SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**MARCH 24, 2011**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3384 Teresa Spencer, et al., Index 6859/06
Plaintiffs-Respondents,

-against-

Golden Eagle, Inc., et al.,
Defendants-Appellants.

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

Spiegel & Barbato, LLP., Bronx (Brian C. Mardon of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered March 22, 2010, which, in this action seeking damages for personal injuries suffered in a motor vehicle accident, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiffs Teresa Spencer and Lisa Spencer, her sister, allege that they sustained "serious" injuries pursuant to Insurance Law § 5102(d) when their car was struck in the rear by a vehicle owned and/or operated by defendants. Specifically, they claim "permanent consequential limitation of use of a body

organ or member" and/or "significant limitation of use of a body function or system" and/or non-permanent "medically determined injury or impairment ... [preventing them] from performing substantially all of ... [their] usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

By notice of motion dated February 17, 2009, defendants moved for summary judgment dismissing the complaint against them. By decision and order dated March 11, 2010, the trial court denied defendants' motion on grounds that, inter alia, defendants' orthopedic expert "failed to disclose the testing methods used to determine that plaintiffs' ranges of motion were essentially normal." We affirm the motion court's denial of summary judgment, although we do so on different grounds.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes "'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [2000]).

Where there is objective proof of injury, the defendant may meet his burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [2010], citing *Pommells v Perez*, 4 NY3d 566 [2005]).

Once the defendant meets his initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [2009]; *Style v Joseph*, 32 AD3d 212, 214 [2006]).

Here, in support of their motion, defendants submitted the affirmations of their orthopedic and radiology experts. Defendants' orthopedic expert concluded that plaintiffs suffered no permanent injury as a result of the accident. His affirmations are based on MRI reports, plaintiffs' medical

records, and October 2008 examinations of the plaintiffs. Initially, we note that contrary to the motion court's finding, defendants' orthopedic expert properly provided objective bases for his conclusions that plaintiffs' ranges of motion were normal (*see DeLeon v Ross*, 44 AD3d 545 [2007], citing *Toure*, 98 NY2d at 350). The defendants' orthopedic expert's reports listed the tests he performed and recorded ranges of motion expressed in numerical degrees and the corresponding normal values. Moreover, defendants' radiology expert opined in his reports that the MRI studies were either normal, or indicative of pre-existing and/or degenerative conditions.

In opposition, plaintiffs submitted the affirmations of their treating physician who concluded that they suffer permanent partial disability as a result of the accident. His conclusions are based on medical records documenting their continued treatment since the accident including objective tests that he performed, and diminished ranges of motion that he related to plaintiffs' physical limitations. Furthermore, the treating physician's conclusions regarding causation are supported by medical records, wherein he acknowledges some pre-existing injuries but attributes specific other injuries to the accident. Additionally, plaintiffs' contemporaneous MRI reports, in contrast to defendants' expert's reports, do not characterize

their injuries as degenerative (*see Jacobs v Rolon*, 76 AD3d 905 [2010]).

Therefore, we find that plaintiffs have raised a triable issue of fact as to serious injury and defendants' motion for summary judgment was properly denied.

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

ENTERED: MARCH 24, 2011

CLERK

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

4252 Meghan Beard, Inc., etc., Index 107626/09
Plaintiff-Appellant,

-against-

Aina Fadina et al.,
Defendants-Respondents.

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E. Diane Brody, New York, for appellant.

Carlos M. Carvajal, New York, for respondents.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered October 15, 2009, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the amended complaint's third, fourth, fifth, and sixth causes of action pursuant to CPLR 3211(a)(7), unanimously modified, on the law, to reinstate in part the amended complaint's third cause of action, for breach of contract against defendant Aina Fadina, insofar as it alleges breach of the Oscar De La Renta booking agreement, and the fourth cause of action, for tortious interference with contract against defendant Muse Management, Inc., insofar as it alleges breach of the Oscar De La Renta booking agreement, and otherwise affirmed, without costs.

Supreme Court properly determined that the management agreement between plaintiff and defendant Fadina was

unenforceable because the temporal restriction of the noncompete covenant was unreasonable (*see Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 264 [1st Dept 2004]). However, the motion court erred in holding that the management agreement was unenforceable because of an oral covenant. While it is true that "anticompetitive covenants covering the postemployment period will not be implied" and must be express, the covenant can be written or verbal (*see American Broadcasting Cos. v Wolf*, 52 NY2d 394, 406 [1981]). Moreover, the motion court only analyzed the third cause of action as one for breach of the management agreement when in fact, the breach of contract claim was actually premised upon the booking agreements. We find that the third cause of action is viable only to the extent that it is premised upon the booking agreement, between plaintiff and Fadina, for Fadina to appear for the Oscar De La Renta booking in June 2009. Whether plaintiff can demonstrate Fadina breached that booking agreement is a factual determination that can not be made on a CPLR 3211 motion.

The motion court properly dismissed the fourth cause of action to the extent that it was premised upon defendant Muse's tortious interference with plaintiff's booking agreement with Akris. Plaintiff's own allegations negate at least two essential elements of the cause of action – breach and damages – because

plaintiff conceded that Fadina appeared for the booking and that Akris paid plaintiff for that appearance.

Plaintiff, however, has alleged facts sufficient to state a claim for defendant Muse's tortious interference with plaintiff's booking agreement with Oscar De La Renta. The motion court erred insofar as it premised the dismissal upon plaintiff's failure to allege that Muse induced the alleged breach by "unlawful or improper" means. That criteria is only applicable in a cause of action for tortious interference with prospective advantage or business relations (*Carvel Corp. v Noonan*, 3 NY3d 182, 190-194 [2004]). Here, plaintiff's claim is tortious interference with contract, which only requires plaintiff to allege "(1) the existence of a valid contract[;] (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach of that contract[;] and (4) damages" (*Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]). Plaintiff has sufficiently pleaded that Muse interfered with plaintiff's booking agreement with Oscar De La Renta.

Supreme Court properly dismissed the fifth cause of action, for unfair competition. Plaintiff alleged that Muse contacted Akris and Oscar De La Renta to insist that Muse handle the billing instead of plaintiff. There is simply no evidence of record that Muse was taking or using the goodwill attached to

plaintiff's name or that Muse was palming itself off as plaintiff (*see ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 476-478 [2007]).

The motion court also properly dismissed the sixth cause of action, for unjust enrichment. Plaintiff is attempting to recover on a quasi-contractual basis because it cannot prevail on the breach of the management agreement. Plaintiff was compensated by the commissions it received during its concededly "freelance" and "at will" relationship with Fadina, and equity need not intercede.

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4603 The People of the State of New York, Respondent, Ind. 5643/07

-against-

Edward Green, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 8, 2008, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first and third degrees and two counts of criminally using drug paraphernalia in the second degree, and sentencing him, as a second felony drug offender, to an aggregate term of 15 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. Moreover, the evidence overwhelmingly established that defendant was a participant in a drug-selling operation and a possessor of contraband found in two apartments being used as drug factories.

Defendant has not established a violation of the principles of *People v O'Rama* (78 NY2d 270 [1991]) in connection with a note

from the deliberating jury. Before deliberations began, defense counsel expressly agreed to permit the jury to examine the exhibits in evidence. In the note in question on appeal, the jury requested permission to open an evidence bag and try a key in a lock. Under the circumstances of the case, this was not a request to perform an experiment or demonstration, but was essentially a request to apply “everyday experiences, perceptions, and common sense" (*People v Gomez*, 273 AD2d 160, 161 [2000], *lv denied* 95 NY2d 890 [2000]) in handling the exhibit. Accordingly, the request was ministerial rather than substantive (*cf. People v Kelly*, 5 NY3d 116, 120 [2005]), and there was no need for input from counsel.

The court properly conducted an in camera, ex parte hearing concerning an informant’s existence and his communications to the police, in accordance with *People v Darden* (34 NY2d 177 [1974]). Defendant incorrectly asserts that this hearing also constituted a general suppression hearing at which he had a right to be present. After the hearing, the court informed the parties that the hearing testimony raised issues that might warrant an adversarial suppression hearing, and released pertinent portions of that testimony. The court made no determinations regarding those issues at that time, and offered defendant the opportunity to litigate them at a conventional hearing. Defense counsel

declined the offer of a hearing, and chose to rely on written submissions and the *Darden* hearing minutes. Accordingly, defendant waived any objection to the procedure by which the court resolved the suppression issues (*cf. People v Jenkins*, 38 AD3d 230 [2007], *lv denied* 8 NY3d 986 [2007]).

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown a reasonable probability that counsel's isolated error in opening the door to the introduction of two of defendant's prior convictions affected the outcome of the trial, given the overwhelming evidence of guilt. The additional ineffective assistance arguments raised in defendant's pro se supplemental brief are unreviewable on direct appeal because they involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]).

The court properly exercised its discretion in determining that defense counsel's opening statement opened the door to admission of an item of physical evidence that the court had suppressed (*see People v Massie*, 2 NY3d 179, 183-185 [2004]). In

any event, any error in admitting this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4604 Unitrade Marketing Group, Inc., et al.,
Plaintiffs,

-against-

200 Fifth LLC,
Defendant.
- - - - -
Jaroslawicz & Jaros, LLC,
Petitioner-Respondent,

-against-

Laurie Schacht, et al.,
Respondents-Appellants.

Index 603856/05

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Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellants.

Jaroslawicz & Jaros LLC, New York (Natascia Ayers of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 20, 2009, which confirmed the Special Referee's report, dated February 29, 2008, and declared that the fee to petitioner law firm shall be the ten percent fee paid directly to petitioner by defendant landlord, unanimously affirmed, without costs.

The record supports the court's confirmation of the Special Referee's finding that, in settling the underlying action, defendant orally agreed to pay petitioner's legal fee by adding

ten percent to the settlement amount it agreed to pay respondents (*see generally Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705, 705-706 [1985]). The record indicates that respondents were aware of and consented to the oral agreement. As the court found, the oral agreement rendered respondents' contingency fee agreement with petitioner irrelevant since respondent was relieved of its contractual obligation to pay petitioner's legal fee. We have considered respondents' remaining arguments and find them unavailing.

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4606 In re Jennifer J.,
Petitioner-Appellant,

-against-

Robert P.D.,
Respondent-Respondent.

Julian A. Hertz, Larchmont, for appellant.

Neal D. Futerfas, White Plains, for respondent.

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

Order, Family Court, Bronx County (Peter Kuper, Referee), entered on or about February 18, 2010, which dismissed with prejudice the mother's petition for a modification of a final order of custody, unanimously affirmed, without costs.

Application by the mother's assigned counsel to be relieved as counsel is granted (see *Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed

the record and agree with the mother's assigned counsel that there are no nonfrivolous issues which could be raised on this appeal.

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4607 QBE Insurance Corporation, et al., Index 308466/08
Plaintiffs-Respondents,

-against-

Hudson Specialty Insurance Company, et al.,
Defendants-Appellants.

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Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel), for appellants.

Wilson, Bave, Conboy, Cozza & Couzens, P.C., White Plains (Donna L. Cook of counsel), for respondents.

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Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered July 15, 2010, which granted plaintiffs' motion to renew and, upon renewal, denied defendant Hudson Specialty Insurance Company's motion for summary judgment declaring that plaintiff Bali 9 Building Associates is not entitled to additional insured coverage under an insurance policy issued to defendant Peter Samaha for claims against Bali in an underlying personal injury action, unanimously affirmed, with costs.

Bali leased premises to defendant McDonald's Corporation under a lease that included as part of the leased premises the "rear parking lot." The lease further provided, in pertinent part, that McDonald's "shall maintain and keep in force . . . general public liability insurance against claims for personal injury . . . occurring in, on or about the Premises or sidewalks

or premises adjacent to the Premises." Under the heading "Sidewalks," the lease provided that "[Bali] shall maintain the sidewalks. [McDonald's] shall keep the sidewalk in front of the Premises free and clear of snow and ice at all times." Samaha, McDonald's franchisee, purchased an insurance policy from Hudson, naming Bali as an additional insured, "but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to" McDonald's.

Thereafter, a personal injury action was commenced against Bali and others for injuries allegedly sustained when the underlying plaintiff slipped on a patch of ice on a sidewalk "12 feet east of the easternmost post of the rear lot" of the premises leased to McDonald's. Bali and its insurer, QBE Insurance Corporation, commenced this action seeking a declaration that, among other things, Hudson is obligated to defend and indemnify them in the underlying action.

Although plaintiffs failed to present a reasonable excuse for their delay in obtaining the evidence they presented upon renewal, the IAS court providently exercised its discretion in granting the motion to renew in the interest of justice (*see Garner v Latimer*, 306 AD2d 209, 209-210 [2003]). The initial order granting Hudson's motion for summary judgment depended on the motion court's erroneous belief that the premises leased to

McDonald’s did not include the rear parking lot.

Upon renewal, the court properly determined that Hudson failed to meet its initial burden of establishing that it has no duty to defend and indemnify Bali in the underlying action. Issues of fact exist as to whether liability in the underlying action is based on the ownership, maintenance or use of that part of the premises leased to McDonald’s and whether McDonald’s was responsible for keeping the site of the accident free of snow and ice.

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4609 Lorraine Pisani, Index 304819/08
Plaintiff-Appellant,

-against-

First Class Car and Limousine Service Corp.,
Defendants,

Ruben Bello,
Defendant-Respondent.

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Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Aybike Donuk of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered April 7, 2010, which granted defendant Ruben Bello's motion for summary judgment dismissing the complaint as against him for lack of serious injury, unanimously modified, on the law, to the extent of denying that part of defendant's motion to dismiss plaintiff's claims for permanent consequential and/or significant limitation of use, and otherwise affirmed, without costs.

Defendant met his initial burden of proof of establishing that plaintiff's injuries were not, as a matter of law, serious within the meaning of Insurance Law § 5102(d). Defendant submitted the report of an orthopedic surgeon who determined that

plaintiff had a normal range of motion in the cervical and lumbar spine. Defendant also demonstrated that plaintiff's injuries were not causally related to the accident through the report of a radiologist, who opined that the minimal disc bulges and hypertrophic changes of the facet joints were degenerative and preexisted the accident (*see Jacobs v Rolon*, 76 AD3d 905, 905 [2010]). In addition, defendant demonstrated that plaintiff did not sustain a 90/180-day injury by submitting her deposition testimony wherein she admitted that she missed only three days of work following the accident (*see Ortiz v Ash Leasing, Inc*, 63 AD3d 556, 557 [2009]).

Plaintiff, however, raised issues of fact as to whether she sustained a serious injury under the categories of permanent consequential limitation of use of a body organ or member and/or significant limitation of use of a body function or system (*see* Insurance Law § 5102[d]). Plaintiff's treating chiropractor and her treating orthopedist determined, based on objective, quantitative tests, that plaintiff had significant limitations in range of motion in both her cervical and lumbar spine. The chiropractor examined plaintiff on the day after the accident. The chiropractor therefore performed tests immediately after the accident as well as a year and one-half later. Plaintiff's orthopedist performed tests eight months after the accident and

on at least four other occasions over the ensuing year. Both opined that, based on plaintiff's history, her impairments were causally related to the accident. These findings conflicted with those of defendant's experts and raised an issue of credibility to be resolved by the trier of fact (*see Jacobs*, 76 AD3d at 905).

Dismissal of plaintiff's 90/180-day claim was appropriate since plaintiff has failed to raise any issue of fact with respect to this category.

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4610 Ellen Minkow, Index 117264/08
Plaintiff-Appellant,

-against-

Alan J. Sanders, et al.,
Defendants-Respondents.

Moss & Moss LLP, New York (Donald C. Moss of counsel), for appellant.

Furman Kornfeld & Brennan, LLP, New York (A. Michael Furman of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered December 7, 2009, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The documentary evidence conclusively disposed of plaintiff's legal malpractice claims (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). The hearing court found that plaintiff's disobedience of the so-ordered stipulation directing her to transfer certain custodial accounts to her husband's attorney to be placed in escrow or immediately liquidate the accounts and transfer the proceeds was willful. In light of such willful conduct, the motion court properly found that plaintiff – not her attorneys – was the proximate cause of her contempt adjudication and the resulting incarceration (*see Delfyette v Fisher*, 40 AD2d 674 [1972]). We note that letters

from the husband's attorneys, which were provided to plaintiff by defendants, unambiguously indicated that plaintiff's compliance with the so-ordered stipulation was a condition precedent to further settlement discussions. Defendants' alleged failure to correct the purge amount set forth in the contempt order to conform to the stipulation was also not a proximate cause of plaintiff's incarceration from December 23 through December 26, since the stipulation identified the amounts in the subject accounts as "approximate current balance[s]," thus recognizing that their values were subject to market fluctuation. In addition, the slightly higher purge amount in the contempt order conformed to plaintiff's own authorization to transfer the accounts dated just the previous day. Defendants' alleged failures to obtain and provide discovery and with respect to support could have been remedied by successor counsel (*see Somma v Dansker & Aspromonte Assoc.*, 44 AD3d 376, 377 [2007]); moreover, any attempt at modification of the pendente lite award would have had limited prospects of success (*see Nimkoff v Nimkoff*, 69 AD3d 501 [2009]).

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

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4611 The People of the State of New York, Respondent, Ind. 2808/08

-against-

Erica Clemente, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about April 21, 2009, as amended May 15, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4613-
4614 Index 311427/09

Victoria Anne Wenzel LeCrichia,
Plaintiff-Respondent,

-against-

Anthony LeCrichia,
Defendant-Appellant.

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Anthony F. LeCrichia, New York, appellant pro se.

Percy M. Samuel, Elmont, for respondent.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about October 6, 2010, which, insofar as appealed from, granted plaintiff's motion for pendente lite child support in the amount of $500 per month, and order, same court and Justice, entered on or about November 12, 2010, which, insofar as appealed from, denied defendant's motion for renewal, unanimously affirmed, without costs.

The court providently exercised its discretion in imputing an annual income of $180,000 to defendant based upon his failure to provide documentation of his current income as required by the Uniform Rules for Trial Courts (22 NYCRR) § 202.16[k]). The husband also admitted that he works part time as a lawyer and receives, in addition to cash payments, valuable goods and services as barter (*see Gering v Tavano*, 50 AD3d 299, 300-301

[2008], *lv denied* 11 NY3d 707 [2008]; *Ivani v Ivani*, 303 AD2d 639 [2003]). We decline to disturb the pendente lite award, since there was no showing of either exigent circumstances or a failure by the court to properly consider the appropriate factors set forth in Domestic Relations Law § 240(1-b) (*see Ayoub v Ayoub*, 63 AD3d 493, 496-497 [2009], *appeal dismissed* 14 NY3d 921 [2010]).

Defendant's motion seeking, inter alia, renewal was properly denied. The documents defendant submitted, including his tax returns, were readily available to him at the time of the initial motion (*see Ron B. v Tonya P.*, 44 AD3d 513 [2007]).

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

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4615-4615A The People of the State of New York, Respondent, Ind. 939/07 1900/07

-against-

Arnaldo Smalls, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice E. Lee and Linklaters LLP, New York, Kiah Beverly Graham of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 9, 2008, convicting defendant, upon his plea of guilty, of two counts of robbery in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 15 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison terms to concurrent terms of 10 years, and otherwise affirmed.

The court properly denied defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). The record fails to support his assertion that he did not understand the length of his promised sentence. The court specifically told defendant the length of the sentence, and there is nothing to

suggest he did not understand how much time he would have to serve.

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 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4616 Coastal Sheet Metal Corp., Index 400303/06
Plaintiff-Respondent,

-against-

RJR Mechanical Inc., et al.,
Defendants-Appellants,

New York State University
Construction Fund, et al.,
Defendants.

_____

Loanzon Sheikh LLC, New York (Umar A. Sheikh of counsel), for appellants.

Sullivan Gardner, P.C., New York (Brian Gardner of counsel), for respondent.

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Judgment, Supreme Court, New York County (Karen S. Smith, J.), entered April 22, 2009, upon a jury verdict, in an action for breach of contract, awarding plaintiff the total amount of $280,000.95 jointly and severally against defendants-appellants RJR Mechanical Inc. and Mid-State Surety Corporation, unanimously affirmed, with costs.

The jury's finding that plaintiff was owed sums on a contract was well supported by the evidence. Such evidence included, inter alia, plaintiff's former field supervisor's testimony, based upon personal knowledge, that the subject work had been completed and the engineer's finding that the project was "substantially complete."

Appellants failed to object to the court's curative instructions provided in response to the mention of settlement negotiations at trial. Thus, they are precluded from challenging the sufficiency of these instructions on appeal (*see Dennis v Capital Dist. Transp. Auth.*, 274 AD2d 802, 803 [2000]). In any event, the court's prompt and explicit curative instructions sufficiently alleviated any prejudicial effect of the references to settlement discussions. Furthermore, the court's limited charge as to the permissible inference to be drawn based upon RJR Mechanical Inc.'s principal's invocation of his Fifth Amendment right against self-incrimination was appropriate (*see* PJI 1:76).

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

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4617 Ethel McCree, Index 301840/07
Plaintiff-Appellant,

-against-

Sam Trans Corp.,
Defendant-Respondent.

"John Doe",
Defendant.

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Mirman Markovits & Landau, P.C., New York (Ephrem J. Wertenteil of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Lucy Billings, J.), entered October 30, 2009, which granted defendant Sam Trans Corp.'s motion for summary judgment dismissing the complaint on the threshold issue of "serious injury" within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to plaintiff's "permanent consequential limitation" and "significant limitation" claims, and otherwise affirmed, without costs.

Defendant failed to satisfy its burden of demonstrating prima facie that no factual issues exist whether plaintiff suffered an injury that caused "consequential limitation" and "significant limitation." While its medical expert attributed

the range of motion restrictions he found in plaintiff's right shoulder and cervical spine to degenerative changes or a pre-existing condition, his opinion lacked a factual basis and was conclusory (*see Frias v James*, 69 AD3d 466 [2010]; *Torres v Knight*, 63 AD3d 450 [2009]).

However, defendant demonstrated the absence of factual issues as to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony that she was unable to leave her home for about a week following the accident. Plaintiff's affidavit testimony that she was confined to her home for the first five months following the accident appears to have been tailored to avoid the consequences of her deposition testimony and is therefore insufficient to raise an issue of fact as to the duration of her nonpermanent injuries (*see Alloway v Rodriguez*, 61 AD3d 591, 592 [2009]).

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4618 Rafael E. Lemos, Index 103174/07
Plaintiff-Respondent,

-against-

Giacomo Management, Inc., et al.,
Defendants-Appellants.

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

Dinkes & Schwitzer, P.C., New York (Naomi J. Skura of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered September 24, 2010, which, insofar as appealed from, as limited by the briefs, denied defendant corporation's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted in its entirety, and the complaint dismissed as to all defendants. The Clerk is directed to enter judgment accordingly.

Defendant corporation established prima facie that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). It submitted persuasive evidence of pre-existing degenerative bone disease in plaintiff's left knee that predated the accident, by way of a radiologist's affirmed report detailing the findings in plaintiff's MRI film, as well as plaintiff's physician's findings of degenerative disease. In opposition,

plaintiff failed to meet his burden to adduce evidence rebutting the asserted lack of causation (*see Ortiz v Ash Leasing, Inc.*, 63 AD3d 556 [2009]; *Valentin v Pomilla*, 59 AD3d 184, 186 [2009]).

In light of the foregoing, defendant's argument regarding plaintiff's gap in treatment need not be considered.

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4619 The People of the State of New York, Ind. 134/09
Respondent,

-against-

Kirk Morgan,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about October 6, 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 24, 2011

CLERK

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

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, JJ.

4620 In re Neighborhood in the Nineties, Inc., et al., Petitioners-Appellants, Index 115705/07

-against-

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

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Weiss & Hiller, P.C., New York (Michael S. Hiller of counsel), for appellants.

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

Sheldon Lobel, P.C., New York (Richard Lobel of counsel), for non-city respondents.

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Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered August 27, 2009, which dismissed a proceeding, brought pursuant to CPLR article 78, seeking to set aside a determination of respondent Board of Standards and Appeals of the City of New York (BSA), dated July 15, 2008, confirming its prior determination granting respondents Lantern Group, Inc., and Clover Housing Development Fund, Inc., a hardship zoning variance for premises at 319 West 94th Street, New York, New York (the Building), unanimously affirmed, without costs.

Substantial evidence supported each of the five findings made by the BSA required under Zoning Resolution § 72-21 for issuance of the proposed variances (*see Matter of Soho Alliance v*

*New York City Bd. of Stds. & Appeals*, 95 NY2d 437, 440, 442 [2000]).

Petitioners' contention that the Building qualifies as a "city facility," and is therefore subject to "Fair Share" review under the New York City Charter, is unpersuasive. The Fair Share Criteria by their terms apply only where there has been an expansion or reduction in the size of a city facility (*see* 62 RCNY Appx A, Art 3[a]). Here, the net result of the proposed variances will be a modest reduction in the number of units in the Building from 149 to 141. This small change in the number of units is not so significant as to constitute a change in facility size for purposes of the Fair Share Criteria (*see West 97th-W. 98th Sts. Block Assn. v Volunteers of Am. of Greater N.Y.*, 190 AD2d 303, 308 [1993]).

Petitioners' argument that the variance violates Multiple Dwelling Law § 211(1), which provides that "no non-fireproof tenement shall be increased in height so that it shall exceed five stories . . .," is unavailing. Petitioners' argument ignores the remainder of that same sentence in MDL § 211(1), which states that "any tenement may [nonetheless] be increased to any height permitted for multiple dwellings erected after [April 18, 1929], if such tenement conforms to the provisions of this chapter governing such multiple dwellings erected after such

date" (MDL § 211[1]). In that regard, the 2008 Resolution notes the developer's representation that the 80% Demolition variance is necessary at least in part to meet building code fireproofing requirements, by, among other things, replacing the existing wood joist structural system and plumbing and sprinkler systems.

Under the City Charter, the Building Department, not the BSA, is empowered to approve or disapprove building plans, and to ensure in the first instance that they are in compliance with governing law and regulations (*see* NY City Charter §§ 643, 666[6], 668; *Matter of Lesron Junior v Feinberg*, 13 AD2d 90, 93 [1961]). Thus, the Building Department is the appropriate forum, in the first instance, for resolution of concerns relating to building code compliance. In any event, the developer represented that the completed Building would comply with all applicable building codes, and the BSA in its discretion was entitled to credit this representation in granting the variances.

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4622 Viacom Outdoor Inc., etc., Index 111352/05
Plaintiff-Appellant,

-against-

Wixon Jewelers, Inc., etc.,
Defendant-Respondent.

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Cheifetz Iannitelli Marcolini, P.C., New York (Claudio E. Iannitelli, a member of the bar of the State of Arizona admitted pro hac vice of counsel), for appellant.

Steven C. Moore, Bloomington MN, a member of the bar of the State of Minnesota admitted pro hac vice, for respondent.

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Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered December 11, 2009, dismissing the complaint and awarding defendant the principal sum of $142,800 upon its counterclaim, unanimously modified, on the law, to vacate the damages award and dismiss the counterclaim, and otherwise affirmed, without costs.

Plaintiff's failure to provide a working tri-vision billboard constituted a material breach of the parties' contracts; thus, defendant was excused from performing its contractual payment obligations (*NAS Elec., Inc. v Transtech Elec. PTE Ltd.*, 262 F Supp 2d 134, 145 [SD NY 2003]). Plaintiff's unequivocal statement that it was going to convert the tri-vision billboard to a standard billboard, making clear

that it did not intend to perform under the parties' 2005 and 2006 contracts, constituted an anticipatory breach of those contracts (*see Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266-267 [1995]).

However, since defendant failed to present any evidence of damages resulting from the breach, it should not have been awarded any damages; indeed, the counterclaim should have been dismissed (*Lexington 360 Assoc. v First Union Natl. Bank of N. Carolina*, 234 AD2d 187, 190 [1996]; *StoreRunner Network, Inc. v CBS Corp.*, 8 AD3d 127, 128 [2004]).

We have considered plaintiff's remaining contentions and find them without merit.

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4623 The People of the State of New York Ex. Rel Dominic Larocco, Petitioner,

-against-

Warden, etc., et al., Respondents.

Index 341142/09

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Steven N. Feinman, White Plains, for petitioner.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for New York State Division of Parole, respondent.

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Determination of respondent State Division of Parole, dated February 13, 2009, which revoked petitioner's parole and imposed a 24-month time assessment, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, Bronx County [Robert A. Neary, J.], entered on or about May 10, 2010), dismissed, without costs.

The determination that petitioner violated his parole by stalking and harassing the 17-year-old victim was supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]). The hearing testimony established that the victim was frightened, annoyed and alarmed by petitioner's repeated conduct over a period of months, and petitioner's intent

could be inferred from the surrounding circumstances (*see Matter of Reiss v Reiss*, 221 AD2d 280 [1995], *lv denied* 89 NY2d 801 [1996]). Respondent's decision to impose a 24-month time assessment rather than accept the administrative law judge's (ALJ) recommendation of an 18-month assessment was a provident exercise of discretion. The recommendation of the ALJ is advisory and not binding on respondent (*see People ex rel. Coleman v Smith*, 75 AD2d 706, 707 [1980], *lv denied* 50 NY2d 804 [1980]).

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

ENTERED: MARCH 24, 2011

CLERK

Tom, J.P., Saxe, Catterson, DeGrasse, JJ.

3461 In re Michael Lichtman, Index 106877/10
[M-4352 & Petitioner,
M-4868]

-against-

Departmental Disciplinary Committee,
Respondent.

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The above-named petitioner having presented an application to this Court praying for an order pursuant to article 78 of the Civil Practice Law and Rules,

And a cross motion having been made on behalf of respondent to dismiss the petition,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied, the cross motion granted and the petition dismissed, without costs or disbursements.

The Decision and Order of this Court entered herein on March 17, 2011 is hereby recalled and vacated.

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4296 Siu Nam Wong Pun, Index 305736/07
Plaintiff-Respondent,

-against-

Che Kwok Pun,
Defendant-Appellant.

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Nnebe & Associates, P.C., Williamsburg (Okechukwu Valentine Nnebe of counsel), for appellant.

Yu-Xi Liu, New York, for respondent.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered March 10, 2010, which, after a nonjury trial, granted plaintiff a divorce on the grounds of cruelty and constructive abandonment, unanimously affirmed, without costs.

Plaintiff testified that during the marriage, defendant regularly lost his temper and yelled at her, verbally abused and demeaned her, and made disparaging remarks in response to her cancer diagnosis. She further testified that several years before she commenced this action, defendant choked her. In addition, she testified that he frequently yelled at her insisting that the family had to listen to him because he was the master of the household. Plaintiff recounted defendant's threat

to kill her if she sought a divorce, and explained that she ultimately moved out because she feared defendant and was concerned for her safety. This testimony, portions of which were corroborated by the testimony of the parties' adult son, was sufficient to support the finding of cruel and inhuman treatment (*Bartha v Bartha*, 15 AD3d 111, 114-115 [2005]; *Stoothoff v Stoothoff*, 226 AD2d 209 [1996]).

Although plaintiff periodically returned to the marital residence after she moved out, she credibly explained that she did so to cook and clean the residence for her sons, who resided there. The lower court was not persuaded by defendant's claim that this behavior undermined plaintiff's contention that it was unsafe and improper for her to cohabit with defendant, and we agree with that determination. Moreover, plaintiff testified that when she did return on occasion, defendant scolded and berated her.

In light of our decision to uphold the divorce on the ground of cruel and inhuman treatment, we need not address whether the

court's decision to grant a divorce on the additional ground of constructive abandonment was warranted.

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

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4354 Nicholas Georgiou, Index 8095/05
Plaintiff-Respondent, 85687/06

-against-

32-42 Broadway LLC, et al.,
Defendants,

Colgate Scaffolding Corp., et al.,
Defendants-Appellants.

[And a Third Party Action]

French & Casey, LLP., New York (Joseph A. French of counsel), for appellants.

Richard J. Katz, LLP., New York (Jonathan A. Rapport of counsel), for respondent.

Order, Supreme Court, Bronx County (Maryann Brigantti-Hughes, J.), entered October 2, 2009, which, in an action for personal injury sustained in a slip and fall in the vestibule of a restaurant, the entranceway to which was under a sidewalk bridge erected by defendants-appellants, denied defendants-appellants' motion for summary judgment dismissing the complaint and all cross claims against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint and all cross claims as against defendants-appellants.

Plaintiff alleges that defendants-appellants (collectively

referred to as “Colgate”) created a hazardous condition by constructing a sidewalk bridge that allowed rain water to stream down its roof and enter the vestibule of the restaurant. Colgate made a prima facie showing that it did not create, nor did it have notice of, the slippery condition. Colgate submitted evidence that it was required to erect a sidewalk scaffold bridge and that the bridge was not intended to be waterproof. Furthermore, Colgate did not receive any complaints about water flowing from the sidewalk bridge into the vestibule area. Colgate also demonstrated that it was not required by statute or contract to provide for water drainage.

Plaintiff failed to raise a triable issue of fact to defeat Colgate’s prima facie showing. In opining that the sidewalk bridge was defectively designed, plaintiff’s expert did not specify any accepted industry standards or practices that were violated by Colgate (*see Jones v City of New York*, 32 AD3d 706, 707 [2006]). The record does not support the expert’s conclusion that Colgate violated New York City Administrative Code §§ 27-1021(b)(7)(a), 27-1009(a), and 27-1018(a), as plaintiff was not injured by construction work, and wetness on outdoor walkways does not constitute a hazardous condition (*see McGuire v 3901 Independence Owners, Inc.*, 74 AD3d 434 [2010]). Plaintiff’s deposition testimony that it was “self-understood” that the

sidewalk bridge was not "level," that he "suppose[d]" the opening and closing of the restaurant's door swept water from the sidewalk onto the vestibule floor, and that it was possible there were other sources of water, is mere speculation as to the cause of his fall, which is insufficient to defeat summary judgment (*see Segretti v Shorenstein Co., E.*, 256 AD2d 234, 235 [1998]).

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

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4368 Tower Insurance Company of New York, Index 103671/08
Plaintiff-Appellant,

-against-

R&R Dental Modeling Inc.,
Defendant-Respondent,

Macion Chery, et al.,
Defendants.

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Law Office of Max W. Gershweir, New York (Jennifer Kotlyarsky of counsel), for appellant.

Portela Law Firm, P.C., New York (Bradley D. Shaw of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 9, 2010, which, to the extent appealed from, denied plaintiff's motion for summary judgment seeking a declaration that it had no duty to defend and indemnify defendant R&R Dental Modeling Inc. in the underlying personal injury action, unanimously reversed, on the law, without costs, the motion granted, and it is declared that plaintiff has no such duty.

Defendant's principal heard the plaintiff in the underlying personal injury action stumble on the steps, heard her complain of pain, and saw her walking with a limp. A week later, defendant's principal saw that the injured woman's leg was in a

new cast. Nevertheless, defendant failed to notify plaintiff of the possibility of a claim until 17 months later, after it had been served with the summons and complaint in the personal injury action. Defendant's failure, despite the observations of its principal, to make any inquiry into the incident belies its claim to a good faith belief that the injured person would not seek to hold it liable for her injuries and renders its delay in notifying plaintiff inexcusable (*see e.g. Tower Ins. Co. of N.Y. v Miles*, 74 AD3d 410 [2010]; *Tower Ins. Co. of N.Y. v Red Rose Rest., Inc.*, 77 AD3d 453 [2010]).

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

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4584 The People of the State of New York, Respondent, Ind. 41056C/08

-against-

Paul Wrighton, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Diane R. Kiesel, J.), rendered September 11, 2009, as amended October 16, 2009, convicting defendant, after a nonjury trial, of attempted forcible touching, attempted sexual misconduct, and harassment in the second degree, and sentencing him to concurrent terms of 90 days, unanimously affirmed.

Defendant argues that he was constitutionally entitled to a jury trial on the attempted sexual misconduct charge, even though it is a class B misdemeanor carrying a maximum sentence of 90 days, because the added consequence of registration as a sex offender allegedly takes the crime out of the petty offense category. However, at trial defendant raised a completely different argument, in which he made the unavailing (*see People v Urbaez*, 10 NY3d 773 [2008]) claim that the People's reduction of

the original class A misdemeanor charges to attempts violated his right to a jury trial. Accordingly, his present claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. "It is well established that a defendant's right to a jury trial attaches only to serious offenses, not to petty crimes, the determining factor being length of exposure to incarceration" (*People v Urbaez*, 10 NY3d at 774 [internal quotation marks and citations omitted]; *see also People v Foy*, 88 NY2d 742, 745 [1996]). "An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious" (*Lewis v United States*, 518 US 322, 326 [1996]). The requirement of registration under the Sex Offender Registration Act does not render an otherwise petty offense "serious" for purposes of the right to a trial by jury, as this requirement is not a penalty, but a remedial, collateral consequence of the conviction (*see People v Gravino*, 14 NY3d 546, 556-558 [2010]).

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 court's credibility determinations.

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

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, P.J., Saxe, Friedman, Acosta, Freedman, JJ.

4585 In re Randy K. Pajooh, Index 302864/07
Petitioner-Appellant,

-against-

State Division of Human Rights, et al.,
Respondents-Respondents.

Randy K. Pajooh, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Francis F. Caputo of counsel), for respondents.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered June 26, 2009, which denied the petition to annul the determination of respondent New York State Division of Human Rights (DHR), dated October 4, 2007, finding no probable cause to believe that respondent New York City Department of Sanitation had engaged in unlawful discriminatory practices against petitioner, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The challenged no probable cause determination was rationally based and not arbitrary and capricious (*see Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 111-113 [1998]). DHR has broad discretion in determining the method to be employed in investigating a claim, and the record shows that the investigation in this case was not "abbreviated or

one-sided" (*Matter of Pascual v New York State Div. of Human Rights*, 37 AD3d 215, 216 [2007]; *see also McFarland*, 241 AD2d at 111-113).

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 24, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4586 Sarah Stackpole, M.D., Index 117128/06
Plaintiff-Appellant,

-against-

Cohen, Ehrlich & Frankel, LLP,
Defendant-Respondent.

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William M. Pinzler, New York, for appellant.

McElroy, Deutsch, Mulvaney & Carpenter LLP, New York (John P. Cookson of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered August 26, 2010, after a nonjury trial, dismissing the complaint, unanimously affirmed, without costs.

This legal malpractice action arises from defendant's representation of plaintiff in connection with her purchase of a cooperative apartment that she intended to use as a medical office. Plaintiff alleged that defendant was negligent in failing to advise her, before she closed on the purchase, that the certificate of occupancy did not permit the use of the apartment as a professional space, and that, as a result of this negligence, she was forced to expend large sums of money to amend the certificate of occupancy and make certain alterations.

The record supports the trial court's finding, based on credibility determinations, that plaintiff failed to prove that

defendant did not advise her that her intended use of the apartment was impermissible under the certificate of occupancy (*see Garza v 508 W. 112th St., Inc.*, 71 AD3d 567 [2010]). To the extent that defendant was negligent in failing to further advise plaintiff of the consequences of occupying a cooperative apartment in contravention of the certificate of occupancy, plaintiff failed to prove that, but for defendant's negligence, she would not have purchased the apartment. To the contrary, plaintiff testified that she had been made aware of the "horrors" (including the cost) of amending a certificate of occupancy several years before in connection with an apartment in another building; despite this awareness, she purchased the subject apartment (*see e.g. AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 435-436 [2007]; *Orchard Motorcycle Distribs., Inc. v Morrison Cohen Singer & Weinstein, LLP*, 49 AD3d 292 [2008]).

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 24, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4587 In re Kathleen Shaquana G.,

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

Stephen Green,
Respondent-Appellant,

Crystal Edith Whaley,
Respondent,

McMahon Services for Children, etc.,
Petitioner-Respondent.

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Julian A. Hertz, Larchmont, for appellant.

Joseph T. Gatti, New York, for respondent.

Lawyers for Children, Inc., New York (Betsy Kramer of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about June 1, 2009, which, insofar as appealed from as limited by the briefs, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for purposes of adoption, unanimously modified, on the law and the facts, the disposition as to the child vacated only with respect to her foster care placement, the matter remanded for a determination as to whether placement with the father's

cousin would be in the best interests of the child, and otherwise affirmed, without costs.

The father does not dispute the court's findings of permanent neglect or the termination of his parental rights. However, he does challenge the determination that it was in the best interests of the child to place her with the foster mother rather than his cousin, whom he proposed as a resource for the child. The record demonstrates that although, at the time the dispositional order was entered, freeing the child to be adopted by her foster mother rather than the cousin was in the child's best interests, changed circumstances since the order was issued warrant remanding the matter to the extent indicated (*see Matter of Mentora Monique B.*, 44 AD3d 445, 446-447 [2007]). According to the agency, the child has been hospitalized for hallucinations and exhibited violent tendencies and the foster mother no longer wishes to adopt the child because she believes she is unable to provide the child with the support needed for her mental and emotional issues.

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

ENTERED:

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4590 Gary M. Holloway, Index 113346/09
Plaintiff-Appellant,

-against-

Ernst & Young LLP,
Defendant-Respondent.

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Reed Smith LLP, New York (Raymond A. Cardozo of counsel), for appellant.

Vinson & Elkins LLP, New York (Clifford Thau of counsel), for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 23, 2010, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff is the former chairman, president, and chief executive officer of GMH Associates, Inc., a publicly traded company. Defendant accounting firm provided auditing services to GMH. The allegations in the complaint describing plaintiff's significant contact with defendant do not support his claim that he is an intended third-party beneficiary of the engagement letters between GMH and defendant (*see Raffa v Stilloe Roofing & Siding*, 182 AD2d 901, 902 [1992]), since a corporation acts solely through its officers and employees (*see Diamond v Oreamuno*, 29 AD2d 285, 287 [1968], *affd* 24 NY2d 494 [1969]).

Because plaintiff was a Pennsylvania resident, his negligence,

negligent misrepresentation, and breach of fiduciary duty causes of action are time-barred under the governing two-year Pennsylvania statute of limitations (*see* 42 Pa Cons Stat § 5524[7]; *see* CPLR 202; *Kat House Prods., LLC v Paul, Hastings, Janofsky & Walker, LLP*, 71 AD3d 580 [2010]).

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

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4591 The People of the State of New York, Respondent, Ind. 3960/03

-against-

Ronald Smalls, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (James A. Yates, J. at plea, Ronald A. Zweibel, J., at sentence), rendered on or about April 20, 2006, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4594 The People of the State of New York, Respondent, Ind. 383/09

-against-

Omar Tsouristakis, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice E. Lee and Joni Forster Galvin of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered August 10, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the third and fifth degrees and unlawful possession of marijuana, and sentencing him to an aggregate term of 5 years, with a fine of $100, unanimously affirmed.

The court properly granted the People's reverse-*Batson* application (*see Batson v Kentucky*, 476 US 79 [1986]; *People v Kern*, 75 NY2d 638 [1990], *cert denied* 498 US 824 [1990]). The record supports the court's finding that the race-neutral reasons provided by defense counsel for the peremptory challenge at issue were pretextual. These findings, based primarily on the court's

assessment of counsel's credibility, are entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350, 356 [1990], *affd* 500 US 352 [1991]). Initially, we note that the People made a strong prima facie case of discrimination against Asian-Americans, and the strength of that showing is relevant to the issue of pretext (*see People v Hecker*, 15 NY3d 625, 660 [2010]). The court correctly followed the three-step *Batson* procedure, and properly found pretext based on its own "founded and articulated rejection of the race-neutral reason[s]" offered by defense counsel (*People v Payne*, 88 NY2d 88 NY2d 172, 184 [1996]; *see also People v Camarena*, 289 AD2d 7 [2001], *lv denied* 97 NY2d 752 [2002]). Although defense counsel's principal explanation was that he knew very little about the panelist, counsel ended his voir dire with five minutes of his allotted time to spare, and without asking any questions of the prospective juror (*see People v Kidkarndee*, 41 AD3d 247 [2007], *lv denied* 9 NY3d 923 [2007]; *compare Hecker*, 15 NY3d at 657-658 [lack of information not pretextual reason for challenge where court's time constraints prevented attorney from questioning panelist]). Moreover, counsel failed to challenge non-Asian panelists about whom he had little information. The record also supports the court's refusal to credit counsel's claim that he was concerned about the panelist's knowledge of

English. Finally, although counsel claimed the panelist expressed a negative attitude toward firearms, the court had no recollection of any such statement by this panelist, and the record does not confirm counsel's assertion.

The court properly denied defendant's suppression motion. The officer's observation of defendant rolling marijuana cigarettes in his car provided probable cause for an arrest (*see Matter of Javier N.*, 226 AD2d 178 [1996]). Although the officer did not specifically testify as to his experience and training regarding marijuana, his general police experience and training permitted the inference that he could identify marijuana, for probable cause purposes, under the circumstances he observed.

To the extent a portion of the prosecutor's summation could be viewed as shifting the burden of proof, the court's thorough curative actions were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]). The prosecutor did not vouch for his witnesses when he responded to the defense summation with proper arguments concerning the witnesses' motives or lack of motives to give false testimony (*see e.g. People v. Gonzalez*, 298 AD2d 133 [2002], *lv denied* 99 NY2d 614 [2003]). Defendant's remaining summation claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find there was nothing so egregious as to

deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 24, 2011

CLERK

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

4595 Isabel Rivera, Index 15424/99
Plaintiff-Respondent,

-against-

Board of Education of the
City of New York,
Defendant-Appellant.

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

Gash & Associates, P.C., White Plains (Gary Mitchell Gash of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about March 2, 2010, which, to the extent appealed from as limited by the briefs, denied as untimely defendant's motion to dismiss the complaint for failure to state a cause of action, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

While defendant's prior motion sought to dismiss either on the pleadings or on summary judgment and was denied as premature in light of the need for further discovery (with leave to renew within 120 days after a certain deposition was taken), the instant motion seeks to dismiss solely for failure to state a cause of action. Defendant therefore was not bound to bring the

motion within the time imposed by the court for renewal of the summary judgment motion (*see* CPLR 3211[e]; *Herman v Greenberg*, 221 AD2d 251 [1995]). Nor does the motion violate the single motion rule (*see* CPLR 3211[e]), since the prior motion was not decided on the merits (*see generally Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86 [1993]; *compare Miller v Schreyer*, 257 AD2d 358, 361 [1999] ["the issue to be decided is whether defendants are entitled to a second determination of the identical question"]).

Plaintiff alleges that she was injured while attempting to restrain a disruptive student whom she had previously asked defendant to remove from her classroom, and that her injuries were caused by defendant's negligent failure to remove the student and to afford her proper protection in the classroom. Recognizing that a discretionary government action may not be a basis of liability, plaintiff argues that, since defendant's director of special education exercised her discretion in referring the troubled student for an evaluation, any follow-up action became mandatory and thus ministerial (*see McLean v City of New York*, 12 NY3d 194, 203 [2009]). This argument is unavailing. The decision to change a student's classroom placement is within the discretion of the Board of Education (*Brady v Board of Educ. of City of N.Y.*, 197 AD2d 655 [1993]);

*Dinardo v City of New York*, 13 NY3d 872, 877-878 [2009] [Lippman, J., concurring]). Moreover, ministerial actions may be a basis of liability, "but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (*McLean*, 12 NY3d at 203). As plaintiff neither alleged nor testified that defendant assured her that the student would be removed from her classroom or that she would be provided with any particular security there, she has not satisfied the requirement of pleading a special duty owed to her by defendant (*see Dinardo*, 13 NY3d at 874-875).

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

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4596 Bondy & Schloss, et al., Index 101203/09
Plaintiffs-Respondents,

—against—

Strategic Development
Partners LLC, et al.,
Defendants-Appellants.

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Davidoff Malito & Hutcher LLP, New York (Larry Hutcher of counsel), for appellants.

Hodgson Ross LLP, New York, (S. Robert Schrager of counsel), for respondents.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered April 6, 2010, awarding plaintiffs damages, and bringing up for review, an order, same court and Justice, entered March 29, 2010, which, inter alia, granted plaintiffs' motion for partial summary judgment, unanimously reversed, on the law, without costs, the judgment vacated, the motion denied and the matter remanded for further proceedings.

The court erred in granting plaintiffs partial summary judgment based solely on its finding that a notation on a document created by defendants but consisting of information supplied entirely by plaintiffs constituted an admission by defendants. It is clear from the face of the document that defendants did not "manifest[] an adoption or *belief*" in the

truth of its contents and, as such, the notation cannot constitute an admission (*Addo v Melnick*, 61 AD3d 453, 454 [2009]).

In any event, even if an admission, it was an extra-judicial admission, which is not conclusive and its probative value is an issue of fact for the jury (*see Matter of Rhodes [Motor Veh. Acc. Indem. Corp. ýBiggs]*, 203 AD2d 46, 47 [1994]; *see also Gangi v Fradus*, 227 NY 452, 456 [1920].

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

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4597 Edward Ruane, Index 103575/06
Plaintiff-Respondent, 590373/07
590207/08

-against-

The Allen-Stevenson School, et al.,
Defendants-Appellants.

- - - - -

F.J. Sciame Construction Co., Inc.
Third-Party Plaintiff Appellant,

-against-

Met Sales & Installations Corp.,
Third-Party Defendant-Respondent,

[And Another Third-Party Action]

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Cerussi & Spring PC, White Plains (Kevin P. Westerman of counsel), for appellants.

Mauro Lilling Naparty LLP, Great Neck (Anthony F. DeStefano of counsel), for Met Sales & Installations Corp., respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered July 7, 2010, which, insofar as appealed from, denied defendants' motion for summary judgment on defendant/third party-plaintiff F.J. Sciame Construction Co's claim for contractual indemnification against third-party defendant Met Sales & Installation Corp. and for summary judgment dismissing plaintiffs Labor Law §200 and common law negligence causes of action, unanimously affirmed, without costs.

In August, 2005, plaintiff Edward Ruane, a sheet metal

worker employed by Met Sales & Installations Corp., sustained a knee injury when he slipped and fell on construction debris in a stairwell. Ruane commenced this personal injury action against The Allen-Stevenson School, as owner of the building, and F.J. Sciame Construction Company, Inc. and Sciame Development, Inc, as general contractors. F.J. Sciame filed a third-party action against Met asserting that Met was obligated to indemnify F.J. Sciame for Ruane's injuries pursuant to an indemnification rider incorporated by reference into the purchase order for the job. Met denied that it had agreed to be bound by the rider.

In determining whether the parties entered into a contractual agreement and what its terms were, it is necessary to look to the objective manifestations of the intent of the parties, as evidenced by the totality of their expressed words and deeds. The court must look to the attendant circumstances, the situation of the parties, and the objectives they were striving to attain (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397 [1977]; *see also Kowalchuk v Stroup*, 61 AD3d 118 [2009]; *Tighe v Hennegan Const. Co., Inc.*, 48 AD3d 201 [2008]). F.J. Sciame failed to make a prima facie showing that the unsigned documents called “Terms and Condition of the Purchase Order” and "Vendor Insurance Indemnification Rider," were part of the purchase order contracts such as to entitle it

to indemnity from Met.

As the fact-dependent nature of the *Brown* rule suggests, in many instances the issue of whether or when an indemnification agreement came into being, in the absence of a signed document, will present a question to be resolved by the trier of fact (*Flores v Lower East Side Service Center, Inc.*, 4 NY3d 363 [2005]). This case is such an instance.

The motion court also properly found that questions of fact as to constructive notice of the alleged dangerous condition precluded summary judgment dismissing the common-law negligence and Labor Law §200 claims. (see *Maza v University Ave. Development Corp.*, 13 AD3d 65 [2004]; *see also, Moser v BP/CG Center I, LLC*, 56 AD3d 323 [2008]).

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

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4599 Chelsea Village Associates, et al., Index 105911/08
Plaintiffs-Respondents-Appellants, 590740/08

-against-

U.S. Underwriters Insurance Company,
Defendant-Appellant-Respondent,

Utica First Insurance Company, et al.,
Defendants.

[And a Third-Party Action]

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Miranda Sambursky Slone Sklarin Verveniotis LLP, Mineola (Steven Verveniotis of counsel), for appellant-respondent.

Ahmuty, Demers & McManus, Albertson (William J. Mitchell of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 5, 2010, which denied defendant U.S. Underwriters Insurance Company's motion for summary judgment dismissing the complaint as against it and declaring that it has no duty to defend or indemnify plaintiffs (Chelsea Village) in the underlying personal injury action, and denied Chelsea Village's cross motion for summary judgment declaring in its favor, unanimously modified, on the law, to grant defendant's motion to the extent of declaring that it has no duty to defend or indemnify Chelsea Village in the underlying action, and otherwise affirmed, without costs.

Chelsea Village satisfied its notice obligations under the U.S. Underwriters policy by submitting notice of claim on April 30, 2007, via a "series of intermediaries" (*see U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 369 F3d 102, 105 [2d Cir 2004]; *see also U.S. Underwriters Ins. Co. v Falcon Constr. Corp.*, 2003 WL 22019429, *5-6, 2002 US Dist LEXIS 15065, *15-16 [SD NY 2003]).

Contrary to Chelsea Village's contention, defendant's May 17, 2007 denial of coverage under the policy was not rendered "invalid" by the fact that its April 30, 2007 letter stated that the policy did not provide coverage to Chelsea Village (*see State Ins. Fund v Utica First Ins. Co.*, 25 AD3d 388, 388 [2006]). In addition to the erroneous statement that Chelsea Village was not an insured under the policy, in the April 30, 2007 letter, defendant asserted several other grounds for denying coverage, including a policy exclusion for bodily injury to any employee of any insured. In the May 17, 2007 letter, in response to a letter from Chelsea Village's broker, defendant acknowledged that Chelsea Village was an additional insured under the policy, and reiterated the other grounds for the denial of coverage. Thus, rather than changing its position to rely on a ground not stated in the April 30, 2007 denial, in the May 17, 2007 letter,

defendant merely retracted one of the grounds set forth in the April 30, 2007 letter.

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

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

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4600-
4600A Isaac Litchfield, et al.,
Plaintiffs-Appellants,

-against-

Mark M. Altschul, et al.,
Defendants-Respondents.

Index 109296/08

Roger J. Bernstein, New York, for appellants.

Altschul & Altschul, New York (Barbara Friedman of counsel), for respondents.

Judgment, Supreme Court, New York County (Louis B. York, J.), entered February 5, 2010, dismissing the complaint and awarding defendants the amount of $495.00 for costs and disbursements, and bringing up for review an order, same court and Justice, entered January 27, 2010, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the judgment vacated. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs commenced this action against defendants for professional malpractice in connection with defendants' representation of plaintiffs in a lawsuit for unpaid rent that resulted in a judgment against plaintiffs in the amount of

$129,911.32. The court granted defendants summary judgment dismissing the malpractice claims on the ground that the unpaid rent judgment was satisfied by a voluntary and gratuitous third-party payment, which meant that plaintiffs suffered no loss due to the alleged malpractice. Although the judgment was satisfied without plaintiffs making any direct out-of-pocket expenditures from their personal accounts, the payment satisfying the judgment was not made by a separate and disinterested third-party, but by companies that plaintiffs own and control, and based on loans that plaintiffs are co-obliged to pay back. The satisfaction of the judgment in this manner did not warrant a finding that plaintiffs suffered no loss as a result of defendants' alleged malpractice so as to justify the dismissal of the complaint.

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

ENTERED: MARCH 24, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4601 The People of the State of New York, Ind. 3171/07
Respondent,

-against-

Thomas Fulton,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Sean Maraynes of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Judith S. Lieb, J.), rendered on or about July 16, 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 24, 2011

CLERK

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

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4602N ADHY Advisors LLC., Index 602215/09
Plaintiff-Appellant,

-against-

530 West 152nd Street LLC,
Defendant-Respondent,

New York State Department of Taxation
and Finance, et al.,
Defendants.

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Berliner & Pilson, Great Neck (Richard J. Pilson of counsel), for appellant.

Schwartz, Lichtenberg LLP, New York (Barry E. Lichtenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered September 17, 2010, which denied plaintiff's motion to appoint a receiver pursuant to Real Property Law § 254(10), unanimously affirmed, with costs.

Although the mortgage agreement at issue contains a provision which specifically authorizes the appointment of a receiver upon application by the mortgagee in any action to foreclose (*see* Real Property Law § 254[10]), it is well settled that "[a]n action to foreclose a mortgage is an action in equity" (*Jamaica Sav. Bank v M. S. Inv. Co.*, 274 NY 215, 219 [1937]). Thus, a court of equity, in its discretion and under appropriate circumstances, may deny such an application (*see Maspeth Fed.*

*Sav. & Loan Assn. v McGowan*, 77 AD3d 889, 889-890 [2010]; *Clinton Capital Corp. v One Tiffany Place Developers*, 112 AD2d 911, 912 [1985]); *Mancuso v Kambourelis*, 72 AD2d 636, 637 [1979], *appeal dismissed* 48 NY2d 1027 [1980]; *W. I. M. Corp. v Cipulo*, 216 App Div 46 [1926]). Based upon the circumstances presented here, we find that the motion court properly exercised its discretion in declining to appoint a receiver.

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

ENTERED: MARCH 24, 2011

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3910 Mary Masillo, Index 13938/07
Plaintiff-Appellant,

-against-

On Stage, Ltd., et al.,
Defendants-Respondents.

_____

Taubman Kimelman & Soroka, LLP., New York (Antonette M. Milcetic of counsel), for appellant.

Barry, McTiernan & Moore, New York (Laura A. Wedinger of counsel), for On Stage, Ltd., respondent.

Eustace & Marquez, White Plains (Edward M. Eustace of counsel), for Queens Theatre in The Park, Inc., respondent.

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Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered July 28, 2009, affirmed, without costs.

Opinion by Gonzalez, P.J. All concur except Acosta, J. who dissents in an Opinion.

Order filed.

CORRECTED ORDER - MARCH 25, 2011

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
James M. Catterson
Rolando T. Acosta
Roslyn H. Richter
Sheila Abdus-Salaam, JJ.

3910
Index 13938/07

x

Mary Masillo,
Plaintiff-Appellant,

-against-

On Stage, Ltd., et al.,
Defendants-Respondents.

Plaintiff appeals from the order of the Supreme Court, Bronx County (Cynthia S. Kern, J.), entered July 28, 2009, which, insofar as appealed from as limited by the briefs, granted defendant Queens Theatre's motion for summary judgment dismissing the complaint as against it.

Taubman Kimelman & Soroka, LLP., New York (Antonette M. Milcetic of counsel), for appellant.

Barry McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for On Stage, Ltd., respondent.

Eustace & Marquez, White Plains (Edward M. Eustace of counsel), for Queens Theatre in The Park, Inc., respondent.

GONZALEZ, P.J.

On April 12, 2005, plaintiff Mary Massillo, an assistant teacher, accompanied teacher Madelaine Riback and a number of other chaperones on a school field trip. They took 72 pre-kindergartners to a 10:00 A.M. puppet show at Queens Theatre in the Park (Queens Theatre), an enclosed auditorium. Plaintiff testified at her deposition that she seated her assigned children, that she proceeded to her seat, and that as she put her foot out to go down a step, the house lights went off without warning. She fell to her knees and was injured. Masillo testified that she saw an illuminated strip of lights on the front of the steps as she attempted to get up.

Plaintiff commenced the instant action against defendant Queens Theatre, the owner of the premises, and defendant On Stage Ltd., the production company that rented the theater for the show. In her complaint, she alleged that defendants were negligent in failing to maintain the premises in a reasonably safe condition due to "the lack of adequate and/or appropriate lighting" in the theater. Her bill of particulars amplified her claim, stating, "The dangerous conditions complained of herein are with respect to inadequate and/or improper lighting within the theater and/or inadequate training of the theatre personnel in turning off the 'house' lights while the spectators were still

finding their seats."

During discovery, Queens Theatre's managing director, Robert Kaplan, and On Stage's artistic coordinator, Joan Lavin, were deposed. Kaplan testified that the regular practice with respect to lighting at the theater was that an individual located in a booth above the rear seats operated the lights, and that after a brief introduction and welcome speech, the stage manager told that individual to turn down the house lights. When the house lights are turned off, the lights across the steps in the aisles automatically went on. Lavin testified that her company had used the theater for 10 to 20 years, and related the theater's common practice with respect to lighting at the commencement of her company's performances, although she was not at the performance on the date of plaintiff's accident:

> "Q. In your experience when you were there, would the lights go out in the theater before everyone was seated?
>
> A. No.
>
> Q. That would never happen?
>
> A. *No, they wouldn't go out, they would dim, maybe.*
>
> Q. *What does that mean?*
>
> A. *They would be on dim; not completely black, never completely black, because there are little lights on the stairs* (emphasis supplied)."

Kaplan gave the following testimony in response to

plaintiff's counsel's questions:

> "Q. With [an outside production company] such as the one on April 12, 2005, how does your lighting person know when to dim the lights for the show?
>
> ...
>
> A. On Stage tells us they're ready.
>
> Q. How do they tell you they're ready?
>
> A. Physically tells us. There's a lady whose name I usually forget. After the counting is done, she says, "Okay, we're ready to go." Whoever's making the speech goes on stage, makes the speech, gives out the little goodies, goes behind the curtains *and the stage manager, by microphone, communicates to the lighting person, you know, houselights (sic) down, or whatever the instructions are* (emphasis supplied).
>
> Q. So your stage manager communicates to your lighting person to lower the lights?
>
> A. Yes."

Plaintiff's counsel then elicited the following testimony from Kaplan:

> "Q. And I just want to be sure. What I said before, the dimming of the lights when the show is to begin, in a situation like on April 12, 2005, the rental situation, that's in the sole discretion of the stage manager when the lights go down? Is that your testimony, the stage manager contacts the lighting and says lower the lights?
>
> A. We work - could I elaborate on it?
>
> Q. Absolutely.
>
> A. We work in support of the rental. We take direction from the renter. When they start the show, they tell us they're ready and we go forward; the procedure.
>
> ...

Q. Does anybody on the theater staff, before the lights go down, check to make sure everybody is seated?

A. No.

...

Q. [W]hen the speeches are over, it's still your stage manager telling your lighting person to go ahead and dim the lights?

A. But if Joan Lavin does the speech, *she comes backstage and she'll tell our stage manager, let's go* (emphasis supplied)."

Photographs were also produced in discovery that confirm the presence of black rubber strips containing approximately 10 illuminated lights across the front of each of the aisle steps.

Queens Theatre and On Stage moved separately for summary judgment. The grant of On Stage's motion is not at issue on this appeal. Queens Theatre argued that there was no defective condition on its property that was responsible for plaintiff's injuries. It contended that the theater was in compliance with all building codes and regulations for the lighting of audience areas during the presentations of plays, concerts, and other such events. It was Queens Theatre's position that despite adequate lighting "[p]laintiff simply misstepped."

In support, Queens Theatre submitted the detailed affidavit of a licensed professional engineer, who researched the archived building records for Queens Theatre, including all renovations

made after the building was constructed, and conducted tests at the premises under both daytime and nighttime performance lighting conditions to determine whether the theater was in compliance with building codes for the City of New York. The expert stated that regulation of theater illumination is governed by the Life Safety Code of the National Fire Protection Association (NFPA 101). In April 2005, when plaintiff's accident occurred, the 2003 edition of the NFPA Code (NFPA 101-2003) was in effect. It provided:

> "**Illumination of Means of Egress: General.** In assembly occupancies, the illumination of the floors of exit access shall be at least 0.2 ft-candle during periods of performance or projections involving directed light" (NFPA 101-2003, Section 7.8.1.3[3]).

Relying upon plaintiff's deposition testimony as to where she fell, the expert measured the lighting at the top two steps of both middle aisles, at the upper and lower limits of performance lighting, during both morning and evening performances. He found that the illumination in those locations, where plaintiff claimed to have been standing, exceeded the required 0.2 ft-candle when the house lights were turned off. This level of lighting is in compliance with the standards promulgated in the NFPA 101 Code.

Accordingly, the expert gave his opinion, with a reasonable

degree of engineering certainty, that the light levels in the Queens Theatre complied with, and even exceeded, generally accepted standards (i.e., the NFPA Code) for the lighting of audience areas during the presentations of plays, concerts, and other such events, and that they were safe, adequate, and consistent with light levels required at theaters and cinemas throughout the United States.

In opposition, plaintiff stated that the actionable negligence was not inadequate lighting, but rather "negligent ... *operation* of the lights." She argued that the record raised a material issue of fact as to whether someone gave a premature cue to the Queens Theatre lighting employee to turn off the lights while patrons were still being seated.

In support, plaintiff submitted an affidavit by Madelaine Riback, the aforementioned teacher. Riback was seating a group of students in another area of the theater when the lights went off, and she also fell. She stated that "[w]hile [she] was still seating the children in [her] group, the theater suddenly went completely dark," that no announcements were made prior to turning the lights off, and that there was no flickering or gradual dimming of the lights. Riback stated that she also lost her footing on the steps of the aisle and injured her knee.

The court granted Queens Theatre's motion. It found that

Queens Theatre established prima facie that there was adequate lighting in the theater, and that plaintiff failed to raise a triable issue of fact based upon the manner in which the lights were turned off. The court noted that plaintiff conceded seeing the illuminated lights on the strips of the steps after she fell. Plaintiff appeals, and we affirm.

A landowner has a duty to maintain its property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Basso v Miller*, 40 NY2d 233, 241 [1976] [internal quotation marks and citations omitted]). Landowners and tenants who operate places of public assembly, such as theaters, are similarly "charged with the duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress" (*Peralta v Henriquez*, 100 NY2d 139, 143-144 [2003] [internal quotation marks and citations omitted]; *Knickerbocker v Ulster Performing Arts Center*, 74 AD3d 1526 [2010]).

As the motion court found, through the testimony of plaintiff, Lavin and Kaplan and the expert affidavit, Queens Theatre established that it provided the public with a reasonably safe premises insofar as its lighting was concerned. Photographs in the record confirm the existence of strips of lights on the

stairs, and plaintiff's concession that she saw those lights after her fall was consistent with Lavin's testimony that those lights go on when the house lights are turned off.

Plaintiff failed to raise an issue of fact with Riback's affidavit. She presented no evidence to controvert the conclusions of the theater's expert, and produced no expert of her own. Queens Theatre did not have a rule requiring that the lights be flashed or dimmed before going off, and there is no common law authority prescribing this procedure (*see generally, Gilson v Metropolitan Opera*, 5 NY3d 574, 577 [2005]). Plaintiff's alternative contention, that the house lights should not have been turned off until everyone was seated, amounts to a prescription of conduct exceeding the duty of reasonable care (*see id.*).

*Gilson* is one of two recent Court of Appeals decisions that are instructive as to the parameters of a theater owner's duty of care to patrons. There, the plaintiff was injured when another audience member fell onto her while attempting to return to his seat after the performance had begun. The Court of Appeals found that an internal policy requiring that during the performance ticket holders be assisted to their seats by escorts with flashlights prescribed conduct transcending reasonable care and that evidence of its violation did not constitute negligence (*id.*

at 577).

In the other case, *Branham v Loews Orpheum Cinemas, Inc.* (8 NY3d 931 [2007]), the plaintiff was injured when returning to her seat from the restroom mid-movie; she tripped over a boy who was sitting in the aisle of the theater. The theater showed that wall sconces were dimmed during the movie but that the aisle lighting remained on, illuminating a path to the front row (*see* 31 AD3d 319, 324-325 [2006]). Plaintiff submitted her testimony that she saw no lights in the theater (*id.*). The Court of Appeals found, inter alia, that plaintiff failed to raise a triable issue of fact whether the lighting in the theater was inadequate.

While *Gilson* and *Branham* do not address the exact theory propounded by the instant plaintiff - negligent operation of the lighting - both illustrate a tension inherent to the proper operation of a theater, that is, the need for sufficient light for patrons to move around, and sufficient darkness for patrons to see the performance comfortably. In determining whether a theater owner maintained its premises in a reasonably safe condition, both sides of this tension must be considered (*see Basso*, 40 NY2d at 241).

The dissent concludes that the surprise of having the lights suddenly being turned off created a dangerous condition.

However, a patron of a theater expects that the lights in the theater will be turned off before the show begins, and there is no evidence here that the lights were turned off in a negligent fashion. Queens Theatre had no written policy regarding turning the houselights off gradually, and, contrary to the dissent's view, the deposition testimony regarding the theater's customary practice does not indicate that it ever "gradually dim[med]" the house lights.

The dissent states that plaintiff provided sufficient evidence of negligence based upon "the nature of the *operation* of the lighting." However, a theater owner breaches a duty to its patrons in the operation of the lighting when it creates a dangerous state of darkness. In the instant case, there is ample evidence that the end result of the alleged negligent operation of the lights was not inadequate lighting. Lavin testified that dimming occurred because the house lights were turned off at the time that the stair lights were turned on. Plaintiff similarly testified that she saw lighting on the stairs after she fell. The expert confirmed that the lighting in the theater exceeded the standard prescribed by applicable regulations.

Viewing the facts in the light most favorable to plaintiff, we find that no act or omission on the part of Queens Theatre proximately caused her injuries. Thus, the motion court

correctly granted Queens Theatre's motion for summary judgment dismissing the complaint as against it.

Accordingly, the order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered July 28, 2009, which, insofar as appealed from as limited by the briefs, granted defendant Queens Theatre's motion for summary judgment dismissing the complaint as against it, should be affirmed, without costs.

All concur except Catterson and Acosta, JJ.
who dissent in an Opinion by Acosta, J.

ACOSTA, J. (dissenting)

Because I believe plaintiff has raised a triable issue of fact whether defendant Queens Theatre in the Park created a dangerous condition, I respectfully dissent.

On April 12, 2005, plaintiff, a paraprofessional, along with two teachers, another paraprofessional, a "Family Assistant" and nine parents, accompanied a group of 72 pre-kindergarten children on a field trip to Queens Theatre to see a show presented by defendant On Stage. Upon arrival at the theater, plaintiff escorted the children inside and seated them. Then she headed toward her seat. Plaintiff testified that, as she put her foot out to go down a step, the house lights were turned off suddenly, causing her to fall on her hands and knees and was injured. Plaintiff testified further that no warning or announcement was given before the lights went out.

Plaintiff thereafter commenced the instant action, alleging that "[t]he dangerous conditions complained of [] are with respect to inadequate and/or improper lighting within the theater and/or inadequate training of the theater personnel in turning off the 'house' lights while the spectators were still finding their seats."

Supreme Court granted Queens Theatre's motion for summary judgment, finding that Queens Theatre established prima facie

that there was adequate lighting at the theatre. The court further found, and the majority agrees, that plaintiff failed to raise a triable issue of fact as to the adequacy of the lighting. I disagree. Viewing the facts in the light most favorable to plaintiff, I find that defendant failed to meet its prima facie burden, and therefore would reverse.

The conclusion that there was adequate lighting in the theater misses the mark. Plaintiff's claim is that Queens Theater created a dangerous condition by suddenly and without warning turning off the lights, and that this negligent operation of the lights was the reason for her fall (*see Peralta v Henriquez*, 100 NY2d 139, 143 [2003] ["Whenever the public is invited into . . . places of public assembly, the owner is charged with the duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress"] [internal quotation marks and citations omitted]).

Joan Lavin, On Stage's artistic coordinator, and Robert Kaplan, the managing director of Queens Theatre, testified that ordinarily someone from On Stage or Queens Theatre gave a speech before a show began, while the patrons were being seated and the house was fully lit and that, after the speech ended, the lights were *dimmed*. However, Lavin was not at the theater on the day of the accident. And Kaplan was not sure if he was at the theater on

the day of plaintiff's accident.

In opposition, plaintiff submitted the affidavit of Madelaine Riback, the teacher with whom plaintiff worked, who also stated that while she was seating the children in her group, "the theater went completely dark," and that she too lost her footing on the steps and injured her knee. This evidence raises an issue of fact as to whether the theater was gradually dimmed or whether the sudden turning off the lights created a dangerous condition. The relevant issue therefore, is not whether the theater had adequate lighting, but whether Queens Theatre was negligent in the *operation* of the lighting.

Even if defendant had met its prima facie burden, on this record, plaintiff sufficiently raised issues of fact which precluded summary judgment in favor of Queens Theater. While Queens Theater's witnesses testified that the normal procedure was to gradually dim the lights, they were not present on the day of the accident. Therefore, plaintiff's testimony, which is corroborated by Ryback's testimony that the lights suddenly went out, remains uncontroverted. The inference is that the surprise of having the theater suddenly go completely dark created a dangerous condition. It is reasonably foreseeable that a person walking mid-step in a theater will be startled or momentarily thrown off or disoriented if suddenly and without warning the

theater is encased in total darkness, even for a brief moment. (*see Trincere v County of Suffolk*, 90 Ny2d 976, 977 [1997] ["Whether a dangerous or defective condition exists on the property of another so as to create liability. . . is generally a question of fact for the jury"] [internal quotation marks and citations omitted]).

It was also error for the motion court to grant summary judgment to Queens Theatre based in part on the fact that plaintiff acknowledged that she noticed that the step lights of the theater were illuminated at the time of her fall. Plaintiff testified that she only noticed the step lights after she had fallen and was helped up off the floor. In other words she became aware of the step lights only after the dangerous condition was created. Indeed, Mr. Kaplan testified that it is only "when the other lights go off, [the step] lights go on." Based on Mr. Kaplan's testimony, and given the fact that adaptation to darkness is delayed by extended exposure to bright light, I believe the motion court erred to find as a matter of law that the presence of the strip lights warranted summary judgment (*see* Russ, Freeman, McQuade and Stewart, Attorneys Medical Advisor, § 3:68, at 3-55 [2005 Thomson/West 3/2005]).

I also disagree that plaintiff needed to contradict Queens Theatre's expert's opinion that the lighting in the theater was

in compliance with the Life Safety Code of the National Fire Protection Association. Indeed, plaintiff concedes the lighting complied with or exceeded the relevant standards. Plaintiff provided sufficient evidence that on the date of her accident Queens Theatre's negligence was in the nature of the *operation* of the lighting. Moreover, while it is true that a patron of a theater expects the lights to be turned off before a show begins, consistent with Queens Theater's witnesses' testimony, I do not believe that the patron expects this to be done suddenly and without warning.

Finally, *Branham v Loews Orpheum Cinemas, Inc.* (31 AD3d 319 [2006] *affd* 8 NY3d 931 [2007]), on which Queens Theatre relies, is distinguishable from this case. The plaintiff in *Branham* claimed that the lighting in the theater where her accident occurred was inadequate, causing her to trip over a boy seated in the aisle. There was no argument advanced that the manner in which defendant dimmed the lights was negligent.

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

ENTERED: MARCH 24, 2011

CLERK