in plaintiff's recollection of the accident could be pieced together from plaintiff's trial testimony *and* the testimony of nonparty eyewitnesses" (internal quotation marks and brackets omitted; emphasis added)]).

accounts given by other eyewitnesses (and with the objective fact that he could not have been hit by the mirror). But it scarcely follows that his testimony about this one detail is sufficient to warrant a *Noseworthy* instruction. To the contrary, the precedents discussed above make clear that it is not.

Moreover, there certainly are other possible explanations, i.e., ones other than amnesia, for plaintiff's repeated insistence that he was hit by the mirror. If the last thing plaintiff saw was the mirror, his testimony that he was struck by the mirror may have been the result of a simple mistake, rather than a brain injury. Or, as the Transit Authority argues, "Plaintiff would appear far less blameworthy if he were on the curb and the projecting mirror of a passing bus s[truck] him in the head than if he had walked off the curb . . . and . . . into [the bus] doors." But in any event, regardless of whether plaintiff was mistaken or lied to avoid admitting he had stepped off the curb and into the street without looking, the crucial fact is that there was *no* medical testimony to the effect that this or any other detail to which plaintiff testified was

unreliable because of his head injury.[3]

The jury's irrational finding of no comparative negligence is the second and independent reason why a new trial is necessary. Plaintiff's efforts to uphold that finding are meritless. Except in one respect, this case is indistinguishable from *Splain v New York City Tr. Auth.* (180 AD2d 454 [1992], *lv denied* 80 NY2d 759 [1992]). In *Splain*, "[p]laintiff's evidence demonstrated that he was on the sidewalk at the curb in the middle of a block when, without turning his head to look for traffic, he suddenly stepped off, almost instantly colliding with the side of a Transit Authority bus travelling at a speed of from 10 to 15 miles per hour." We held, of course, "that these facts do not establish any actionable negligence" (*id.*). *Splain* is distinguishable only on the ground that the safety-cushion theory of liability was not advanced. But the presence of that theory in this case does not absolve plaintiff of all liability.

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[3]Plaintiff is wrong to the extent he contends that the *Noseworthy* instruction was proper because the bus driver had better knowledge than he of what happened. Establishing that the defendant's knowledge of the relevant facts is superior to the plaintiff's is a necessary condition that a plaintiff with retrograde amnesia must satisfy to obtain a *Noseworthy* instruction. But it is not a sufficient condition. Neither *Walsh v Murphy* (267 AD2d 172 [1st Dept. 1999]) nor any other case holds otherwise.

The decision of the Court of Appeals in *Rucker v Fifth Ave. Coach Lines* (15 NY2d 516 [1964], *cert denied* 382 US 815 [1965]), also is instructive. In *Rucker*, the Court of Appeals held, "upon the ground, fully developed in the dissenting opinion at the Appellate Division, that the plaintiff failed, as a matter of law, to establish actionable negligence" (*id*. at 517). As Justice Steuer stated in that dissenting opinion:

> "The claim that the [bus] driver on seeing the plaintiff standing out from the curb should have anticipated that she might at any time have proceeded into the street and hence into the path of his bus, and have slowed down, assumes a rule of conduct utterly at variance with street conditions and, if followed in practice, would undoubtedly so disrupt traffic that the streets would become well nigh unusable for vehicles" (*Rucker*, 19 AD2d 598, 599 [1963]).

If there were such a duty:

> "A driver would be obliged to stop or slow down to the extent that he could stop in time, his progress would be so affected at practically every corner he approached that vehicular traffic would be impeded to an intolerable extent" (*id*.).

But the most critical point is that, even assuming that the bus driver was negligent, plaintiff's own negligence is just indisputable. As noted earlier, plaintiff's own theory of the case is that he stepped off the curb and into the street.

Plaintiff's counsel expressly so conceded at oral argument of this appeal. At trial, plaintiff's expert gave his opinion as to how the accident happened: "My opinion is that the bus is traveling adjacent to the curb, very close to the curb, Mr. Williams turns and takes one step and has an accident . . ." Moreover, it is indisputable that plaintiff stepped into Madison Avenue without looking. Apart from plaintiff's own testimony that he was looking "straight" (i.e., "across the street," to the west and not downtown), there is common sense. Who would step off the curb and into a bus after looking and seeing it coming? Other indisputable facts supportive of a finding of comparative negligence are that plaintiff was some seven feet north of the crosswalk, and that the bus was not closer than two feet, seven inches from the curb, when the bus hit plaintiff.

Although no additional citation of authority is necessary, plaintiff's conduct was manifestly negligent (*see e.g. Pinto v Selinger Ice Cream Corp.*, 47 AD3d 496 [2008]). Albeit very infrequently, juries sometimes make findings that are utterly without foundation in the law or the evidence. This is one such case, and the finding of no comparative negligence is so irrational as to require that we unconditionally direct a new trial (*see e.g. D'Onofrio-Ruden v Town of Hempstead*, 29 AD3d 512

[2006]), rather than order a new trial unless plaintiff agreed to a specific share of culpability (*see e.g.*, *Streich v New York City Tr. Auth.*, 305 AD2d 221 [2003].

Most of the remaining issues may be dealt with more summarily. Even assuming for the moment that the Transit Authority's challenges to the sufficiency of the evidence have been waived by its failure to move under CPLR 4401 for a directed verdict at the close of plaintiff's case (*but see Siegel, NY Prac.* § 405 [4th ed]), the Transit Authority's weight-of-the-evidence arguments are properly before us. With respect to the theory of liability premised on the claim that the bus driver ran a red light, it is supported only by conjecture. The ambulance driver, who also had been proceeding north on Madison Avenue and saw the accident, gave no such testimony; indeed, *no* witness testified that the bus ran a red light. But in any event, this theory of liability is fatally flawed for another reason. Plaintiff was some seven feet north of the crosswalk -- the evidence on this score is uncontested -- and he stepped off the curb without looking. Thus, the color of the light and the

precise speed of the bus are irrelevant[4] (*Sheehan v City of New York*, 40 NY2d 496 [1976]). A finding of liability on the safe-cushion theory advanced by plaintiff's expert, however, is supported by legally sufficient evidence. Accordingly, we need not decide whether it is supported by the weight of the evidence, as the Transit Authority would not be entitled in any event to dismissal of the complaint.

The Transit Authority is entitled to no relief on account of its claim that plaintiff unilaterally amended the notice of claim to assert that he was hit not by the mirror but by some other front part of the bus. Contrary to the Transit Authority's claim, plaintiff did not thereby advance a new and distinct theory of liability (*cf. Monmasterio v New York City Hous. Auth.*, 39 AD3d 354, 356 [2007]). As there should be a new trial, we briefly address the Transit Authority's argument that a missing document charge should not have been given with respect to the missing color photographs. Black-and-white versions of the photographs were admitted; the Transit Authority employee who

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[4]At most, based on unpersuasive extrapolations, plaintiff's expert opined that the bus was moving at up to 18 miles per hour when it hit plaintiff (as opposed to 5 to 10 miles per hour estimated by the ambulance driver). The opinion of plaintiff's expert on the speed of the bus, however, is relevant to and supports the safe-cushion theory.

took the photographs acknowledged that he saw blood, that the blood was on the sidewalk and that blood was not visible on the black-and-white photographs but would have been visible in the missing color photographs. To be sure, the Transit Authority provided no explanation at all for the absence. But a missing document charge should not be given unless the document bears on a material issue at trial (*cf. People v Gonzalez*, 68 NY2d 424, 427 [1986]). We need not (and should not, given the sparseness of the record on the question) resolve the question of whether the color photographs bear on a material issue at trial concerning precisely where the bus hit him. The parties should focus on that question in the event the issue arises at the new trial.

All concur except Saxe and Acosta, JJ. who concur in a separate memorandum by Saxe, J. as follows:

SAXE, J. (concurring)

Like my colleagues, I would reverse and remand for a new trial. I write separately, however, because I would reverse on different grounds.

Unlike the majority, I do not view the trial court's use of the *Noseworthy* charge (*see Noseworthy v City of New York*, 298 NY 76 [1948]) as improper. On the contrary, I perceive a sound basis for the court's finding that plaintiff had suffered memory loss (*see Sala v Spallone*, 38 AD2d 860 [1972]) that effectively prevented him from accurately recalling the events (*see Jarrett v Madifari*, 67 AD2d 396 [1979]). As to defendants' contention that plaintiff should have been precluded from presenting for the first time at trial a new description of the accident, based on the assertions in his notice of claim, I join the rest of the bench in rejecting that challenge.

In my view, a new trial is necessary because the jury's liability findings were against the weight of the evidence, both on the issue of the bus driver's negligence and on the issue of the plaintiff's own negligence. As to plaintiff's comparative negligence, there was no dispute that plaintiff stepped onto Madison Avenue north of the crosswalk at 125th Street without first checking for oncoming vehicles, an act that qualifies as

negligent. The driver's various contradictory statements about how the accident happened do nothing to extinguish the undisputed fact that plaintiff stepped out into the roadway without first checking for oncoming vehicles. The jury's decision to attribute no comparative negligence to plaintiff under such circumstances is inexplicable.

As to plaintiff's claim of the driver's negligence, it rested too heavily on assertions unsupported by evidence or law to be permitted to stand. One claimed basis of liability was the assertion by plaintiff's expert that a bus driver ought to maintain a six- to eight-foot "cushion" of space between the bus and the curb until it reaches the bus stop, at which point it should pull in adjacent to the curb. There is no basis in law for the imposition of such a duty on bus drivers; there is no such regulatory or industry standard. Indeed, there are a number of reasons why imposing such a duty on bus drivers would be inadvisable. Even if defendants failed to sufficiently challenge the theory proffered by plaintiff's expert as unfounded, we should rule on the issue in the interest of justice in order to avoid reliance on that reasoning for future liability claims against bus companies and drivers.

Another invalid basis proffered by plaintiff as support for

the claim of negligence against defendants was the assertion that the bus driver ran a red light at 125th Street. There was no testimony either so stating or supporting such an inference. The eyewitness ambulance driver who was also heading northbound on Madison Avenue, but was stopped in the far right lane at a red light on 125th Street, merely stated that defendant's bus had proceeded northbound towards the bus stop just north of where plaintiff was standing, that plaintiff stepped off the sidewalk onto Madison Avenue, and that the bus then struck plaintiff and knocked him back onto the curb. Nothing in what he or any other witness described indicated in any way that the bus had run the red light.

In any event, the assertion that the traffic signal at 125th Street was red when defendant bus driver drove through the intersection is meaningless, since plaintiff was seven feet north of the crosswalk, and stepped into the roadway without checking either the light or the road for oncoming vehicles. The color of the traffic light would have had virtually no bearing on the occurrence of the accident.

Finally, the driver's many contradictory statements may justify a rejection of the driver's credibility, but they cannot substitute for an affirmative showing of negligence.

Although defendants' failure to move for a directed verdict pursuant to CPLR 4401 at the close of evidence precludes the dismissal on appeal (*see Miller v Miller*, 68 NY2d 871 [1986]) to which defendants claim entitlement under *Splain v New York City Tr. Auth.* (180 AD2d 454 [1992], *lv denied* 80 NY2d 759 [1992]), both plaintiff's excessive reliance on unsupported reasoning, and the jury's failure to find any comparative negligence despite plaintiff's undisputed conduct, warrant a reversal and a remand for a new trial on liability.

The Decision and Order of this Court entered herein on November 9, 2010 is hereby recalled and vacated (*see* M-5991 decided simultaneously herewith).

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

ENTERED: MARCH 8, 2011

CLERK

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4267 Spread NYC LLC, Index 107038/10
Plaintiff-Appellant,

-against-

Jason Lee,
Defendant-Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Doris Ling-Cohan, J.), entered on or about September 28, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 17, 2011,

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3067 The People of the State of New York, Ind. 5759/05
Respondent,

-against-

Antonio Alvarado,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered October 12, 2007, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of 5 years, affirmed.

Since defendant's plea withdrawal application was made on different grounds from those asserted on appeal, his claim that the plea was rendered involuntary by the court's allegedly inaccurate description of defendant's sentencing exposure is unpreserved (*see People v Cerveira*, 6 AD3d 294 [2004], *lv denied* 3 NY3d 704 [2004]), and we decline to review it in the interest of justice. Furthermore, defendant did not make a CPL 440.10 motion, and to the extent his argument raises issues concerning

the advice provided by counsel, it is unreviewable on the present, unexpanded record. As an alternative holding, we find that the record, including the transcript of a proceeding held one week before the plea, establishes that defendant received all the sentencing information he needed in order to make an intelligent choice among the available courses of action (*see People v Ford*, 86 NY2d 397, 403 [1995]).

Defendant's valid waiver of his right to appeal forecloses review of his claim that his second felony drug offender adjudication was procedurally defective (*see People v Callahan*, 80 NY2d 273, 281 [1992]; *see also People v Samms*, 95 NY2d 52, 56-58 [2000]). Aside from the waiver, this claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

Defendant got precisely the sentence for which he bargained. But his first claim is that once the terms of the plea bargain changed during the plea proceeding so that he no longer was required to admit to having been convicted previously of a violent felony offense and instead was required only to admit to having been convicted previously of a felony, the court was obligated to inform him of the sentencing range applicable to a class C drug felony committed by such a second felony offender (the "new sentencing range"). Although the plea bargain permitted defendant to avoid the greater sentences that could have been imposed if he was convicted after trial of the class B felony charged in the indictment (he was fully and accurately informed about all the possible sentences that could be imposed following a conviction for the class B felony), he maintains that the court should have informed him of the new sentencing range. In his brief, defendant does not explain how this range (rather than the ranges applicable to the class B felony with which he was charged, the range applicable to a persistent felony offender and the specific sentence to which he agreed), could be relevant

to his decision to plead guilty.[5] Nonetheless, defendant claims that his guilty plea was not knowingly, voluntarily and intelligently entered because of the court's failure so to inform him; he likens the new sentencing range to the direct consequences of a plea about which a court must inform a defendant (*see People v Catu*, 4 NY3d 242 [2005]). Moreover, defendant also argues that he was not required to move to withdraw his plea on this ground.

Defendant does not ask that we grant the only relief that is appropriate upon sustaining a claim that a guilty plea was not knowingly, voluntarily and intelligently entered -- vacatur of the plea (*People v Hill*, 9 NY3d 189, 191 [2007], *cert denied* 553 US 1048 [2008]). Rather, he asks only that we remand for further proceedings to determine whether he wishes to withdraw his plea. Given that vacatur of the plea would expose defendant anew to the greater sentences his guilty plea avoided, it certainly is understandable that he does not ask us to vacate it. In essence,

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[5]At oral argument, defendant argued that informing him about the new sentencing range was necessary because defendants "sometimes get more than the promised sentence." As defendant did not get more than the promised sentence and a defendant who did would have the right to get his plea back on request, it is not obvious why informing him about the new sentencing range was essential.

he is asking us to declare that he has the right to demand that his plea be vacated at a future date if he is so inclined. But because defendant might not ask the trial court to vacate the plea, the determination he would have us make "would be merely advisory since it can have no immediate effect and may never resolve anything" (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]; *see also Hirschfeld v Hogan*, 60 AD3d 728, 729 [2009], *lv denied* 14 NY3d 706 [2010] [declaration that both legal services provider and voluntary patient at mental health facility have the right to request the patient's release "constituted an impermissible advisory opinion, as it will have no immediate effect and may never resolve any actual dispute or controversy"]). At oral argument, defendant's attorney argued that defendant could not intelligently decide whether to ask that the plea be vacated because he does not know whether this Court will rule in his favor on this claim or on the third claim he raises (that we should vacate the sentence and remand for a new sentencing proceeding because he was not given an opportunity to contest the allegations of the second felony offender statement). However difficult the decision may be, defendant either does or does not want his plea back; the possibility that he might prevail on his claim of entitlement to a remand for a new

sentencing proceeding does not prevent him from making that decision. In any event, we are not permitted to issue advisory opinions (*New York Pub. Interest Research Group*, 42 NY2d at 529-530).

Defendant's second claim is that his attorney's failure to correct the court's "error" and inform him about the new sentencing range constituted a denial of his constitutional right to the effective assistance of counsel which rendered the plea unknowing. As defendant asks only that we remand for him to determine whether to ask that his plea be vacated, this claim suffers from the same fatal infirmity as the first claim.

Defendant's third claim is that he is entitled to a new sentencing proceeding because he was not arraigned and thus was deprived of an opportunity to controvert the second felony offender statement. At the plea proceeding, the court made clear that the plea bargain was contingent on an admission by defendant that he was a non-violent felony offender, and defendant said he understood. At sentencing, which occurred nearly a year later, defendant was not arraigned on the second felony offender statement the People had filed shortly after the plea proceeding

alleging he had been convicted on December 12, 1999 of criminal sale of a controlled substance in the fifth degree. The court stated, however, that defendant was "found to be a predicate felon."

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3744 In re Untitled LLC, Index 112008/08
Petitioner-Respondent,

-against-

New York State Liquor Authority,
Respondent-Appellant.

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Jean Marie Cho, New York (Donald Martin of counsel), for appellant.

Ravi Ivan Sharma, New York, for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about April 20, 2009, which granted the petition to the extent of annulling respondent's determination to suspend petitioner's liquor license for seven days, and remanding the matter for a hearing on mitigating circumstances and modification of the penalty, unanimously reversed, on the law, without costs, the petition denied and the proceeding dismissed.

Although petitioner attempted to offer mitigation evidence that respondent did not consider in imposing a $7,000 fine and seven-day suspension, the penalty is warranted in view of petitioner's history, including three prior occasions on which it was similarly found to have served alcohol to underage persons (*see Matter of Cris Place, Inc. v New York State Liq. Auth.*, 56

AD3d 339, 339-340 [2008]). The assessed penalty is not disproportionate to the offense (*see Matter of Monessar v New York State Liq. Auth.*, 266 AD2d 123 [1999]; *3120 Wilkinson Food Corp. v Duffy*, 224 AD2d 296 [1996]), nor does it shock the Court's sense of fairness so as to constitute an abuse of discretion by the administrative agency (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]; *Matter of Norwood Pub v State Liq. Auth.*, 145 AD2d 322, 323 [1988]).

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

ENTERED: MARCH 8, 2011

CLERK

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

3771 Cecilia Ashbourne, Index 17198/07
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendants,

New York City Housing Authority,
Defendant-Respondent.

_____

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered September 15, 2009, that granted defendant New York City Housing Authority's (NYCHA) motion for summary judgment, unanimously reversed, on the law, without costs, and the motion denied.

This case requires us to analyze the extent to which the assumption of risk doctrine remains viable after *Trupia v Lake George Cent. School Dist.* (14 NY3d 392, 395-396 [2010]). Plaintiff, an adult experienced in the activity, was rollerblading home on the sidewalk. She maneuvered to avoid a group of pedestrians in front of her. As she passed them, she

admittedly was looking at the pedestrians and not at the ground. Her wheels became "stuck" and she fell. She sustained injuries requiring surgery. Plaintiff claims that a rise or bump in a part of the sidewalk was the cause of her fall. The location of her fall was adjacent to public housing, so plaintiff sued NYCHA as well as the City.

The motion court granted defendant NYCHA's motion for summary judgment solely on the basis of assumption of risk, essentially holding that by engaging in the activity "plaintiff assumed the risk of falling and being injured while roller-blading." In the interim between the trial court's decision dismissing the case and this decision, the Court of Appeals decided *Trupia.* In *Trupia*, an infant plaintiff, who was attending a summer program that the defendants administered, seriously injured himself while sliding down a banister. The defendant had left the plaintiff, who was under twelve, unsupervised. The complaint sought to recover principally on a theory of negligent supervision. The defendants moved to dismiss based on assumption of risk.

In its decision affirming that of the Appellate Division, Third Department, the Court of Appeals discussed how, in 1975, the Legislature abolished contributory negligence and assumption

of risk as absolute defenses and replaced them with a comparative negligence framework. Under a comparative negligence approach, the amount of damages is diminished depending on the percentage that the plaintiff is negligent. The Court of Appeals made clear that the assumption of risk doctrine has little place in a comparative negligence framework:

> "We have not applied the doctrine outside of this limited context [sporting activities] and it is clear that its application must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation that the Legislature has deemed applicable to '*any* action to recover damages for personal injury, injury to property, or wrongful death' (CPLR 1411 [emphasis added])" (14 NY3d at 395-396).

Thus, the Court recognized that blanket application of assumption of risk in every sporting activity was not correct and limited application of the doctrine primarily to protect sponsors of athletic and recreational activities from liability that arose from these activities (*id.*, at 396). The Court of Appeals afforded this protection as a policy matter because of the "enormous social value" that athletic and recreational activities impart, "even while they involve significantly heightened risks" (*id.* at 395). The Court of Appeals noted that it had "employed the notion that these risks may be voluntarily assumed to

preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise" (*id.*). Accordingly, the Court refused to apply assumption of risk to the infant plaintiff because the case was not one where the defendant "solely by reason of having sponsored or otherwise supported some risk-laden, but socially valuable voluntary activity has been called to account in damages" (*id.* at 396).

On December 21, 2010, the Court of Appeals decided *Anand v Kapoor* (__ NY3d __, 2010 NY Slip Op 09380 [2010]) and did apply the assumption of risk doctrine to an injury a golfer sustained when a golfing companion hit a golf ball into his eye. The Court of Appeals affirmed the Appellate Division, Second Department's dismissal of the action, stating that "[a] person who chooses to participate in a sport or recreational activity consents to certain risks that 'are inherent in and arise out of the nature of the sport generally and flow from such participation'" (internal citations omitted).

Although plaintiff was rollerblading, an activity one could consider to be recreational and risky, this is not a case like *Anand* where plaintiff and defendant were participants in an organized sporting event. Plaintiff's leisurely rollerblading on a public sidewalk does not constitute a sponsored sporting event

or recreational activity for the purpose of applying the assumption of risk doctrine any more than jogging on the sidewalk would. We simply cannot say, as a matter of law, that by engaging in a form of exercise, such as rollerblading or jogging on a public sidewalk, a plaintiff consents to the negligent maintenance of that sidewalk (*see Cotty v Town of Southhampton*, 64 AD3d 251, 256-257 [2009] [declining to extend assumption of risk to plaintiff bicyclist who collided with an oncoming vehicle after she swerved in the road to avoid collision with another cyclist who fell into her path after unsuccessfully attempting to avoid an unbarricaded "lip" road construction had created]).

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4436 The People of the State of New York, Ind. 5534/07
Respondent,

-against-

Richard Kelley,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Jalina J. Hudson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered July 7, 2008, convicting defendant, after a jury trial, of course of sexual conduct against a child in the first degree, endangering the welfare of a child, and 20 counts of criminal contempt in the second degree, and sentencing him to an aggregate term of 25 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 credibility determinations. The jury convicted defendant of a course of sexual conduct against his daughter, committed when she was 11 and 12 years old, but acquitted him of rape and incest charges pertaining to three later incidents. Although, in performing weight of evidence

review, we may consider these acquittals (*see People v Rayam* 94 NY2d 557, 563 n [2000]), we find that the mixed verdict does not warrant a different conclusion. Aside from the possibility that it chose to extend leniency, the jury could have reasonably found that the evidence of the three specific incidents was not as strong as the evidence of the prior course of conduct.

The court properly denied defendant's request for preclusion of DNA evidence introduced late in the trial, or alternatively for a mistrial. The victim testified that defendant customarily ejaculated on a towel during the sexual acts at issue. The victim's mother gave a particular towel to the police. Defense counsel, who had been told by the prosecutor that there was no incriminating DNA evidence in the case, interviewed the DNA technician assigned to the case in contemplation of calling her as a defense witness. In the interview, the technician revealed that although other items had been tested, the towel had not. Defense counsel then inquired of the prosecutor as to why the towel had not been tested. This led to testing of the towel, which showed that it contained defendant's DNA and that of a female other than the victim.

The court properly exercised its discretion in permitting the People to introduce the results of DNA testing of the towel

on their rebuttal case. There was no discovery violation, because the applicable statute (CPL 240.20[1][c]) governs the timing of the disclosure of test results demanded by the defense, not the timing of the tests. Until the towel was tested, no report of DNA evidence existed, and the People were not required to turn over a report that did not exist.

In any event, there was no bad faith by the People, who were unaware of the laboratory's failure to test the towel, and no prejudice to defendant (*see People v Jenkins*, 98 NY2d 280, 284 [2002]; *People v Kelly*, 62 NY2d 516, 520 [1984]). Defendant argues that he structured his defense in reliance on the prosecutor's misrepresentation that there was no incriminating DNA evidence. However, we do not find that any significant component of the defense resulted from any such reliance, or that the belated revelations about the towel caused any irreparable damage. On the contrary, counsel affirmatively used the DNA evidence to argue that defendant had not committed the charged crimes, since the female DNA on the towel did not match the victim's, as would have been expected according to her testimony.

Although defense counsel's phone call alerted the prosecutor to the fact that no testing had occurred, this did not deprive defendant of the effective assistance of counsel (*see People v*

Benevento, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Counsel's action met an "objective standard of reasonableness" (*Strickland* at 688). It was appropriate for counsel to be concerned as to why the towel had not been tested, given that the absence of DNA evidence on the towel would have been helpful to the defense, and to follow up with an inquiry. In any event, defendant has not shown a reasonable probability that counsel's alleged error affected the outcome of the trial or undermined confidence in the result (*id.* at 694). As noted, the DNA evidence on the towel cut both ways. On the one hand, it provided some relatively minor corroboration of the victim's testimony regarding a detail of the sexual offenses. On the other hand, the presence of defendant's DNA on a towel in his own home was not particularly incriminating, and, as defense counsel argued, the presence of DNA from an unidentified female rather than from the victim tended to be exculpatory.

The court properly permitted the People to impeach defendant's testimony with statements made by his counsel in his presence at arraignment (*see People v Brown*, 98 NY2d 226 [2002]; *People v Gary*, 44 AD3d 416 [2007], *lv denied* 9 NY3d 1006 [2007]).

The statements reasonably appeared to be attributable to defendant, even if the attorney was also speaking from her personal knowledge regarding some matters.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4437 Tower Insurance of New York, Index 109286/07
Plaintiff-Respondent,

-against-

Amsterdam Apartments, LLC, et al.,
Defendants-Appellants,

Marcelino Marin,
Defendant.

_____

Maidman and Mittelman, LLP, New York (Stuart A. Jackson of counsel), for appellants.

Mound Cotton Wollan & Greengrass, New York (Labe C. Feldman of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered December 18, 2009, which, in a declaratory judgment action, granted plaintiff Tower Insurance of New York's motion for summary judgment and declared that plaintiff had no duty to indemnify and defend appellants in an underlying personal injury action, unanimously affirmed, without costs.

Where an insurance policy mandates that notice of an occurrence be given to the insurer "as soon as practicable," the insured's failure to do so vitiates the insurance contract (*see Great Canal Realty Co. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]; *Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339

[2005]).

The insureds' building superintendent's knowledge of the accident and injuries is imputable to the appellant building owners (*see Anglero v George Units, LLC*, 61 AD3d 564, 565 [2009]). Appellants' reference to the subject building manager's statement in his affidavit that Ana Hernandez was not the building's superintendent is insufficient to raise a triable issue of fact, as it is directly contradicted by the manager's earlier statement at his deposition that Hernandez was, in fact, the superintendent (*see Roimeshner v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426 [2010]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]).

Accordingly, Supreme Court correctly found that appellants had knowledge of the occurrence about 76 days before notifying the insurer. As such, the notice was untimely as a matter of law (*see Juvenex Ltd. v Burlington Ins. Co.*, 63 AD3d 554 [2009] [two month delay untimely]; *Young Israel Co-Op City v Guideone Mut. Ins. Co.*, 52 AD3d 245 [2008] [40 day delay untimely]; *Pandora Indus. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277 [1992] [31 day delay untimely]).

Failure to give timely notice may be excused if the insured has a good faith belief of non-liability, but only if such belief

is reasonable (*see Great Canal Realty Corp.*, 5 NY3d at 743-744). In the case at bar, even assuming the appellants' property manager believed that the injured party would not assert a claim against the building owner, such belief was not reasonable. First, notwithstanding the fact that the property manager may have understood, based on his conversation with the building's superintendent, that Marin's injury was not serious, he still had the duty to report the possibility of a claim as soon as practicable (*see Republic N.Y. Corp. v American Home Assur. Co.*, 125 AD2d 247, 248 [1986]). Second, it is undisputed that the appellants did not undertake any investigation of the incident, or make inquiry regarding the property manager's alleged belief that the injury was slight. Thus, the appellants could not have formed a reasonable belief of non-liability (*see Great Canal Realty Corp.*, 5 NY3d at 744; *Tower Ins. Co. of N.Y. v Jaison John Realty Corp.*, 60 AD3d 418, 419 [2009]). Moreover, where, as here, the building superintendent observed Marin bleeding from the head and being removed from the accident scene by ambulance, it was not reasonable for the appellants to fail to notify plaintiff of the occurrence at that time (*see Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 307-08 [2008]; *Anglero*, 61 AD3d at 565).

Supreme Court also properly held that one of the appellants, FY 1661 Park LLC d/b/a Townhouse Management Company, which was not named as an insured in relation to the building at which the accident occurred, was not entitled to coverage in any event. A party not named as an insured or additional insured on the face of the policy is not entitled to coverage (*see Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [2006]; *Moleon v Kreisler Borg Florman Gen. Constr.*, 304 AD2d 337, 339 [2003]). That such appellant, an affiliate of the other appellants, was allegedly insured in relation to a different property included in the policy, is irrelevant (*see Mary Lou Pendill v Furry Paws, Inc.*, 29 AD3d 453, 454 [2006]).

In light of our determination, we do not reach the parties' remaining contentions concerning the policy's exclusion for "Designated Ongoing Operations."

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4438 In Rem Tax Foreclosure Action No. 49 Index 580001/08
Borough of Manhattan, 590412/09
Sections 2, 3, 4, 5, 6, 7 & 8
Tax Classes 1 and 2

- - - - -

Ramasar Holding, Inc.,
Third-Party Plaintiff-Appellant,

-against-

The New York City Department of Law, et al.,
Third-Party Defendants-Respondents,

The New York State Division of Housing
and Community Renewal (DHCR), et al.,
Third-Party Defendants.

_____

Jonathan David Bachrach, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered August 5, 2009, which, in an in rem tax lien foreclosure action, granted the motion of the City third-party defendants to dismiss third-party plaintiff-appellant's counterclaims and third-party claims and denied appellant's cross motion to, inter alia, amend its pleading, unanimously affirmed, without costs.

The motion court properly dismissed the counterclaims and third-party claims since New York City Administrative Code

§ 11-409(c) prohibits counterclaims in a tax foreclosure action brought pursuant to Administrative Code § 11-401 *et seq.* Appellant cannot avoid the import of section 11-409(c) by re-characterizing its counterclaims and third-party claims as defenses. Nor can it avoid the prohibition on counterclaims in this action by casting the claims as third-party claims against various City agencies. Furthermore, these were not true third-party claims as provided in CPLR 1007 since they were not brought against "a person not a party" to this action. Administrative Code § 11-409(c) would be rendered meaningless if a party to a tax foreclosure action could interpose affirmative causes of action as third-party claims rather than as counterclaims.

Because denominating the counterclaims and third-party claims as defenses would not actually change their character, the motion court properly denied the cross motion. To the extent the third-party claims were brought against entities unrelated to the

City, the motion court properly exercised its discretion in dismissing those claims (*see* CPLR 1010).

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

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4439 Gladstein & Isaac, et al., Index 601014/07
Plaintiffs-Respondents,

-against-

Philadelphia Indemnity Insurance Company,
Defendant-Appellant.

_____

Babchik & Young, LLP, White Plains (James E. Musurca of counsel), for appellant.

Harvey Gladstein & Partners, LLC, New York (Ronald P. Berman of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered December 3, 2009, which denied defendant's motion for summary judgment dismissing the complaint and granted plaintiffs' cross motion for summary judgment declaring that defendant had a duty to defend and indemnify plaintiff in an underlying action, unanimously affirmed, without costs.

The court properly determined that the allegations in the underlying complaint that plaintiffs' law firm negligently hired and supervised an attorney who purportedly made sexual advances to a client, fall within the type of errors and omissions coverage provided by defendant's professional liability insurance policy (*see Watkins Glen Cent. School Dist. v National Union Fire*

Ins. Co. of Pittsburgh, Pa., 286 AD2d 48 [2001]).

While the allegations may not fall under the policy definition of "Personal Injury," the court properly determined that they fall within the policy's definition of "Wrongful Act."

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4440 Barbra Michelle Miller, et al., Index 602434/09
M-505 Plaintiffs-Appellants,

-against-

Iris W. Miller, et al.,
Defendants-Respondents.

_____

Philip Sherwood Greenhaus, New York, for appellants.

The Catafago Law Firm, P.C., New York (Jacques Catafago of counsel), for Iris W. Miller, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Karen J. Seemen of counsel), for Teachers' Retirement System, respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 12, 2010, which, inter alia, granted defendants' motion to dismiss the complaint for failure to state a cause of action, and denied plaintiffs' cross motion for summary judgment, unanimously affirmed, without costs.

The 1975 stipulation pursuant to which plaintiffs claim entitlement to their deceased father's pension death benefits was superseded by the stipulation entered into between their parents in 1990. The 1990 stipulation was expressly intended "to settle all of the demands, claims, counterclaims, set-offs and defenses in the above-captioned matter [the divorce action], and to settle all disputes, claims, and agreements between the parties, and to

once and for all put this matter to rest," and therefore encompassed the parents' ongoing dispute over the father's obligation to name plaintiffs as irrevocable beneficiaries under his pension. Furthermore, the 1990 stipulation provided that it "contain[ed] the entire agreement of the parties and supersede[d] and replace[d] any and all prior agreements or Court Orders previously entered in the above captioned matter." Thus, it is clear that the parents intended to replace the 1975 stipulation with the 1990 stipulation.

In any event, the pension death benefits that the father promised plaintiffs when they were young children were his active service benefits, which would have been payable only if he had died before retiring. When he retired in 2001, he applied for "Option II" post-retirement death benefits, which entitled him to reduced payments during his lifetime and payments in the same amount for his designated beneficiary after his death for the remainder of the beneficiary's life (*see* Administrative Code of City of NY § 13-558). The Teachers Retirement System is obligated by law to honor his choice of beneficiary (*see id.*; *see generally Matter of Creveling v Teachers' Retirement Bd.*, 255 NY 364, 372-373 [1931]).

Plaintiffs contend that their parents had no authority to

extinguish the father's obligation, originally agreed to in the 1975 stipulation, to name them as irrevocable beneficiaries without their consent. To the extent they claim entitlement to the benefits as third-party beneficiaries of a child support obligation embodied in the 1975 stipulation, their argument fails because the right to receive child support belongs to the custodial parent, not to the child (*see Kendall v Kendall*, 200 App Div 702 [1922]). To the extent they claim entitlement to the benefits as third-party beneficiaries of non-support obligations under the 1975 stipulation, their argument fails because they have no right to enforce a superseded agreement – even one superseded without their consent – when the benefit they seek to enforce had not yet vested before the agreement was modified and the superseded agreement did not prohibit its modification (*see Salesky v Hat Corp. of Am.*, 20 AD2d 114 [1963]).

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

M-505 ***Barbra Michelle Miller, et al. v Iris W. Miller, et al.***

Motion seeking to amend record granted.

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4441 In re Doreen Nash, Index 112365/08
Petitioner-Appellant,

-against-

The Board of Education of the
City School District of the
City of New York, et al.,
Respondents-Respondents.

_____

Richard E. Casagrande, New York (Keith J. Gross of counsel), for appellant.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Marilyn Shafer, J.), entered November 10, 2009, which denied the petition seeking to annul respondents' determination terminating petitioner's probationary employment as a school secretary and to direct respondents to reinstate her employment with back pay and interest, and granted respondents' cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner's probationary employment was terminated based on an "Unsatisfactory" rating (U-rating) on her year-end performance review. To the extent that petitioner challenges the termination, this claim is time-barred, since a petition to

challenge the termination of probationary employment must be brought within four months of the effective date of termination, during which time the termination is deemed to become final and binding, and a petitioner's pursuit of administrative remedies does not toll the four-month statute of limitations (*see* CPLR 217[1]; *Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 767 [1988]; *Matter of Strong v New York City Dept. of Educ.*, 62 AD3d 592 [2009], *lv denied* 14 NY3d 704 [2010]). Because the effective date of petitioner's termination was July 15, 2005, her petition, filed September 10, 2008, was untimely. The reconsideration of the matter by respondent Chancellor's committee did not amount to a "fresh look" at the merits so as to renew the running of the statute of limitations (*Matter of Eldaghar v New York City Hous. Auth.*, 34 AD3d 326, 327 [2006], *lv denied* 8 NY3d 804 [2007]).

The proceeding, insofar as it challenges the U-rating, need not have been commenced within four months from the July 15, 2005 decision (*see Matter of Andersen v Klein*, 50 AD3d 296 [2008]). Contrary to respondents' contention, petitioner did not fail to exhaust her administrative or contractual remedies so as to bar this claim, as the committee's and the Chancellor's review of the

termination necessarily encompassed a review of the U-rating (*see* CPLR 7801[1]; *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]).

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4442 The People of the State of New York, Ind. 4618/04
Respondent,

-against-

Kevin Pozo,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Charles J. Tejada, J.), entered on or about November 19, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court had ample evidence on which to assess 15 points under the risk factor for drug or alcohol abuse. In any event, even without that assessment defendant would remain a level two offender, and we find no basis for a discretionary downward departure from his presumptive risk level (*see People v Mingo*, 12

NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 2008]). The mitigating circumstances cited by defendant were adequately taken into account by the risk assessment instrument.

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4443 Trayvon Ward, etc., et al., Index 15810/05
Plaintiffs-Appellants,

-against-

New York City Health & Hospitals Corporation,
Defendant-Respondent.

_____

Regina L. Darby, New York, for appellants.

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

_____

Order, Supreme Court, Bronx County (Paul Victor, J.), entered October 8, 2008, which denied plaintiffs' motion to vacate an order granting, on default, defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Defendant obtained a default judgment dismissing the action after plaintiffs failed to comply with a pre-condition to commencing action by failing to appear at a GML § 50-h hearing, after adjourning the hearing nine times. In seeking to vacate the dismissal, plaintiffs failed to demonstrate a meritorious defense (*see Best v City of New York*, 97 AD2d 389 [1983], *affd* 61 NY2d 847 [1984]; *Wells v City of New York*, 254 AD2d 121 [1998], *lv dismissed* 92 NY2d 1046 [1999], *cert denied* 527 US 1012 [1999]). They also failed to demonstrate the merits of their

cause of action by not submitting an affidavit of merit by a medical professional (*see Walker v City of New York*, 46 AD3d 278, 281-282 [2007]; *Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 634 [2003]).

Nor was plaintiffs' "conclusory and perfunctory" claim of law office failure a reasonable excuse for the default in view of the pattern of dilatory behavior they engaged in in prosecuting this matter (*see Perez v New York City Hous. Auth.*, 47 AD3d 505, 505-506 [2008]; *Metral v Bonifacio*, 309 AD2d 724 [2003]). There were, in addition to the 10 missed appointments for a General Municipal Law § 50-h hearing, and other things, three motions to file a late notice of claim. In the nearly 10 years since plaintiffs filed their late notice of claim, discovery has not even been commenced (*see Metral*, 309 AD2d at 724). Moreover, their proffered excuse is based not on the affirmant's personal

knowledge but on the hearsay of a per diem attorney who claimed that a motion clerk advised him that no motion was pending in the case (*see AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904, 906 [2009]).

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4444 Security Insurance Company of Hartford, as Subrogee of Mutual Redevelopment Houses, Inc., Plaintiff-Appellant, Index 108868/03

-against-

Architron Designers and Builders, Inc., et al., Defendants-Respondents,

Bernice Waldorf, etc., et al. Defendants.

Gennet, Kallmann, Antin & Robinson, P.C., New York (Donald G. Sweetman of counsel), for appellant.

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for Architron Designers and Builders, Inc., respondent.

Law Offices of Michael E. Pressman, New York (Eric S. Fenyes of counsel), for J.J.H. Construction Corp., respondent.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for 360 West 28th Street, LLC and Mitchell Hirth, respondents.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Joseph V. Cambareri of counsel), for Van Jay Brody respondents.

Gogick, Byrne & O'Neill, LLP, New York (John Rondello of counsel), for Jack William Mendelson, P.E. and JWM Consulting, respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 13, 2009, which, insofar as appealed from as limited by the briefs, granted the motions of defendants Van Jay

Brody, R.A., and Van Jan Brody, Architect, P.C. (collectively, Brody), and Jack William Mendelson, P.E. and JWM Consulting (collectively, Mendelson) for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

Plaintiff contends that Brody's and Mendelson's alleged failure to comply with certain Building Code provisions, including former Administrative Code of City of NY § 27-157 (repealed Local Law No. 33 [2007], eff July 1, 2008), governing the filing of architectural and structural plans constitutes evidence of negligence on their part. However, these provisions require the filing of plans but do not provide any substantive standards specifying, for example, when shoring may be required in an excavation project. Hence, plaintiff cannot show a causal relationship between its alleged loss and any negligence on Brody's or Mendelson's part in failing to file allegedly "complete" plans (*see Driscoll v Tower Assoc.*, 16 AD3d 311, 313 [2005]; *see also Miller v Astucci U.S. Ltd.*, 2007 WL 102092, *9, 2007 US Dist LEXIS 4436, *28 [SD NY 2007]).

We have considered plaintiff's remaining arguments, including those based upon the assertions of its expert engineer, and find them unavailing.

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4446 In re Keith Moskowitz, Index 112299/08
Petitioner-Appellant,

-against-

New York City Police Pension Fund, et al.,
Respondents-Respondents.

_____

Meyer, Suozzi, English & Klein, P.C., New York (Barry J. Peek of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (David R. Priddy of counsel), for respondents.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered March 31, 2009, as amended by order, same court and Justice, entered August 28, 2009, which denied as untimely the petition seeking to compel respondents to change petitioner's retirement date to July 25, 2006 and grant his pension application, and granted respondents' cross motion to deny the petition and dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

In an article 78 proceeding for mandamus to compel, the four-month statute of limitations runs from the date upon which the respondent agency refuses to act (*see Austin v Board of Higher Educ. of City of N.Y.*, 5 NY2d 430, 441-442 [1959]; *see also Ruskin Assoc., LLC v State of N.Y. Div. of Hous. & Community*

Renewal, 77 AD3d 401, 403 [2010]). By letter dated November 3, 2006, respondents refused to comply with petitioner's demand that his pension be reinstated. Petitioner's commencement of this proceeding on September 9, 2008 was thus untimely. Petitioner's April 2007 request for reconsideration does not toll or revive the statute of limitations (*see Matter of Lubin v Board of Educ. of City of N.Y.*, 60 NY2d 974, 976 [1983], *cert denied* 469 US 823 [1984]).

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4447 97TH Street Holdings, LLC, Index 102105/09
Plaintiff-Appellant,

-against-

East Side Tenants Corporation,
Defendant-Respondent,

Nicholas Toumbekis, etc.,
Defendant.

_____

Shapiro & Shapiro, LLP, Brooklyn (Jeanne M. Weisneck of counsel), for appellant.

Hartman & Craven LLP, New York (Victor M. Metsch of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 28, 2010, which, insofar as appealed from, as limited by the briefs, granted defendant-seller East Side Tenants Corporation's (East Side) motion for summary judgment dismissing the complaint, granted East Side summary judgment on its first and second counterclaims, declared that plaintiff-buyer 97th Street Holdings, LLC (97 LLC) was in breach of the parties' contract of sale and that East Side was entitled to 97 LLC's $190,000 down payment, and cancelled 97 LLC's notice of pendency against the property, unanimously affirmed, with costs.

The parties, sophisticated business people represented by

counsel at the time they entered the contract of sale, did not condition 97 LLC's performance under the contract upon East Side's procurement of a waiver of liability from an adjoining landowner as to alleged damage caused by the structurally unsound condition of the building on the property to be sold. Nor did the parties' agreement obligate East Side to obtain a consent from the neighboring owner to 97 LLC's proposed construction along the party wall (*see generally* Real Property Actions and Procedure Law § 881). To impute such obligations from generalized language found in the contract's further assurances clause (paragraph 28[g]), as 97 LLC advocates, would amount to a reformation of the contract without basis (*see generally Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986]). The record demonstrates that East Side fully disclosed the condition of the property pre-contract signing, and afforded 97 LLC a sufficient due diligence period to make appropriate inquiries necessitated by its proposed construction plans. 97 LLC has not shown that East Side breached any material term under the contract of sale, and 97 LLC's own unjustified failure to close by a law date reasonably set by East Side constituted a material breach warranting forfeiture of its down payment (*see Maxton Bldrs., Inc. v Lo Galbo*, 113 AD2d 923 [1985], *affd* 68 NY2d 373 [1986]). 97 LLC's unsubstantiated

argument that potential litigation concerns had affected the marketability of the subject property, and thus excused it from its obligations under the agreement, is unavailing (*see e.g. National Land & Bldg. Corp. v Kazim*, 25 AD3d 513, 514 [2006]; *Argent Mtge. Co., LLC v Leveau*, 46 AD3d 727 [2007]). 97 LLC failed to proffer evidence of a title defect that might excuse its non-performance under the contract (*see generally Regan v Lanze*, 40 NY2d 475 [1976]).

The parties' requests for sanctions are denied.

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4448-
4449 The People of the State of New York, Ind. 106/07
Respondent,

-against-

Reginald Pearson,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew L. Mazur of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered May 28, 2008, as amended June 27, 2008, convicting defendant, after a jury trial, of predatory sexual assault (eight counts), rape in the first degree (four counts), criminal sexual act in the first degree (two counts), kidnapping in the second degree and criminal possession of stolen property in the fifth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 175 years to life, unanimously affirmed. Appeal from order, same court (Lewis Bart Stone, J.), entered on or about December 17, 2009, which denied defendant's CPL 440.10 motion to vacate the convictions and his request that the court order disclosure of DNA data for analysis by a defense

expert, unanimously dismissed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The stolen keys and jewelry recovered from defendant, as well as his statements pertaining thereto, were not the product of a warrantless entry into his apartment. The location of defendant's arrest is dispositive of his claim under *Payton v New York* (445 US 573 [1980]). The evidence supports the hearing court's finding that a detective (possessing undisputed probable cause to arrest) intercepted defendant at the threshold of his apartment and stopped him from entering, after which the detective arrested and searched defendant in the hallway. Accordingly, defendant is not entitled to suppression of any evidence (*see People v Reynoso*, 309 AD2d 769, 770 [2003], *affd* 2 NY3d 820 [2004]; *see also United States v Santana*, 427 US 38, 42 [1976]). In any event, any error in receipt of this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]) in light of the overwhelming evidence of guilt, which included virtually conclusive DNA evidence as well as the victim's identification testimony.

To the extent that, in testifying about the chain of custody for the stolen property, a detective implicitly related

declarations made by another detective, who also testified, we find any error to be harmless. Defendant did not preserve his hearsay and Confrontation Clause arguments regarding other police testimony, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. In each instance, the evidence was neither testimonial within the meaning of *Crawford v Washington* (541 US 36 [2004]) nor was it offered for its truth. In any event, we similarly find that any error was harmless.

The court properly exercised its discretion in denying defendant's request for an adjournment of sentencing to obtain a mental health evaluation. The court was in a position to determine that such an examination in aid of sentencing was unnecessary (*see People v Dockery*, 175 AD2d 432 [1996], *lv denied* 78 NY2d 1010 [1991]). To the extent that defendant is raising a constitutional claim regarding the denial of the adjournment, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

We perceive no basis for reducing the sentence.

This Court previously denied defendant's motion for leave to appeal from that portion of the December 2009 order that denied

defendant's motion to vacate the judgment (2010 NY Slip Op 64711[U]). The balance of the order is appealable only if it denied a motion for DNA testing under CPL 440.30(1-a) (*see* CPL 450.10[5]). However, defendant's purported CPL 440.30(1-a) motion was actually a request for postconviction discovery of electronic DNA data, and not a motion for "the performance of a forensic DNA test on specified evidence" (CPL 440.30[1-a]). Accordingly, there is no statutory basis for defendant's appeal (*see e.g. People v Bautista*, 7 NY3d 838, 838-839 [2006]). In any event, we note that defendant obtained the services of a DNA expert before trial and had a full opportunity to challenge the People's DNA results.

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4450 The People of the State of New York, Ind. 6723/08
Respondent,

-against-

Rakaiyah Willis,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about August 11, 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: MARCH 8, 2011

CLERK

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

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4451 In re Vincent Leone, Index 108072/09
Petitioner-Appellant,

-against-

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

_____

Hugh B. Ehrenzweig, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered December 10, 2009, which granted respondents' cross motion to dismiss the petition brought pursuant to CPLR article 78 seeking to reinstate respondents' promotional list for the position of Sergeant in the New York City Police Department and retroactively promote petitioner to the rank of Sergeant, unanimously affirmed, without costs.

Petitioner commenced this proceeding after the expiration of the promotional list. As petitioner acknowledges, he may not be promoted from an expired list and the courts do not have the power to extend the life of a civil service list (*see Matter of Deas v Levitt*, 73 NY2d 525, 532-533 [1989]; *Andriola v Ortiz*, 156

AD2d 241, 242 [1989], *lv dismissed*, 75 NY2d 963 [1990]). Further, given, among other things, petitioner's extensive disciplinary history, respondents had a rational basis for declining to promote him (*see generally Matter of Straker v Giuliani*, 292 AD2d 260 [2002], *lv denied* 98 NY2d 606 [2002]). Petitioner's argument that he was the victim of the Department's "illegal quota" system, lacks evidentiary support.

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4453 Tung Auyeung, Index 300293/04
Plaintiff-Respondent,

-against-

Yinyin Mui,
Defendant-Appellant.

_____

Shiqing Yue, Flushing, for appellant.

Law Offices of Wendy Tso, P.C., New York (Wendy Tso of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Matthew F. Cooper, J.), entered December 11, 2009, awarding plaintiff a divorce and distributing the marital assets, and bringing up for review an order of the same court (Harold Beeler, J.), entered on or about December 29, 2008, which, insofar as appealed from as limited by the briefs, confirmed a referee's report which, among other things, (1) found that the two-family house purchased during the marriage was part of the marital assets; (2) barred the admission of a separation agreement; (3) failed to address charges of bigamy and cruel and inhuman treatment by plaintiff-husband; (4) failed to determine whether defendant-wife had properly received service of the summons and complaint, unanimously affirmed, without costs.

The wife failed to rebut the presumption that all property acquired by either spouse during the marriage is marital property (*see DeJesus v DeJesus*, 90 NY2d 643, 648 [1997]; *see also* DRL § 236[B][5][d][7]). As a result, the referee properly found that the parties should equally divide the proceeds of the house sale (*see Smith v Smith*, 8 AD3d 728 [2004]; *see also* (*McManus v McManus*, 298 AD2d 189 [2002]; *Fields v Fields*, 15 NY3d 158, 165-166 [2010], *affg Fields v Fields*, 65 AD3d 297 [2009]).

We find no basis to disturb the referee's credibility determinations, and thus, find no basis to disturb the referee's finding on fault (*see Hale v Hale*, 16 AD3d 231, 233 [2005]).

We have considered the wife's remaining contentions and find that they are either unpreserved or without merit.

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4454-
4455 In re Dominique P.,

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

_____

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

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for presentment agency.

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Orders of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about July 29, 2010, which adjudicated appellant a juvenile delinquent upon his admissions that he committed acts that, if committed by an adult, would constitute the crimes of burglary in the second degree (three counts) and attempted grand larceny in the fourth degree (three counts), and placed him with the Office of Children and Family Service for an aggregate period of 18 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. After being lawfully arrested, appellant voluntarily confessed that he took part in numerous residential burglaries.

There was probable cause for appellant's arrest (*see People v Bigelow*, 66 NY2d 417, 423 [1985]; *Spinelli v United States*, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]). Three identified citizen informants provided the police with detailed and specific information concerning appellant's involvement in a series of burglaries. While none of these informants initiated contact with the police, there is no evidence that any of them sought or obtained any benefits in return for their information. Their status as identified citizens satisfied the reliability prong of the *Aguilar/Spinelli* test (*see People v Hetrick*, 80 NY2d 344, 348 [1992]; *People v Hicks*, 38 NY2d 90 [1975]). The basis-of-knowledge prong was clearly satisfied as to two of the informants, since they both heard appellant admit his own involvement in the burglaries.

The totality of the circumstances establishes the voluntariness of appellant's confession (*see Fare v Michael C.*, 442 US 707, 725-728 [1979]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). The circumstances were not coercive, and the police complied with every requirement of Family Court Act § 305.2. Given the seriousness and complexity of the charges, it was clearly necessary to take appellant to a designated facility for questioning (*see* Family Ct Act § 305.2[4][b]). Two

representatives of Children's Village, the entity that was "legally responsible for the child's care" (Family Ct Act § 305.2[3]), were present, and appellant's challenges to the suitability of these persons are without merit (*see Matter of Richard UU.*, 56 AD3d 973, 975 [2008]). The delay in commencing the questioning was reasonable in light of the time consumed in obtaining the presence of the Children's Village employees. The length of the interrogation was reasonable in light of the large number of burglaries and the need to conduct a canvass in which appellant identified the locations he burglarized. We have considered and rejected appellant's remaining challenges to his confession.

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4456N Leslie Marcano, et al., Index 14592/02
Plaintiffs,

-against-

U-Haul Co. of Virginia, et al.,
Defendants.
- - - - - -
Arthur J. Grosshandler,
Nonparty Petitioner-Appellant,

-against-

Tiger & Daguanno, L.L.P.,
Nonparty Respondent-Respondent.

_____

Arthur J. Grosshandler, New York, appellant pro se.

Tiger & Daguanno, L.L.P., New York (James E. Daguanno of counsel for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered January 6, 2010, which denied appellant outgoing attorney's motion to reject the referee's report recommending the apportionment of 25% of legal fees to him and 75% to respondent incoming counsel, unanimously affirmed, with costs.

The referee's findings are supported by the record (*see Baker v Kohler*, 28 AD3d 375, 375 [2006], *lv denied* 7 NY3d 885 [2006]). Plaintiff's subjective satisfaction speaks to the relative quality of the attorneys' services, a relevant factor in

apportioning the fee (*see Diakrousis v Maganga*, 61 AD3d 469 [2009]). The record establishes that appellant's contributions were duly considered by the referee and the court.

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

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4457 The People of the State of New York, Ind. 2616/08
Respondent,

-against-

Shawn Santiago,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered October 9, 2009, as amended November 17, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second drug felony offender whose prior felony conviction was a violent felony, to a term of 9 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 6 years, and otherwise affirmed.

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

People v Danielson, 9 NY3d 342, 348 [2007]). Defendant claimed the bag he sold to an undercover officer did not contain cocaine but rather "beat" cocaine. There is no basis for disturbing the jury's credibility determination rejecting that claim.

We find the sentence excessive to the extent indicated.

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4458 Juan Orozco, Index 17245/05
Plaintiff-Appellant,

-against-

725 S. Blvd., LLC,
Defendant-Respondent.

_____

Pena & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered October 21, 2009, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant landlord established prima facie that it neither knew nor had reason to know that the tenant's dog that attacked plaintiff had vicious propensities (*see Rivers v New York City Hous. Auth.*, 264 AD2d 342 [1999]). Although the building superintendent testified that the other tenants were frightened of the pit bull, he also said that he had never received any complaints about the animal or observed it acting aggressively and that during his own encounters with the dog in the hallway

the dog passed him "at ease." In opposition, plaintiff failed to raise any issues of fact. His testimony that on the day before the attack the dog had growled at him does not support the inference that defendant knew or should have known of the dog's vicious propensities (*see Smith v City of New York*, 68 AD3d 445 [2009]). Nor is it significant that the tenant allegedly tied the dog when it was in the apartment, since there is no evidence that the tenant did so because he feared that the dog would attack a visitor (*see Collier v Zambito*, 1 NY3d 444, 447 [2004]).

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

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4459 In re Dianne M.,
Petitioner-Respondent,

-against-

Princess R.F.,
Respondent-Appellant.

_____

Julian A. Hertz, Larchmont, for appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Sarah P. Cooper, Referee), entered on or about April 7, 2010, which, inter alia, granted the paternal grandmother's petition for guardianship of the subject child, unanimously affirmed, without costs.

The evidence established that extraordinary circumstances existed as a result of the prolonged separation between the mother and the child, who resided with the paternal grandmother for most of his life (*see Matter of Iris R. v Jose R.*, 74 AD3d 457 [2010]; *Matter of Carton v Grimm*, 51 AD3d 1111 [2008], *lv denied* 10 NY3d 716 [2008]; Domestic Relations Law § 72). There exists no basis to disturb the credibility determinations of the Referee (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]).

Furthermore, the totality of the circumstances demonstrated

that the award of guardianship to the grandmother was in the best interests of the child (*see Matter of Julia C. v Phoebe L.*, 76 AD3d 933 [2010]). The grandmother has provided the child with a loving and stable home environment and the child has thrived under her care. The record further showed that the mother often failed to appear for visits and has not taken day-to-day care of the child (*see Melnitzky v Melnitzky*, 268 AD2d 378, 379 [2000]).

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

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4460-
4460A James R. Haefner, et al., Index 150189/08
Plaintiffs-Appellants,

-against-

New York Media, LLC, et al.,
Defendants-Respondents,

Frank Lucas, et al.,
Defendants.

_____

Dominic F. Amorosa, New York, and Carey & Associates LLC, New York (Michael Q. Carey of counsel), for appellants.

Hogan Lovells US LLP, New York (Slade R. Metcalf of counsel), for New York Media, LLC and Mark Jacobson, respondents.

Lynch Daskal Emery LLP, New York (Scott R. Emery of counsel), for Primedia, Inc., respondent.

_____

Orders, Supreme Court, New York County (Walter B. Tolub, J.), entered October 22, 2009 and October 26, 2009, which, in an action alleging, inter alia, libel, granted the motions of defendants Primedia, Inc., New York Media, LLC (NYM) and Mark Jacobson to dismiss the complaint as against them, unanimously affirmed, with costs.

The claims against Primedia were properly dismissed as time barred. The asserted republications within the one-year limitations period all took place after Primedia had sold its

rights with regard to the articles in question to NYM. Primedia had no ability to participate or acquiesce in the decision to republish the material (*see Rinaldi v Viking Penguin*, 52 NY2d 422, 435 [1981]).

With regard to NYM and Jacobson, we exercise our discretion to disregard the inaccuracies in the notice of appeal and deem it valid (*see* CPLR 5520[c]). Nevertheless, dismissal of the complaint as against them was appropriate. The complained of statements' vague reference to a "NYPD/DEA strike force" failed to provide sufficient identifiers to make it "of and concerning" plaintiffs so as to avail them of the small-group libel doctrine (*see Brady v Ottaway Newspapers*, 84 AD2d 226, 232 [1981] [internal quotation marks and citations omitted]). Furthermore, the continuous access to a web article via links on NYM's website was not a republication (*see Firth v State of New York*, 98 NY2d 365, 371-372 [2002]), and the link by IFC.com was not alleged to have been effected with defendants' acquiescence or participation. The paperback edition of a book was published

more than one year before the action was filed.

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

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4461 In re Dominick Cognata, Index 102285/09
Petitioner-Appellant,

-against-

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

_____

Vincent J. Licata, New York, for appellant.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Walter B. Tolub, J.), entered December 22, 2009, which denied the petition seeking to annul respondent's denial of petitioner's appeal from a housing company's rejection of his application for succession rights to an apartment, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner did not have the right to succeed to the subject apartment since he could not make the necessary demonstration that the unit was his primary residence for the required time period (*see Matter of Greichel v New York State Div. of Hous. and Community Renewal*, 39 AD3d 421 [2007]). Although petitioner presented evidence of having resided in the apartment, he did not

submit evidence in proper form, such as a notice of change or income affidavits, showing that he resided there in the two years preceding the tenant of record's death (*see Matter of Martino v Southbridge Towers, Inc.*, 68 AD3d 412 [2009]).

We have considered petitioner's remaining contentions, including that respondent acted arbitrarily and capriciously in failing to adhere to precedent, and find them unavailing.

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4462 WP 760 Market Street, LLC, Index 600470/09
Plaintiff-Respondent-Appellant,

-against-

Thor 760M LLC,
Defendant-Appellant-Respondent,

Chicago Title Insurance Company,
Defendant.

_____

Matalon Shweky Elman PLLC, New York (Joseph Lee Matalon of counsel), for appellant-respondent.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Janice Mac Avoy of counsel), for respondent-appellant.

_____

Order and judgment (one paper), Supreme Court, New York County (Eileen Bransten, J.), entered May 28, 2010, which, inter alia, denied defendant Thor 760M LLC's motion for summary judgment dismissing the complaint, and granted plaintiff's motion for summary judgment on its first and second causes of action, declared that plaintiff is entitled to the escrow funds, and awarded plaintiff attorneys' fees, costs and disbursements, unanimously affirmed, with costs.

Pursuant to ¶ 51(c) of the Sale-Purchase Agreement (to which California law applies), disbursement of the escrow funds to plaintiff was conditioned solely on the delivery of "the Rite Aid

Surrender Agreement" to Thor on or before September 30, 2009 (*see Powerine Oil Co. v Superior Court of Los Angeles County*, 37 Cal 4th 377, 390, 118 P3d 589, 598 [2005] ["If contractual language is clear and explicit, it governs" (internal quotation marks and citations omitted)]). The record demonstrates that this condition was satisfied (*see Moss v Minor Props., Inc.*, 262 Cal App 2d 847, 853 [1968] ["the terms and conditions of an escrow must be strictly performed" (internal quotation marks and citations omitted)]).

Paragraph 51(b)(i) of the Sale-Purchase Agreement defines "Rite Aid Surrender Agreement" as "an agreement . . . which shall provide for the termination of the Rite Aid Lease on or before the date that is one hundred and eighty (180) days after the date of the execution and delivery of such agreement." Significantly, ¶ 51(b)(i) further provides that "[plaintiff] shall have the right, in its sole and absolute discretion, to negotiate and commit [Thor] to the terms of the Rite Aid Surrender Agreement (and choose the terms thereof in its sole discretion)." Contrary to Thor's contention, the Sale-Purchase Agreement authorizes plaintiff (no longer the owner of the property following the sale to Thor) to make efforts "to cause" Rite Aid to enter into a "Surrender Agreement," but it does not require that plaintiff

cause Rite Aid to surrender the lease. It requires only that a "Surrender Agreement" executed by Rite Aid be delivered to Thor on or before September 30, 2009.

Thor contends that Rite Aid did not enter into an agreement that could have resulted in a termination of its lease because Rite Aid assigned its leasehold interest to a third party. However, plaintiff, in accordance with its broad rights under ¶ 51(b)(i), elected on behalf of Thor to terminate the lease rather than consent to the requested assignment. Plaintiff delivered to Thor the papers reflecting the assignment, along with the lease termination notice for its signature, in February 2009. The lease was terminated well before the September 30, 2009 deadline set forth in ¶ 51(c).

Plaintiff is not entitled to pre-judgment interest on the escrow funds, because there was no "sum awarded" against Thor, the money was held by a neutral third-party escrow agent, and Thor had no more use of it than did plaintiff (CPLR 5001[a]; *see*

Manufacturer's & Traders Trust Co. v Reliance Ins. Co., 8 NY3d 583, 589 [2007]).

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

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4467 Yahaira Reyes, Index 302792/08
Plaintiff-Respondent,

-against-

Alejandro A. Diaz, et al.,
Defendants-Appellants.

_____

Feinman & Grossbard, P.C., White Plains (Steven N. Feinman of counsel), for appellants.

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Adam S. Bernstein of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered June 17, 2010, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendants' orthopedic surgeon failed to indicate the objective tests used to determine the range of motion in plaintiff's hip. Defendant failed to offer any expert opinion addressed to plaintiff's claimed psychological injuries (*see Offman v Singh*, 27 AD3d 284 [2006]). In addition, the opinion of defendants' radiologist that plaintiff's herniation was degenerative was "too equivocal to satisfy defendant[s']

prima facie burden to show that such herniation was not caused by a traumatic event" (*Glynn v Hopkins*, 55 AD3d 498, 498 [2008]).

In view of the foregoing, we need not consider the sufficiency of plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4469-
4469A- The People of the State of New York, Ind. 1502/06
4469B Respondent, 4980/08

-against-

Salimou Dabo,
Defendant-Appellant.

_____

Robert DiDio, Kew Gardens, for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered July 15, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, and judgment of resentence, same court, Justice and date, convicting defendant, upon his plea of guilty, of violation of probation, revoking his prior sentence of probation and resentencing him to a concurrent term of 5 years, unanimously affirmed. Purported appeal from judgment, same court (Charles H. Solomon, J.), rendered September 18, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of 5 years' probation, unanimously dismissed as untimely.

Defendant claims that his 2007 weapon possession conviction was invalid. However, defendant did not file a notice of appeal from that conviction, or a request for an extension of time to take an appeal (*see* CPL 460.30). To the extent any notice of appeal filed in 2009 purports to appeal from the 2007 conviction, that notice is untimely. Therefore, this Court has no jurisdiction to review the 2007 conviction. Defendant's appeal from the 2009 resentence following the revocation of probation does not bring up for review the underlying judgment of conviction (*see* CPL 450.30[3]; *People v Ramirez*, 5 AD3d 102, 103 [2004], *lv denied* 2 NY3d 805 [2004]).

The record demonstrates that defendant's 2009 guilty pleas were knowing, intelligent and voluntary (*see generally People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). Defendant's claim that the pleas resulted from coercion are contradicted by the allocution record and without merit.

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4470-
4471-
4472-
4472A Stellar Sutton LLC, Index 103215/08
Plaintiff-Appellant,

-against-

Linda Dushey, et al.,
Defendants-Respondents.

_____

Meister Seelig & Fein LLP, New York (Jeffrey Schreiber of counsel), for appellant.

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered May 6, 2010, which denied plaintiff's motion to dismiss defendants' first and second counterclaims, unanimously affirmed, with costs. Order, same court and Justice, entered June 21, 2010, which granted defendants' motion for a final preliminary injunction, unanimously affirmed, with costs. Order, same court and Justice, entered July 19, 2010, which denied plaintiff's motion to vacate or modify the temporary restraining order issued on March 29, 2010, and granted its motion to reargue and renew the application for a TRO, and, upon reargument, adhered to the original determination, unanimously affirmed, with costs. Appeal

from order, same court and Justice, entered May 11, 2010, which granted defendants' motion for a preliminary injunction to the extent of extending the temporary restraining order pending the parties' submissions of proposed orders containing undertaking amounts, unanimously dismissed, without costs, as academic.

Paragraph 39 of the Contract of Sale provides, "In connection with any litigation *arising out of this Agreement*, the prevailing party shall be entitled to recover all costs, including reasonable attorneys' fees" (emphasis added). Paragraph 22 addresses exclusively the lease agreements at issue and explicitly references defendants. Thus, contrary to plaintiff's contention, the documentary evidence does not establish as a matter of law that defendants may not seek to enforce paragraph 22 of the Contract of Sale, including the right to prevailing party attorneys' fees.

Initially, we note that the question of whether specific performance should be awarded to a party is ordinarily committed to the sound discretion of the trial court and should not be determined on a motion to dismiss (*see Cho v 401-403 57th Street Realty Corp.*, 300 AD2d 174 [2002]). We reject plaintiff's contention that the remedy of specific performance of the apartment 15A lease is unavailable to defendants as a matter of

law (*see Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186 [1986]). The object of this transaction for defendants was that they remain together as a family in apartments in the same building at below-market rents – "not a minor consideration" (*see e.g. Seitzman v Hudson Riv. Assoc.*, 126 AD2d 211, 214 [1987]). Under these circumstances and at this stage in the proceedings, the bargained for options in the contract of sale are incapable of being valued with reasonable certainty (*see Van Wagner*, 67 NY2d at 193-194).

Defendants demonstrated their entitlement to the preliminary injunction with respect to apartments 15A, 11B and 11F (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]). They established that there was "activity" going on in apartment 15A, that renovations were being made to apartments 11B and 11F, and that plaintiff was accepting applications for these units; that, given the difficulty, if not impossibility, of finding another building in New York where they could live as a family at below-market rents, they would suffer irreparable harm if unable to exercise their contractual options to lease one of these apartments, while plaintiff would be required merely to abide by the terms of its purchase of the building in 2005 (*see e.g. Penstraw, Inc. v Metropolitan Transp. Auth.*, 200 AD2d 442

[1994]); and, that success on the merits was likely, given the finding made in a prior related proceeding that the contractual options are enforceable (*see Tucker v Toia*, 54 AD2d 322, 325-326 [1976]). Contrary to plaintiff's contention, both apartments 11B and 11F were appropriately included in the injunction, because whether these apartments qualify under the particular contractual option at issue cannot be determined on this record – largely because of plaintiff's inconsistent evidence and representations. Finally, plaintiff offered no "new facts" in its renewal motion that could not have been provided on the prior motion.

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, JJ.

4474 In re Mary March, Index 402740/09
Petitioner,

-against-

John B. Rhea, as Commissioner of the
New York City Housing Authority,
Respondent.

_____

Joan L. Beranbaum, DC 37 Municipal Employees Legal Services, New York (Stephen Shepard of counsel), for appellant.

Sonya M. Kaloyanides, New York (Andrew M. Lupin of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority, dated July 1, 2009, which terminated petitioner's tenancy in public housing on the grounds of undesirability and breach of rules and regulations, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Marcy S. Friedman, J.], entered May 4, 2010), dismissed, without costs.

There is substantial evidence in the record to support respondent's determination that petitioner refused, without legitimate reason, to relocate to another Housing Authority apartment when requested to do so to allow for a major renovation

of the building in which she was living (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). The hearing officer fairly concluded that petitioner failed to present objective evidence to support her "safety concerns" with regard to several of the apartments offered to her and that her belief that several of the apartments were too small was not a permissible justification for rejecting them.

Under the circumstances, the penalty of terminating petitioner's tenancy does not "shock[] the judicial conscience" (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

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

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4476 Frances Porter, Index 302815/07
Plaintiff-Respondent-Appellant,

-against-

Franklin Bajana,
Defendant-Appellant-Respondent.

_____

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

Hoberman & Trepp, P.C., Bronx (Adam F. Raclaw of counsel), for respondent-appellant.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about July 27, 2010, which granted defendant's motion for summary judgment on the threshold issue of serious injury as to plaintiff's claims of injury of a permanent nature and denied the motion as to her claim of injury of a non-permanent nature, unanimously modified, on the law, to grant the motion as to the claim of non-permanent serious injury, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

The reports of defendant's expert neurologist and radiologist established prima facie that plaintiff's injuries were not permanent or significant because the injuries had resolved and plaintiff had full range of motion in her cervical

and lumbar spine (*see* Insurance Law § 5102[d]; *Thompson v Ramnarine*, 40 AD3d 360 [2007]). Moreover, the radiologist affirmed that plaintiff suffered from a preexisting degenerative condition and that the motor vehicle accident did not proximately cause her injuries. In opposition, plaintiff's medical expert failed to address or rebut defendant's evidence that plaintiff suffered from a preexisting degenerative condition (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]; *Valentin v Pomilla*, 59 AD3d 184, 184-185 [2009]).

Plaintiff also failed to raise an issue of fact as to her 90/180-day claim, because her subjective statements indicating the length of time she was unable to work and was substantially disabled from performing her customary and daily activities were not supported by objective medical evidence (*see Becerril v Sol Cab Corp.*, 50 AD3d 261, 262 [2008]).

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4477 The People of the State of New York, Ind. 5540/07
Respondent,

-against-

Ricardo Flores,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow 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 (Thomas A. Farber, J.), rendered on or about May 1, 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: MARCH 8, 2011

CLERK

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

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4478 Chantel S. Jackson, Index 101872/09
Plaintiff-Respondent,

-against-

J. Delossantos-Diaz,
Defendant-Appellant.

_____

The Sullivan Law Firm, New York (Timothy M. Sullivan of counsel), for appellant.

Law Offices of Morton J. Sealove, New York (Morton J. Sealove of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered July 6, 2010, which denied defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, the motion granted as to the 90/180-day category of Insurance Law § 5102(d) and the fracture, and otherwise affirmed, without costs.

Defendant failed to meet his initial burden to show that no triable issue of fact exists as to whether plaintiff sustained a significant limitation within the meaning of Insurance Law § 5102(d). The report by defendant's orthopedic expert, based on a recent examination, found limitations in range of motion in plaintiff's left shoulder but failed to set forth objective findings as to whether the limitations were significant or caused

by the subject accident (*see Shaw v Looking Glass Assoc., LP*, 8 AD3d 100, 103 [2004]).

However, defendant met his initial burden to show that no triable issue of fact exists as to whether the accident caused plaintiff's alleged fracture. Defendant's radiology expert affirmed that any bone abnormality was caused by a pre-existing degenerative condition (*see Bray v Rosas*, 29 AD3d 422, 424 [2006]). Plaintiff failed to meet her burden to present any evidence raising a triable issue of fact as to the cause of the fracture. Although she presented a report by the radiologist who conducted the MRI and who concluded that plaintiff had a fracture in her left shoulder, this report was silent as to the cause of the fracture (*see id.*).

Finally, defendant met his initial burden to show that plaintiff submitted no objective evidence establishing that she was unable to engage in any of her usual activities at any point during the 180 days immediately following the accident.

Plaintiff submitted only self-serving testimony, which does not suffice to raise a triable issue of fact concerning whether she met the threshold requirement for the 90/180-day category (*see Nelson v Distant*, 308 AD3d 338, 339 [2003]).

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

ENTERED: MARCH 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4480N Northern Leasing Systems, Inc., Index 602006/04
Plaintiff-Respondent,

-against-

The Estate of Edward M. Turner, et al.,
Defendants-Appellants.

_____

Chittur & Associates, P.C., New York (Krishnan Chittur of counsel), for appellants.

Moses & Singer LLP, New York (Declan Butvick of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered April 15, 2010, which precluded defendants from introducing into evidence any material not produced to plaintiff by April 2, 2009 as sanction for their dilatory discovery conduct, unanimously affirmed, without costs.

The motion court providently exercised its discretion in sanctioning defendants. Defendants' willful and contumacious refusal to cooperate with the discovery process can be inferred from two years of noncompliance with plaintiff's requests and defendants' failure to comply with three court orders directing defendants to produce documents and warning them of sanctions (*see Glasburgh v Port Auth. of N.Y. & N.J.*, 193 AD2d 441 [1993]; *Fish & Richardson, P.C. v Schindler*, 75 AD3d 219 [2010]).

Defendants' argument that plaintiff's failure to include an affirmation of good faith pursuant to 22 NYCRR 202.7 should be fatal to its cross motion for sanctions, is unavailing. The record indicates that plaintiff attempted, both under the auspices of the court and out of court, to reach an accommodation with defendants. "Under the unique circumstances of this case," any further attempt to resolve the dispute non-judicially would have been futile (*see Carrasquillo v Netsloh Realty Corp.*, 279 AD2d 334, 334 [2001]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MARCH 8, 2011

CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3544 Jose Mendoza, Index 13502/07
Plaintiff-Respondent,

-against-

Highpoint Associates, IX, LLC,
Defendant-Appellant.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Jonathan A. Judd of counsel), for appellant.

Davidson & Cohen, P.C., Rockville Centre (Robin Mary Heaney of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 12, 2010, modified, on the law, to the extent of granting defendant summary judgment on plaintiff's Labor Law § 241(6) claim, and otherwise affirmed, without costs.

Opinion by Renwick, J. All concur except Acosta, J. who concurs in part and dissents in part in a separate Opinion and Tom, J.P. who dissents in part in a separate Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
James M. McGuire
Rolando T. Acosta
Dianne T. Renwick
Helen E. Freedman, JJ.

3544
Index 13502/07

_____x

Jose Mendoza,
Plaintiff-Respondent,

-against-

Highpoint Associates, IX, LLC,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 12, 2010, which, insofar as appealed from as limited by the briefs, denied its motion for summary judgment dismissing the complaint.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Jonathan A. Judd and Shanna R. Torgerson of counsel), for appellant.

Davidson & Cohen, P.C., Rockville Centre (Robin Mary Heaney of counsel), for respondent.

RENWICK, J.

Plaintiff Jose Mendoza brought this action for injuries sustained during a fall while he was on a roof to inspect damage and determine the extent of necessary repairs. Plaintiff asserts claims under Labor Law §§ 240(1), 241(6) and 200, and common-law negligence. During the discovery process, defendant refused to produce an employee of the subject property for a deposition. As a result, Supreme Court ultimately precluded defendant from introducing evidence at trial with respect to liability.

Defendant does not dispute that Supreme Court appropriately exercised its discretion to fashion a remedy for its failure to comply with discovery demands. What defendant disputes is Supreme Court's subsequent determination that the preclusion order ipso facto prevented it from making a motion for summary judgment on the ground that plaintiff would not be able to make a prima facie case on liability. For the reasons explained below, we find the preclusion order did not prevent defendant from making such a motion. Accordingly, we entertain the motion on the merits.

Factual and Procedural Background

The alleged roof accident occurred in April 2006, at the premises known as 81-11A Broadway Avenue, Elmhurst, New York, a vacant one-story commercial building. This action was commenced

in March 2007 against defendant Highpoint Associates IX, LLC (Highpoint), the owner of the premises. Plaintiff's deposition took place on November 5, 2008, at which time he testified that on the date of the accident, he was employed by Keystone Management (Keystone) as a property manager. Keystone's headquarters were located in California, but the entity also managed numerous properties in New York City. Plaintiff supervised nine Keystone employees at various properties in the City, including the instant premises. Plaintiff's supervisor in California was Raha Arna who was no longer employed by Keystone at the time this action was commenced.

At the time of the accident, plaintiff was "assessing" a damaged roof. The previous day, Arna had told plaintiff that there was a leak in the roof, and directed him to assess the damage and fix it. Plaintiff testified that the leaking started during the summer of 2005, at which time debris covered a large part of the roof, further straining it. Arna had instructed plaintiff to have the debris removed by Keystone employees. The employees, however, complained that the roof did not feel right, and plaintiff informed Arna that the roof was "flimsy" and "not too safe." Plaintiff, at Arna's direction, took photos and e-mailed them to Arna. Plaintiff was aware that prior tenants had complained, at least since 2005, to Keystone and the building

owner about leaks in the roof; plaintiff heard about the complaints from Arna, but he did not know to whom the complaints were made.

Prior to the accident, plaintiff was "doing a walk-through" on the roof, assessing what repairs were necessary and what materials would be required, and taking down notes. At one point, after about one half hour, he stopped near the middle of the roof. The roof then "started to buckle" causing him to fall to his right side and land on his knee. As plaintiff explained, prior to his fall, the roof under his right foot started to "sink, to give way . . . about maybe an inch and a half, two inches," which "threw [plaintiff] off to the side," and caused him to fall onto his right knee, coming into contact with a piece of metal, "like a conduit pipe," on a conduit platform.

Daniel Shalom, the president of Keystone, was deposed on March 13, 2009. Shalom, a resident of California, testified that he was the sole shareholder of Keystone, which managed about 30 buildings, about half in the City and the other half in California. Shalom denied having any ownership interest in Highpoint but admitted he had such interest in several similarly named entities, which owned properties in the City. He claimed that his sister, Amy Shalom, was the sole owner of Highpoint.

Shalom remembered discussing the roof leaks with plaintiff

and directing him to inspect the roof. Although Shalom kept records of tenants' complaints for the various properties he managed, he did not bring any of them to the deposition; they remained in California. However, he remembered reviewing records revealing that the entire roof of the Elmhurst property had to be replaced in May 2006 because of leaks.

Because of the repeated failures to comply with discovery demands, by order dated May 5, 2009, Supreme Court precluded Highpoint from introducing evidence at trial unless, within 45 days of the order, defendant produced employees who had personal knowledge of facts related to the instant accident. Defendant was also directed to produce copies of all violations on the building for the year preceding plaintiff's accident. By its terms, the order was self-executing, specifically directing that defendant's failure to comply would result in preclusion of evidence at trial as to liability.

Defendant failed to produce any witness for a deposition. Nor did defendant appeal from the preclusion order. Instead, defendant moved for summary judgment on the ground, inter alia, that plaintiff would not be able to make out a prima facie case on liability for any of the claims asserted against it. Plaintiff opposed and cross-moved for summary judgment. Supreme Court refused to hear defendant's motion on the ground that the

preclusion order prevented defendant from presenting any evidence at trial on liability. Likewise, Supreme Court denied plaintiff's cross motion as untimely. Defendant appeals from the refusal to entertain its motion and seeks a dismissal of the action.

Discussion

A.

As a threshold procedural issue, we find no legal impediment to examining the merits of defendant's motion for summary judgment. Contrary to Supreme Court's determination, the fact that defendant was precluded from presenting evidence at trial on liability did not affect its right to move for summary judgment. Generally, a defendant's preclusion from introducing evidence at trial does not automatically entitle a plaintiff to summary judgment (*see Northway Eng'g v Felix Indus.*, 77 NY2d 332 [1991]; *Rosario v Humphreys & Harding*, 301 AD2d 406 [2003]). Indeed, a preclusion order does not relieve the plaintiff of the burden of proving its case (*see Northway*, 77 NY2d at 337; *Murphy v Herbert Constr., Co.*, 297 AD2d 503 [2002]; *Israel v Drei Corp.*, 5 AD2d 987 [1958]); nor does it preclude affirmative defenses (*see e.g., Ramos v Shendell Realty Group*, Inc., 8 AD3d 41 [2004] [affirmative defense of comparative negligence still a viable defense despite the preclusion order]; *Mendez v Queens Plumbing*

Supply, Inc., 12 Misc 3d 1064 [Sup Ct, Bronx County 2006] [same]; see also Moskowitz v Garlock, 23 AD2d 943 [1965]). Therefore, a preclusion order preventing evidence at trial on liability is unlike the striking of an answer, which effectively resolves a claim against the nondisclosing defendant *(see Rokina Opt. Co. v Camera King*, 63 NY2d 728 [1984]).

Accordingly, summary judgment should be granted where the non-disclosing defendant can establish entitlement to such relief despite the preclusion order barring it from offering its own affirmative evidence as to liability. This Court's determination in *Murphy v Herbert Constr. Co.* (297 AD2d 503 [2002]) aptly illustrates the point. In *Murphy*, the plaintiff moved for summary judgment on liability pursuant to Labor Law § 241(6), and the defendant subcontractor cross-moved for summary judgment dismissal of the claims under Labor Law §§ 240(1) and 241(6). Supreme Court granted plaintiff summary judgment and denied defendant's cross motion in its entirety. This Court reversed and granted the non-disclosing defendant summary judgment despite the fact that the motion court had precluded it from presenting evidence at trial on liability. Specifically, this Court dismissed the Labor Law §§ 240(1) and 241(6) claims asserted against the subcontractor because the plaintiff's evidence failed to allege a key element of such claims (*id.* at 504).

Plaintiff's reasoning for distinguishing *Murphy* -- adopted by the dissenters -- is not persuasive. Plaintiff argues that *Murphy* is inapplicable, in that the plaintiff there was the movant, but failed to produce any evidence establishing a prima facie case, a fundamentally different procedural posture from that at issue here. Plaintiff contends that, since defendant has the burden of establishing a prima facie case on its motion for summary judgment through the tendering of evidence and it is barred from tendering such evidence because of the preclusion order, it cannot meet its burden.

The divergent posture of this case vis-à-vis *Murphy* changes nothing. What is significant is that in both cases the preclusion order did not bar the defendant from challenging the sufficiency of the plaintiff's evidence; the answer was not stricken and the preclusion did not extend beyond limiting the defendant's affirmative evidence at trial on liability. The application of the remedy of preclusion to a specific category of evidence, as applied against a defendant, should not be a device for precluding a defendant from challenging the sufficiency of the plaintiff's evidence. In fact, courts have consistently held that a defendant may establish its prima facie entitlement to judgment as a matter of law by relying upon the plaintiff's evidence, including the plaintiff's own deposition, which may

negate liability (*see e.g. Acheson v Shepard*, 27 AD3d 596 [2006]; *Wellington v Manmall, LLC*, 70 AD3d 401 [2010]).

For example, *in DeSantis v Lessing's, Inc.* (46 AD3d 742 [2007]), the defendant established its prima facie entitlement to judgment as a matter of law by submitting the plaintiff's deposition testimony, in which she was unable to explain what caused her to trip and fall. Similarly, in *Frank v Time Equities* (292 AD2d 186 [2002]), this Court held that "[w]hile a defendant moving for summary judgment [in a slip-and-fall case] has the burden of demonstrating entitlement to dismissal as a matter of law, there is no need for a defendant to submit evidentiary materials . . . where the plaintiff failed to claim the existence of notice of the condition" (*id.* at 186). Thus, while *Murphy* arose in a different procedural context, its ruling underscores the basic rule applicable here: that a defendant can prevail at the summary judgment stage by challenging the sufficiency of the plaintiff's evidence.

Indeed, it cannot be seriously disputed that a preclusion order does not prevent a defendant from challenging a plaintiff's evidence at trial by moving for a directed verdict at the end of the plaintiff's case on the ground that the latter has failed to make a prima facie case. It is also beyond cavil that a motion for summary judgment is the procedural equivalent of a trial (see

Crowley's Milk Co. v Klein, 24 AD2d 920 [1965]). In fact, CPLR 3212(b) implicitly draws an analogy between the motion for summary judgment and the motion for a directed verdict made at trial.[1] In each instance, the court is taking the case away from the fact finder by determining that there is nothing to try. Of course, the main difference is that on a summary judgment motion the judge is asked to decide the issue on papers alone while in a motion for a directed verdict, the judge has the advantage of hearing live testimony.

Significantly, we perceive no imperative policy consideration that militates against allowing by summary judgment motion what a defendant can do at trial. Contrary to the dissenters' assertions, such determination does not "perversely undermine the point of the order." On the contrary, while the purpose of a preclusion order is to make the demanding party whole (*see Northway*, 77 NY2d at 337), whatever disadvantage plaintiff sustained as a result of defendant's failure to provide the required discovery was overcome when Supreme Court effectively prohibited defendant from offering its own affirmative evidence at trial on liability. To further preclude

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[1] The motion for a directed verdict, although still called that in practice, is officially known today as a motion for judgment during trial (see CPLR 4401).

defendant from making a motion for summary judgment to challenge plaintiff's evidence -- as a defendant can do at trial -- would give plaintiff more relief than is warranted *(id.)*.

For the foregoing reasons, we are satisfied that the preclusion order does not constitute a procedural bar to this Court's proper disposition of defendant's motion for summary judgment on the merits. To be sure, as plaintiff correctly points out, we are mindful of the fact that defendant, by its own failure to comply with the conditional preclusion order, should be barred from offering its own affirmative evidence as to liability, either at trial or on the motion, regardless of the order's reference to "at trial." The result, otherwise, would perversely undermine the point of the order by allowing defendant to benefit from the short cut of summary judgment by use of the same evidence that otherwise would have been barred at trial. Hence, for present purposes, all of defendant's affirmative evidence is precluded.[2]

B.

With this evidentiary constraint in mind, we now examine defendant's motion for summary judgment on the merits. We first

[2] The dissent incorrectly points out that "[i]n essence, defendant merely submitted a notice of motion and counsel's affirmation ... ," when in fact defendant supported its motion with the deposition testimony of plaintiff, among others.

turn to the claims under common-law negligence and Labor Law § 200. Labor Law § 200 codifies the common law duty of an owner or an employer to provide a safe work place; it is tantamount to a common-law negligence claim in a workplace context *(see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Where, as here, the accident arises not from the methods or manner of the work, but from a dangerous premises condition, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008]; *see also* 261 *Schultz v Hi-Tech Constr. & Mgt. Servs. Inc.*, 69 AD3d 701 [2010]; *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460 [2008]).

Here, from plaintiff's testimony, it is apparent that the roof started to leak at least in or before 2005, a year prior to the incident, and Keystone and defendant were aware of that. That the surface of the roof was in some degree compromised, was thus known to the managing agent and, at least by reasonable imputation, to the owner, defendant. At that time, plaintiff reported that the roof seemed unstable and was "flimsy." This lays the factual basis for plaintiff arguing at trial that the

long-term, chronically uncorrected, water seepage through the roof placed it in a state of disrepair destabilizing its surface, providing constructive notice that the roof as a whole posed a dangerous condition to any worker sent to walk around on it. Under the circumstances, it cannot be said that plaintiff's testimony negates any common-law negligence or Labor Law § 200 claim.

The same factual allegations that support a claim under common law/Labor Law § 200 – defendant commanded plaintiff to inspect the roof despite its apparent knowledge that the roof was in a "flimsy" condition and that plaintiff was not adequately protected against the dangers of the job -- also support a Labor Law § 240(1) claim.

We reject defendant's argument that plaintiff was involved only in routine maintenance, which is not a covered activity under section 240(1). Although the extent of plaintiff's responsibilities for repair of the roof is uncertain, especially since his injuries obviously prevented him from performing any subsequent roofing work, he indicated that he and his workers would perform the work. Thus, a fair reading of plaintiff's testimony indicates that at a minimum he was an integral part of the repair work, which, under ordinary circumstances, would proceed under his supervision, and that it was an imminent event

and not merely a possible future task (*Caraciolo v 800 Second Ave. Condominium*, 294 AD2d 200 [2002] [building engineer's inspection of a rooftop water tank was a covered activity under Labor Law § 240(1), rather than routine maintenance since it was done in furtherance of the repair of an apparent malfunction]).

Nor do we find any merit to defendant's argument that plaintiff's testimony does not raise an issue of fact as to whether his injuries resulted from a gravity-related hazard that brought about the need for a safety device. Consistent with the principle that "the determination of the type of protective device required for a particular job [and thus whether section 240(1) is implicated] turns on the foreseeable risks of harm presented by the nature of the work being performed" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 268 [2007], *lv denied* 10 NY3d 710 [2008]), this Court recently held in *Jones v 414 Equities LLC* (57 AD3d 65 [2008]), and reiterated in *Espinosa v Azure Holdings II, LP* (58 AD3d 287 [[2008]), that to prevail on a Labor Law § 240(1) claim based on an injury resulting from the failure of a completed and permanent building structure, "the plaintiff must show that the failure of the structure in question 'was a foreseeable risk of the task he was performing'" (*Espinosa*, at 291-292, quoting *Jones*, at 80), creating a need for protective devices of the kind enumerated in the statute

(*Espinosa* at 291-292).[3]

In *Espinosa*, the plaintiff, a worker on a gut rehabilitation project, was injured when the sidewalk on which he was standing collapsed due to the failure of the cellar vault below it (58 AD3d 287, *supra*). This Court reversed the trial court's dismissal of the Labor Law § 240(1) claim because the evidence of the building's deteriorated condition raised a triable issue of fact as to whether the collapse of the sidewalk due to the failure of a corroded steel support beam in the cellar vault ceiling was a foreseeable risk that gave rise to the need for the kind of safety devices enumerated in the statute (*id.* at 289).

Prior to *Jones* and *Espinosa*, the Second Department had also held that where the building's structure in which the plaintiff

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[3] Justice Acosta's writing takes exception to our reliance on *Jones* and its progeny, which it finds "legally unsound" for improperly injecting a forseeability requirement into a Labor Law 240(1) analysis. We, however, find *Jones* consistent with Court of Appeals precedent (*see e.g. Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993] ["(t)o establish a prima facie case (of a violation of Labor Law § 240[1]) plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable" [emphasis added]). As this Court recently pointed out in *Vasquez v Urbahn Assoc. Inc.* (__ AD3d __, 2010 N.Y. Slip Op. 09076 [December 09, 2010]), "While it is true that Labor Law § 240(1) fails to mention any foreseeability requirement as a predicate to its violation, a foreseeability requirement must necessarily be imputed as to every claim pursuant thereto, when as here, the claim is premised on a collapsing permanent structure."

was performing work was in a state of disrepair, that condition is sufficient to raise a triable issue as to whether the plaintiff's work "exposed him to a foreseeable risk of injury from an elevation-related hazard" *(Shipkoski v Watch Case Factory Assoc.*, 292 AD2d 588 [2002]). In *Shipkoski*, the plaintiff's employer had contracted to board up broken windows in a vacant building. The plaintiff "allegedly was injured when, as he was walking on the deteriorated third floor measuring windows for the installation of plywood, the floor gave way and he fell through" (*id.* at 588). The Court affirmed the denial of the plaintiff's motion for summary judgment on his Labor Law § 240(1) claim because there were

> "issues of fact as to whether the building was in such an advanced state of disrepair and decay from neglect, vandalism, and the elements that the plaintiff's work on the third floor exposed him to a foreseeable risk of injury from an elevation-related hazard, and whether the absence of a type of protective device enumerated under Labor Law § 240(1) was a proximate cause of his injuries" (292 AD2d at 588- 589).

Here, as in *Espinosa* and *Shipkoski*, there is evidence, as fully detailed above, suggesting that the roof was in a state of disrepair due to the long-term, chronically uncorrected, water seepage through the roof that had destabilized its surface. Such evidence clearly raises an issue of fact as to whether it was foreseeable that the roof would buckle. It is immaterial that

the roof did not collapse since a plaintiff need not completely fall from the roof in order to recover under Labor Law § 240(1) as long as the injury resulted from an elevation-related hazard (see *Dominguez v Lafayette-Boynton Hous. Corp.*, 240 AD2d 310 [1997]; *Gramigna v Morse Diesel,* 210 AD2d 115 [1994]). Plaintiff's accident was certainly caused by the effects of gravity as he lost his balance and landed on his knee when the "flimsy, unstable" roof started to "buckle" and "sink" underneath his feet. Defendants are therefore not entitled to summary judgment since plaintiff's evidence raises a triable issue of fact as to whether the flimsy, unstable condition of the roof exposed plaintiff to a foreseeable risk of injury from an elevation-related hazard, and whether the absence of a protective device enumerated under Labor Law § 240(1) was a proximate cause of his injuries.

We reach a different result with regard to plaintiff's Labor Law § 241(6) claim. To prevail on a cause of action pursuant to Labor Law § 241(6), a plaintiff must prove a violation of a provision of the Industrial Code that sets forth a specific safety standard (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). Here, plaintiff's claim under that section is based on an alleged violation of 12 NYCRR 23-1.7(e)(2), which provides that floors, platforms and similar

working areas "shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." That regulation, however, does not apply here because the metal pipe that plaintiff allegedly collided with, when he was on the roof inspecting the damages and determining the extent of necessary repairs, is not a tripping hazard that falls within 12 NYCRR 23-1.7(e)(2). That is, since the pipe was on the roof prior to commencement of the work in connection to the roof repair, it was not left there as a result of the "work performed" (*see Dalanna v City of New York*, 308 AD2d 400 [2003] [plaintiff, who tripped over a protruding bolt while carrying a pipe across an outdoor 50-foot-long concrete slab, could not recover under section 241(6) since the bolt, which was embedded in the ground, was not "dirt," "debris," "scattered tools and materials," or a "sharp projection[]," as required by 12 NYCRR 23-1.7(e)(2)]). Plaintiff's version of the accident, therefore, negates any 12 NYCRR 23 - 1.7(e)(2) violation.

Conclusion

Accordingly, the order of the Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 12, 2010, which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint,

should be modified, on the law, to the extent of granting defendant summary judgment on plaintiff's Labor Law § 241(6) claim, and otherwise affirmed, without costs.

All concur except Acosta, J. who concurs in part and dissents in part in a separate Opinion, and Tom, J.P. who dissents in part in a separate Opinion.

ACOSTA, J. (concurring in part and dissenting in part)

I disagree with the majority's assessment of the "threshold procedural issue," namely, whether the preclusion order prevented defendant from submitting evidence in support of its summary judgment motion. Instead, I agree with plaintiff that defendant, by its own failure to comply with the conditional preclusion order, should be barred from offering affirmative evidence as to liability, either at trial or on the motion, regardless of the order's reference to "at trial." Indeed, the majority acknowledges that allowing defendant to submit its own affirmative evidence on liability in support of its summary judgment motion would "undermine the point of the order by allowing defendant to benefit from the short cut of summary judgment by use of the same evidence that otherwise would have been barred at trial." Apparently categorizing evidence as for either plaintiff or the defense, the majority condones defendant's use of plaintiff's deposition testimony to support its motion because it was given by plaintiff and it is therefore not defendant's affirmative evidence. I disagree. The fact that defendant used plaintiff's deposition testimony makes it defendant's evidence.

The majority grounds its holding on various legal precepts, none of which are dispositive of the issue. Initially, it posits

that "a preclusion order does not relieve the plaintiff of the burden of proving its case." While this precept is true, the majority simply ignores the different burdens of defendant at trial, where it can simply wait for evidence to be introduced by plaintiff, and on summary judgment, where it has the burden, as movant, to come forward with evidence in admissible form (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In the context of a summary judgment motion, assuming a defendant establishes its prima facie entitlement to relief, the burden shifts to the plaintiff, not to prove its case, but merely to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Significantly, the burden shifts only if the defendant first establishes its prima facie entitlement. To do so, it must submit papers, including supporting evidence (*id.*). Here, inasmuch as defendant was precluded from submitting any evidence on liability, in essence, defendant merely submitted a notice of motion and counsel's affirmation, which are insufficient for summary judgment (*see Zuckerman at* 563; *Di Sabato v Soffes*, 9 AD2d 297, 300-301 [1959]). That the preclusion order did not preclude defendant from raising affirmative defenses, such as comparative negligence as the majority notes, is of no moment.

The majority also posits that if the case had gone to trial,

the order would not have prevented defendant from moving for a directed verdict based on the evidence presented by plaintiff. However, that is not the posture of this case. In a trial, a preclusion order would not prevent defendant from using any evidence properly introduced by plaintiff. Thus, a trial judge can rule on a directed verdict motion based on the body of evidence before it. Here, however, as noted above, there was no evidence properly put forth in defendant's moving papers. And, unlike a trial where the plaintiff has the ultimate burden, in the context of a summary judgment motion, plaintiff can simply stay quiet unless defendant has established its prima facie right to summary judgment.

For this reason, the cases relied on by the majority are not on point. In *Murphy v Herbert Constr. Co.* (297 AD2d 503 [2002]), it was the plaintiff who initially moved for summary judgment. Thus, although the defendant was precluded from presenting any evidence, the court properly ruled on the defendant's cross motion for dismissal based on the body of evidence that had been properly presented by the plaintiff. Other cases cited by the majority are equally inapposite. In *DeSantis v Lessing's Inc.* (46 AD3d 742 [2007]), the defendant, unlike in the present case, was not precluded from submitting evidence, which it did in the form of the plaintiff's deposition testimony. In *Frank v Time*

Equities (292 AD2d 186 [2002]), a slip and fall case, not only was the defendant permitted to submit evidence, but the plaintiff failed to claim notice of condition (*see also Acheson v Shepard*, 27 AD3d 596 [2006]; *Wellington v Manmall*, LLC, 70 AD3d 401 [2010]).

Accordingly, in my opinion, the motion court properly declined to entertain defendant's motion.[1]

Assuming for the sake of argument that the majority is correct on the "threshold procedural issue," I agree with its analysis with respect to the Labor Law §§ 200 and 241(6) claims. With respect to the 240(1) claim, however, I concur with the result only inasmuch as there is no statutory requirement that a plaintiff establish that an injury was foreseeable to prevail on a 240(1) claim. Rather, as I stated recently in *Vasquez v Urbahn* (__ AD3d __, 2010 NY Slip Op 09076, *5 [2010] [dissenting opinion]), the plain language of Labor Law § 240(1) mandates that in covered activity, "contractors and owners *shall* furnish safety devices to workers" (emphasis added). "Nowhere is there a requirement that owners and contractors have to supply safety devices only when they divine there is a foreseeable risk of

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[1]Although plaintiff cross-moved for summary judgment, the court declined to entertain that motion as well, finding that it was untimely filed. That portion of the order has not been appealed.

injury in a particular task because of the employee's relative elevation. Nor . . . is there a distinction in the statute between a permanent structure and a temporary structure" (*id.*), or, as the majority seems to be implying in the present case, between a structure and the "surface" of the structure.

The concept of foreseeability in the context of a 240(1) case was addressed by the Court of Appeals in *Gordon v Eastern Ry. Supply* (82 NY2d 555 [1993]), where it explicitly held that a "plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from *defendant's conduct* was foreseeable" (*id.* at 562) (emphasis added). In other words, "[i]t is enough that given the inherently dangerous conditions of work sites, it is foreseeable that an owner or contractor's failure to provide safety devices to workers, as here, may create an injury" (*Vasquez* at *4).[2] The majority, without any statutory support, turns this concept on its head and places the burden on plaintiff instead. For this reason, cases such as *Jones v 414 Equities LLC* (57 AD3d 65 [2008]) and *Espinosa v Azure Holdings II, LP* (58 AD3d 287

[2]Accordingly, the plaintiff's 240(1) claim in *Gordon* was not dismissed by the Court notwithstanding that the injury was the result of an unforeseeable accident, that is the malfunctioning sandblaster trigger (*Gordon* at 562).

[2008]), relied on heavily by the majority, are legally unsound.

Otherwise, I agree with the majority. Contrary to the defendant's assertion, the facts indicate that plaintiff's activity was not routine maintenance. Specifically, his testimony set forth that defendant and/or its managing agent Keystone was aware there was a chronic leaking problem which had to be repaired, that it was going to be repaired and that plaintiff was directed to go to the roof for the purpose of commencing the repair operation, where he and his workers would perform the work.

Thus, I agree with the majority that a fair reading of plaintiff's testimony indicates that plaintiff's inspection of the rooftop was a covered activity under Labor Law § 240(1), rather than routine maintenance, since it was done in furtherance of the repair (*Caraciolo v 800 Second Ave. Condominium*, 294 AD2d 200, 201-202 [2002] [building engineer's inspection of a rooftop water tank was a covered activity under Labor Law § 240(1) rather than routine maintenance, since it was done in furtherance of the repair of an apparent malfunction]). Moreover, as the majority correctly found, plaintiff's injury resulted from an elevation-related hazard even though the roof did not completely cave in (*see Dominguez v Lafayette-Boynton Hous. Corp.*, 240 AD2d 310 [1997]; *Gramigna v Morse Diesel*, 210 AD2d 115 [1994]), and he was

not provided with adequate protection devices. Indeed, under the circumstances, it is not improbable that had plaintiff been provided with roof brackets, toe boards, safety lines, belts or other safety devices, his body would not have collapsed in the manner in which it did, after the roof buckled underneath him. Since it appears that plaintiff was placed at an elevation-related risk (dilapidated roof) and that he was not adequately protected against the dangers of the job, defendant has not established that plaintiff cannot maintain a Labor Law § 240(1) claim at trial. Accordingly, defendant was not entitled to summary dismissal of the Labor Law § 240(1) claim.

TOM, J.P. (dissenting in part)

I concur with Justice Acosta to the extent that the preclusion order requires denial of defendant's motion. Because defendant is barred from offering evidence on the issue of liability, it is unable to demonstrate its prima facie entitlement to summary judgment. Accordingly, it is unnecessary to consider the merits.

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

ENTERED: MARCH 8, 2011

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CLERK