SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 1, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4931 The People of the State of New York, Respondent, Ind. 2235/07

-against-

Abelino Reyes, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (James A. Yates, J.), rendered January 15, 2009, convicting defendant, upon his plea of guilty, of attempted murder in the second degree, and sentencing him to a term of 11 years, to be followed by 5 years of post-release supervision, modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to 8 years, and otherwise affirmed.

As a young boy in his native Dominican Republic, the now 57-year-old defendant sustained unspeakable abuses, solely for

participating in peaceful protests against government shortages. During that time defendant was beaten, tortured, and placed in solitary confinement. At age 15, he began hearing voices.

Defendant migrated to the United States in 1996. Shortly after, he suffered a mental breakdown and became suicidal. Defendant was hospitalized on three separate occasions during the 2003-2004 period, first at North Central Bronx, then at New York Presbyterian and Metropolitan Hospital.

The month before the incident, defendant suffered the death of his beloved mother. After his mother's funeral, he visited his psychiatrist. He had been off his medications for one week because he could not afford to fill his prescription after it had been declined by Medicaid. Defendant's doctor provided him with a generic version of the drug, but defendant stopped taking it after experiencing a bad reaction to the substitute medication. Defendant's mental condition deteriorated to such a degree that he suffered a psychotic break that compelled him to act upon the voices commanding him to kill.

After his arrest, defendant was treated and evaluated at New York Presbyterian, Bellevue Hospital's Prison Ward and the Kirby Forensic Psychiatric Center. The Bellevue staff indicated that defendant wrote "fluently with paranoid content detailing his persecution by a group of black magic practitioners." Indeed,

evaluation notes of his treatment documented that at the time of the incident, defendant reported hearing voices telling him repeatedly "kill him, kill him, kill him."

On June 19, 2007, defendant was diagnosed with schizophrenia, paranoid type or psychotic disorder not otherwise specified, and was declared unfit to proceed with his defense. By November 1, 2007, defendant's condition had stabilized and he was declared fit to proceed to trial. Defendant accepted responsibility for the crime and has expressed genuine remorse.

According to Jeremy Colley, M.D., defendant responded well to hospitalization and treatment with anti-psychotic medication, and has not been violent since his arrest. He explained that "with appropriate psychiatric care defendant's risk is manageable and his prognosis fair."

At the time of the plea, the court expressed concerned about defendant's decision not to pursue a mental illness defense. Defendant explained to the court, with the aid of a Spanish speaking interpreter, that he would rather face a determinate prison sentence than the indeterminate amount of time he might spend in a psychiatric hospital. He was then permitted to enter a plea of guilty to the top count in the indictment, attempted murder in the second degree, with a promise of an 11-year prison sentence, with mental health treatment, and five years'

post-release supervision.

We now reduce defendant's 11-year sentence to 8 years, with continued mental health treatment and 5 years' post-release supervision (*see People v Rosenthal*, 305 AD2d 327, 329 [2003] [this Court "possesses broad, plenary powers to modify a sentence that is unduly harsh or severe under the circumstances, in the interest of justice, even though the sentence falls within the permissible statutory range"], citing *People v Delgado*, 80 NY2d 780, 783 [1992]; *see also* CPL §470.15[2][c]; *People v Garcia*, 195 AD2d 253, 254-255 [1993], *affd* 84 NY2d 336 [1994]; *People v Suitte*, 90 AD2d 80, 86 [1982]).

This incident represents defendant's first and only contact with the criminal justice system. For more than 40 years, defendant successfully managed his mental illness. It is evident that the stress of the loss of his mother, his inadvertent medication lapse, and the psychosis that resulted, conspired to cause this tragic incident. Defendant's treating psychiatrist opined that defendant has insight into his mental condition and that with properly managed psychiatric care, he can continue to function normally.

While this Court appreciates the severity of the injury sustained by defendant's innocent victim, under the circumstances herein, we believe that an 11-year determinate prison term – for

a man suffering from such severe mental illness that his capacity to form the required element of intent for the subject crime is questionable at best – is unduly harsh. Accordingly, we find that a reduction of his sentence, in the interest of justice, to an 8-year prison term is sufficient punishment under the circumstances of this case.

All concur except Sweeny and Moskowitz, JJ. who dissent in a memorandum by Sweeny, J., as follows.

SWEENY, J. (dissenting)

This defendant entered into a negotiated plea and agreed upon sentence. He did so with the advice of counsel and with the approval of an experienced and well respected judge. Other than a surfeit of compassion, there is no basis to reduce the sentence in the interest of justice.

The underlying facts are undisputed. Defendant, without any provocation or justification, tried to stab the victim, Manuel Einoa, with a knife. When defendant missed, the victim tried to run away. Defendant then grabbed a machete, chased Mr. Einoa and proceeded to repeatedly hack at his head and arm, inflicting massive injuries, including three severed fingers, and severely cutting and almost amputating the palm of Mr. Einoa's hand.

Defendant was arrested and charged with one count of attempted murder in the second degree and three counts of assault in the first degree. Rather than proceed to trial where he faced upwards of 25 years' imprisonment on each count, defendant accepted a plea to one count of attempted murder in the second degree (Penal Law § 110/125.25[1]), with an agreed upon sentence of 11 years in prison, followed by 5 years' postrelease supervision, in full satisfaction of all charges.[1]

[1]The People asked for a sentence of 12 years' imprisonment.

The sole basis for this appeal is excessive sentence. There is no claim that the plea was anything other than voluntarily, knowingly and freely entered into. Nor is there any claim that defendant was anything but fully competent when he pleaded.

A reviewing court should rarely reduce a sentence that is the result of a negotiated plea (*People v Lopez*, 190 AD2d 545 [1993]). Indeed the sentencing judge is in the best position to determine the appropriate sentence and his or her action should not be disturbed unless there is a clear abuse of discretion (*see People v Sheppard*, 273 AD2d 498, 500 [2000], *lv denied* 95 NY2d 908 [2000]). Although an appellate court has the broad plenary power to modify a negotiated sentence, it should do so only where the sentence was unduly harsh or severe (*id.; People v Delgado*, 80 NY2d 780 [1992]; *People v Suitte*, 90 AD2d 80 [1982]; CPL 470.15[6][b]). Indeed, "[a]bsent a clear abuse of discretion or the existence of extraordinary circumstances, a trial court's exercise of discretion in imposing what it considers to be an appropriate sentence will not be disturbed" (*People v May*, 301 AD2d 784, 786 [2003], *lv denied* 100 NY2d 564 [2003]). Moreover, a sentence which is within statutory parameters should not be deemed harsh and excessive in the absence of an abuse of discretion or extraordinary circumstances warranting reduction (*People v Mackey*, 136 AD2d 780 [1988], *lv denied* 71 NY2d 899

[1988]).

Here, there were no extraordinary circumstances warranting a reduction of sentence (*see People v Fair,* 33 AD3d 558 [2006], *lv denied*, 8 NY3d 945 [2007]; *People v McNeil*, 268 AD2d 611 [2000]; *People v Bass*, 261 AD2d 651 [1999]). A defendant's history of mental illness does not in itself constitute an extraordinary circumstance (*see People v Gibbs*, 280 AD2d 698, 699 [2001], *lv denied* 96 NY2d 829 [2001]).

All of the points the majority rely on in support of their argument to reduce the sentence were before Justice Yates, including defendant's own narrative of his upbringing and his mental health issues. It is undisputed that these factors were taken into consideration when the sentence was imposed. In fact, Justice Yates specifically included a direction for mental health treatment as part of the disposition. There is no claim that the Justice abused his discretion.

Particularly inexplicable is the argument that the imposed sentence of 11 years is too harsh, but that this harshness will be ameliorated by a reduction of only 3 years.

In short, the majority is not engaging in the limited review prescribed by the case law cited herein but instead is giving

defendant a sentence reduction based solely upon sympathy. I submit that this is not our role. The defendant received a very fair sentence for the horrific acts in which he engaged -- the very sentence he agreed to. It should not be disturbed.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5897 The People of the State of New York, Ind. 5188/01
Respondent,

-against-

Tyrone Robinson,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Carol Berkman, J.), entered on or about December 7, 2010, which denied defendant's CPL 440.20 motion to set aside a resentence of the same court (Charles J. Tejada, J.), rendered September 16, 2008, resentencing him to a term of 8 years, with 5 years' postrelease supervision, unanimously affirmed.

The court properly denied defendant's motion to set aside

the resentencing. The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, J.P., Tom, Sweeny, Renwick, JJ.

5898 Akeem Fleming, Index 15665/04
Plaintiff-Appellant,

-against-

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

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Belovin & Franzblau, LLP, Bronx (David A. Karlin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 26, 2010, which granted defendants' motion to dismiss all causes of action sounding in negligence, and denied plaintiff's cross motion to amend his notice of claim to include the stricken negligence claims, unanimously affirmed, without costs.

The trial court correctly dismissed plaintiff's negligence claims as precluded because that theory of liability was not asserted in the original notice of claim, in which plaintiff asserted that he was injured as a result of an intentional assault by the corrections officer (*see Garcia v O'Keefe*, 34 AD3d 334, 335 [2006]). By the same token, the court correctly denied plaintiff's motion to add the negligence claims to the notice of claim by amendment under General Municipal Law 50-e(6). Any

amendment that creates a new theory of liability is not within the purview of that provision (*see White v New York City Hous. Auth.*, 288 AD2d 150 [2001]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5899 In re Taylor C.,

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

Christin C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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George E. Reed, Jr., White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Andrew S. Wellin of counsel), for respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the child.

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Order of fact-finding, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about July 22, 2010, which, after a hearing, determined that respondent mother neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding of neglect (Family Ct Act § 1012[f][i][B]; § 1046[b][i]). Respondent's mother testified that she witnessed respondent push the then one-month-old child, causing the child to slide across the floor from one room to another. This single incident is sufficient to support a finding of neglect, given that the child's physical, mental or emotional condition has been impaired

or is in imminent risk of being impaired as a result of respondent's behavior (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [2010], *lv denied* 16 NY3d 705 [2011]).

Family Court properly drew the strongest negative inference from respondent's failure to appear and testify (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79-80 [1995]; *Matter of Cantina B.*, 26 AD3d 327, 328 [2006]). The court did not deprive respondent of due process by holding the fact-finding hearing in her absence. The record shows that respondent received notice of the proceedings and was represented by counsel; that the court repeatedly adjourned the proceedings due to respondent's often unexplained absences; and that respondent provided incorrect contact information (*see* Family Ct Act § 1042; *Matter of Elizabeth T. [Leonard T.]*, 3 AD3d 751, 753 [2004]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, JJ.

5900 Jean Allen, etc., Index 6862/04
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

New York Yankees Partnership, et al.,
Defendants.

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Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Brody, Benard & Branch, LLP, New York (Mary Ellen O'Brien of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 9, 2010, which, insofar as appealed from as limited by the briefs, granted defendant City of New York's motion for summary judgment dismissing the Labor Law § 240(1) cause of action as against it, and denied plaintiff's cross motion for summary judgment on that cause of action, unanimously affirmed, without costs.

Plaintiff's decedent, an employee of a traveling carnival, was injured while preparing an amusement ride for use at a carnival on City-owned property. Contrary to plaintiff's contention, the decedent was not engaged in the erection of a structure as contemplated by Labor Law § 240(1). He was

installing scenery panels as a backdrop to the ride, which came pre-built (*see Hodges v Boland's Excavating & Topsoil, Inc.*, 24 AD3d 1089, 1091-1092 [2005], *lv denied* 6 NY3d 710 [2006]; *Munoz v DJZ Realty, LLC*, 5 NY3d 747 [2005]; *Adair v Bestek Light. & Staging Corp.*, 298 AD2d 153 [2002]).

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: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5901 Nina Marie Leone, Index 7737/06
Plaintiff,

-against-

BJ's Wholesale Club, Inc.,
Defendant-Appellant,

A.A.A. Refrigeration Services, Inc.,
Defendant,

Killion Industries, Inc.,
Defendant-Respondent.

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Torino & Bernstein, P.C., Mineola (Bruce A. Torino of counsel), for appellant.

Law Office of Andrea G. Sawyers, Melville (David R. Holland of counsel), for defendant-respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 19, 2010, which, insofar as appealed from as limited by the briefs, granted defendant Killion Industries, Inc.'s motion for summary judgment dismissing the complaint and all cross claims against it, and denied defendant BJ's Wholesale Club, Inc.'s cross motion for summary judgment on its claims for indemnification against Killion, unanimously affirmed, without costs.

Plaintiff was injured when she slipped on water leaking from a refrigerated flower display case in a store owned by defendant BJ's. Defendant Killion, the designer and manufacturer of the

display case, established prima facie that plaintiff's injury did not arise from a design defect in the display case. The evidence showed that the display case's condensation evaporation pans had twice the capacity prescribed by the applicable industry standard (*see Carmona v Mathisson*, 54 AD3d 633 [2008]). The expert affidavit that defendant BJ's offered in opposition failed to raise a triable issue of fact, since the expert had not inspected the subject display case; nor did he opine that the design of the display case failed to comply with applicable industry standards (*see Ramos v Howard Indus., Inc.*, 10 NY3d 218, 223-224 [2008]; *Vasquez v The Rector*, 40 AD3d 265, 266-267 [2007]).

Killion also established that plaintiff's injury was not proximately caused by any failure on its part to warn of potential dangerous uses of the display case such as pouring water from the flower buckets into it. The evidence showed that an employee of BJ's knew that the display case could only handle its own condensate and that additional water would leak or spill out (*see Stewart v Honeywell Intl. Inc.*, 65 AD3d 864 [2009]).

Given Killion's freedom from liability for plaintiff's injury, there is no basis for BJ's indemnification claims against it.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5902-
5903 Nathaniel Hernandez, etc., et al., Index 350664/07
Plaintiffs-Respondents-Appellants,

-against-

Adelango Trucking, et al.,
Defendants-Respondents,

Royal Coach Lines, Inc., et al.,
Defendants-Respondents-Appellants.

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Stefano A. Filippazzo, P.C., Brooklyn (Stefano A. Filippazzo of counsel), for appellants-respondents.

White Fleischner & Fino, LLP, New York (Deanna E. Hazen of counsel), for respondents-appellants.

Law Office of Mary A. Bjork, Tarrytown (David Holmes of counsel), for respondents.

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about June 18, 2010, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Royal Coach Lines, Inc. and Olfemi John Osiyemi (Coach Lines defendants) for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs, and the complaint dismissed as against all defendants. The Clerk is directed to enter judgment accordingly. Appeal from aforesaid order to the extent it denied the motion of the Coach Lines defendants for summary judgment on the issue of liability,

unanimously dismissed, without costs, as academic in light of the foregoing.

Defendants established, prima facie, that the infant plaintiff did not sustain a serious injury as a result of the 2006 vehicular accident, through the submission of affirmed reports of medical experts, who, upon examination, found that plaintiff had normal ranges of ankle motion and had recovered from an ankle sprain without any disability (*see Canelo v Genolg Tr., Inc.*, 82 AD3d 584 [2011]). Moreover, other submissions, including the bill of particulars and plaintiff's deposition, which stated that he missed less than six days of school, sufficiently refuted his 90/180-day claim (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522 [2010]; *see also Torres v Dwyer*, 84 AD3d 626, 626-627 [2011]). In opposition, plaintiffs failed to raise a triable issue of fact.

Dismissal of the complaint as against defendants Adelango Trucking and Jose F. Veloso is warranted because, "'if plaintiff[s] cannot meet the threshold for serious injury against one [set of] defendant[s, they] cannot meet it against the other'" (*DeJesus v Paulino*, 61 AD3d 605, 608 [2009], quoting *Lopez v Simpson*, 39 AD3d 420, 421 [2007]).

In light of the foregoing, the issue of liability is rendered academic with respect to all defendants (*see Williams*, 70 AD3d at 523).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5904 The People of the State of New York, Ind. 4448/03
Respondent, 5934/03

-against-

Andy Rodriguez,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered June 1, 2009, resentencing defendant to a term of 7 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5905 Ruth Daley, Index 18762/07
Plaintiff-Appellant,

-against-

Janel Tower L.P., et al.,
Defendants-Respondents.

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Steven Wildstein, P.C., Great Neck (Steven Wildstein of counsel), for appellant.

Gannon, Lawrence & Rosenfarb, New York (Lisa L. Gokhulsingh of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 27, 2010, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to judgment as a matter of law. Plaintiff alleges that she was injured when she fell on black ice in defendants' parking lot, next to an area where defendants' contractor piled snow after a snowfall. However, the climatological reports showed that it last snowed more than one week prior to plaintiff's fall and that during the three-day period prior to plaintiff's fall, temperatures remained well above freezing. Accordingly, the purported icy condition, consisting of a two-by-two-foot square, would not have formed under those circumstances (*see Perez v*

Canale, 50 AD3d 437 [2008]; *compare San Marco v Village/Town of Mount Kisco*, 16 NY3d 111 [2010]).

In opposition, plaintiff failed to raise a triable issue of fact. Her affidavit in opposition to the motion, and the errata sheet of her deposition, which was not served on defendants until 11 months after her deposition, conflicted materially with her original description of the condition of the area where she fell (*see Perez v Mekulovic*, 13 AD3d 158 [2004]; *see also Smith v Costco Wholesale Corp.*, 50 AD3d 499, 501 [2008]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5906 In re Bryan E.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

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Presentment Agency.

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

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

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 21, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on enhanced supervised probation for a period of 18 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and placed him on enhanced supervised probation. This was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of*

Katherine W., 62 NY2d 947 [1984]). The underlying incident was a particularly violent robbery, and, although appellant does not have prior conflicts with the law, he has a very serious school disciplinary record.

Accordingly, the court properly concluded that appellant was in need of the duration and scope of supervision accorded by enhanced supervised probation.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5908 Jarkita Brown, Index 25675/04
Plaintiff-Respondent,

-against-

2732 Bainbridge Assoc., LLC,
Defendant-Appellant.

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Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Stacy I. Malinow of counsel), for appellant.

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 7, 2010, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish prima facie that it properly maintained the water heating system in its building and that it had no actual or constructive notice of the alleged hazardous condition, that plaintiff was the sole proximate cause of her injury, or that the injury resulted from a normal fluctuation in the water temperature in the bathtub (*see Boderick v R.Y. Mgt. Co., Inc.*, 71 AD3d 144, 147 [2009]). Defendant submitted no evidence to support its contention that plaintiff was injured as a result of a normal fluctuation in the water temperature. Its superintendent testified that plaintiff's mother had complained

to him about the unregulated water temperature in the bathroom and that before the date of plaintiff's injury he had repaired the hot water seals in the shower and the seals and gaskets in the bathtub faucet.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, JJ.

5909 James Lewis, Index 113626/06
Plaintiff,

-against-

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

Consolidated Edison Company of New York,
Defendant-Respondent.

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Fabiani Cohen & Hall, LLP, New York (Anita D. Bowen of counsel), for appellants.

Richard Babinecz, New York (Helman R. Brook of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 2, 2010, which, in this personal injury action arising from a fall on a portion of a sidewalk immediately adjacent to a metal grate owned by defendant Consolidated Edison, insofar as appealed from as limited by the briefs, denied defendants-appellants' motion for summary judgment dismissing plaintiff's common-law negligence claim and Con Ed's cross claims, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants-appellants dismissing the complaint and all cross claims against them.

Defendants-appellants made a prima facie showing of

entitlement to judgment as a matter of law with evidence that they did not have the "ability to exercise control" over the sidewalk defect that allegedly caused plaintiff's fall (*Kaufman v Silver*, 90 NY2d 204, 207 [1997]; *Hurley v Related Mgt. Co.*, 74 AD3d 648, 649 [2010]).

In opposition, plaintiff and Con Edison failed to raise an issue of fact. As the undisputed owner of the subject grate, Con Edison had exclusive maintenance responsibility over the grate and the area extending 12 inches outward from the perimeter of the grate (34 RCNY 2-07[b][1],[2]), which included the alleged sidewalk defect that caused plaintiff's fall. Accordingly, only Con Edison, and not defendants-appellants, may be liable for plaintiff's injuries (*see Storper v Kobe Club*, 76 AD3d 426, 427 [2010]; *Hurley*, 74 AD3d at 649).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5910 In re Urmeala R.,
Petitioner-Respondent,

-against-

Kusaw M.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

_____

Order, Family Court, Bronx County (Andrea Masley, J.), entered on or about December 20, 2010, which, upon a finding that respondent committed the family offense of harassment in the second degree, granted the petition for an order of protection, unanimously affirmed, without costs.

The determination that respondent committed the offense of harassment in the second degree was supported by a fair preponderance of the evidence (*see* Penal Law § 240.26; Family Court Act § 832). The record shows that on various occasions,

respondent pinched petitioner, pulled her hair and kicked her in the stomach at a time when she was pregnant. There exists no basis to disturb the credibility determinations of the court (*see Matter of Hunt v Hunt*, 51 AD3d 924, 925 [2008]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5911-
5912 TAG 380, LLC, Index 101396/04
Plaintiff-Appellant,

-against-

Estate of Howard P. Ronson, etc., et al.,
Defendants-Respondents,

Dutch Metalworkers Fund,
Defendant.

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Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for appellant.

DLA Piper US LLP, New York (Robert F. Fink of counsel), for Estate of Howard P. Ronson, Ivor Walter Freeman and Barclays Private Bank & Trust Limited, respondents.

Seward & Kissel, LLP, New York (Bruce G. Paulsen of counsel), for ComMet 380, Inc., RREEF Corporation, New York State Common Retirement Fund, respoondents.

Ropes & Gray LLP, New York (Jerome C. Katz of counsel), and Butzel Long, New York (Robert Sidorsky of counsel), for Frederick Barclay, David Barclay, Spartan Madison Corporation, respondents.

Lazare Potter & Giacovas, LLP, New York (Yale Glazer of counsel), for Allen Silverman, respondent.

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Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 13, 2010, awarding attorneys' fees against plaintiff, and bringing up for review an order and judgment (one paper), same court and Justice, entered July 26, 2005, inter alia, awarding a $10,000 sanction against plaintiff, and an order, same court and Justice, entered on or about June 2, 2010,

which granted defendants' motion to confirm the report of the Special Referee determining the amount of attorneys' fees, unanimously affirmed, with costs. Appeal from the June 2, 2010 order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff did not abandon its appeal from the July 26, 2005 order and judgment imposing sanctions by unilaterally withdrawing its unperfected appeal (*cf. Garsson v Natl Rubber Mach. Co.*, 271 App Div 770 [1946]). However, it failed to preserve its claim that, if sanctions were imposed, they should be imposed against its attorney only. While defendants expressly sought sanctions against plaintiff, the record is devoid of any argument before the motion court that the sanctions should not be imposed against plaintiff, as distinct from its attorney. It is telling that plaintiff, which was obligated to present a complete record on its appeal (*see e.g Carter v Carter*, 49 AD3d 427 [2008]), managed to include in the record defendants' extensive memoranda seeking sanctions but not its own memorandum in opposition. If we were to address the merits of this contention, we would agree with the motion court that, in light of the untenable factual allegations in the complaint as well as the vexatious litigation history of Sheldon Solow, plaintiff's principal, the sanction was properly imposed against plaintiff.

The Special Referee's findings as to the amount of reasonable attorneys' fees are supported by the record (*see Steingart v Hoffman*, 80 AD3d 444 [2011]). That the complaint was ultimately found to be frivolous does not mean that defendants' attorneys did not justifiably expend extensive efforts to obtain dismissal at an early juncture, before the litigation could engender costly and protracted discovery. Plaintiff's expert testimony on the reasonableness of attorneys' fees was properly barred, as the Special Referee was capable of determining this non-technical and non-scientific issue independently.

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: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5913 The People of the State of New York, Respondent, Ind. 92/07

-against-

Carlos Abreu, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered November 21, 2008, convicting defendant, after a jury trial, of murder in the first degree, robbery in the first degree (two counts), burglary in the first degree (two counts), and criminal possession of a weapon in the second and third degree, and sentencing him to an aggregate term of 35 years to life, unanimously affirmed.

We reject defendant's argument that the first-degree murder conviction was against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence warranted the conclusion that defendant intended to kill the victim, and it does not support defendant's theory that he may have accidentally fired what he believed to be an unloaded revolver.

The court properly permitted a conspirator to testify,

pursuant to the coconspirator declaration exception to the hearsay rule (*see People v Caban*, 5 NY3d 143, 148 [2005]), that a nontestifying conspirator told him that defendant shot the victim. In this home invasion robbery, defendant and the nontestifying conspirator-declarant entered the victim's apartment while the testifying conspirator and another conspirator waited outside the building. Immediately after the crime, defendant and the conspirator-declarant met with the testifying conspirator. At the time the declarant announced to his coconspirators that defendant had killed the victim, the conspiracy was still in progress, especially since the stolen property had not yet been divided up. The declaration was in furtherance of the conspiracy, since it apprised the other conspirators of the progress or status of the conspiracy (*see United States v Paone*, 782 F2d 386, 391 [2d Cir 1996], *cert denied* 483 US 1019 [1987]). Under the circumstances, it was important for the conspirators to know that the victim had been killed.

The court properly permitted the People to rebut a claim of recent fabrication by introducing a prior consistent statement made by the cooperating conspirator, since this statement predated a particular motive to falsify that had been emphasized by the defense (*see People v Flowers*, 83 AD3d 524 [2011], *lv*

denied 17 NY3d 795 [2011]).

In any event, any error with regard to the two evidentiary rulings discussed above, viewed individually or collectively, was harmless given the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We have considered and rejected defendant's claims under *People v O'Rama* (78 NY2d 270 [1991]). The record supports the conclusion that the court discharged its core responsibility by providing the parties with meaningful notice of the jury notes and an opportunity to be heard. As to one of the notes in question, the court read it into the record in open court well before giving the jury a response (*see People v Salas*, 47 AD3d 513, 514 [2008], *lv denied* 10 NY3d 844 [2008]). As to the other note, there is record proof warranting an inference that the court discussed the note with counsel in an unrecorded conversation (*see e.g. People v Wesley*, 85 AD3d 672 [2011]).

The court lawfully imposed consecutive sentences for the murder and weapon possession convictions because defendant committed these offenses through separate and distinct acts (*see People v McKnight*, 16 NY3d 43, 48-49 [2010]). The weapon

offenses were complete before the homicide was committed.

We perceive no basis for reducing defendant's sentence.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5915 The People of the State of New York, Ind. 3481/09
Respondent,

-against-

Dana Frontis,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (A. Kirke Bartley, Jr., J.), rendered on or about March 9, 2010,

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: NOVEMBER 1, 2011

CLERK

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

Gonzalez, P.J., Tom, Sweeny, Renwick, JJ.

5916 Daniel Andino, Index. 17346/05
Plaintiff, 13336/07

-against-

NSPD Associates, LLC, et al.,
Defendants,

[And Another Action]

– – – – –

Consolidated Edison Company of New York, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Step-Mar Contracting Corp.,
Third-Party Defendant-Appellant.

_____

Kral Clerkin Redmond Ryan Perry & Van Etten, LLP, New York (Joseph C. Bellard of counsel), for appellant.

Richard W. Babinecz, New York (Kaming Lau of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about October 29, 2010, which, in this personal injury action arising from a trip and fall on a public sidewalk, to the extent appealed from, denied third-party defendant Step-Mar's cross motion for summary judgment dismissing Consolidated Edison's third-party complaint against it, unanimously affirmed, without costs.

Step-Mar made a prima facie showing of entitlement to

judgment as a matter of law by submitting evidence that it did not create the alleged dangerous condition on the subject sidewalk (*see Fernandez v 707, Inc.*, 85 AD3d 539, 540-541 [2011]). In opposition, Con Edison raised an issue of fact as to whether Step-Mar properly performed its contractual obligation to maintain the work site, which included the subject sidewalk (*cf. id.* at 541). The contract does not state, and Step-Mar's supervisor did not testify at his deposition, that Step-Mar's obligation is limited to safeguarding its own work, materials, or equipment.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, JJ.

5917 In re Ariel Services, Inc., Index 115599/10
Petitioner,

-against-

New York City Environmental
Control Board., et al.,
Respondents.

_____

Kase & Druker, Garden City (Paula Schwartz Frome of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

_____

Determination of respondent New York City Environmental Control Board (ECB) dated September 30, 2010, which, after an evidentiary hearing, found that petitioner violated 15 RCNY 1-51(g), 1-102(b), 1-102(d), and 1-102(f), and imposed civil penalties totaling $12,000, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Cynthia S. Kern, J.], entered April 13, 2011), dismissed, without costs.

Petitioner contends that it was denied due process because it did not receive a copy of respondent New York City Department of Environmental Protection's appeal from the Administrative Law Judge's decision that had been in petitioner's favor. This

argument is unavailing since "a properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption" (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]).

Contrary to petitioner's contention, ECB's determination was supported by substantial evidence. The agency's decision not to credit the testimony of petitioner and the building's superintendent that petitioner did not perform work in the building's boiler room on January 11, 2010 should not be disturbed (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]).

The penalty imposed does not shock our sense of fairness, as the fines were imposed in accordance with 48 RCNY 3-101.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5918 Linda Strauss, Index 12131/08
Plaintiff-Respondent,

-against-

Babak Saadatmand,
Defendant-Appellant.

_____

Julie Hyman, Bronx, for appellant.

Linda Strauss, respondent pro se

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Order, Supreme Court, Bronx County (La Tia W. Martin, J.), entered on or about April 15, 2010, which, in this divorce action, to the extent appealed from as limited by the briefs, denied defendant's application for sanctions, and granted plaintiff's cross motion to the extent of directing defendant, during the pendency of this action, to maintain health insurance for plaintiff upon consent and any existing life insurance policies, and pay $2000 per month in child support, 75% of all child care expenses, and 100% of the child's unreimbursed medical expenses, unanimously affirmed, without costs.

We decline to disturb the pendente lite award. There is no showing of either exigent circumstances or a failure by Supreme Court to consider the appropriate factors, such as the parties' respective incomes and their preseparation standard of living (*see Mimran v Mimran*, 83 AD3d 550, 550 [2011]; *Ayoub v Ayoub*, 63

AD3d 493, 497 [2009], *appeal dismissed* 14 NY3d 921 [2010]). The record does not support defendant's contention that plaintiff's property assets constituted part of her compensation during the marriage (*compare Isaacs v Isaacs*, 246 AD2d 428, 428-429 [1998]).

Supreme Court providently exercised its discretion in denying defendant's request for sanctions. Plaintiff's commencement of this action in New York does not constitute frivolous conduct (*see* 22 NYCRR 130-1.1; *Granato v Granato*, 51 AD3d 589, 590 [2008]).

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

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5919 The People of the State of New York, Ind. 5296/07
Respondent,

-against-

William Jones,
Defendant-Appellant.

_____

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

William Jones, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin 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 (Roger Hayes, J.), rendered on or about November 14, 2008,

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

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

ENTERED: NOVEMBER 1, 2011

CLERK

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

Gonzalez, P.J., Tom, Sweeny, Renwick, JJ.

5920 John K. Whalen, Index 109957/05
Plaintiff-Appellant,

-against-

New York City Department of Environmental Protection, et al.,
Defendants-Respondents.

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Basch & Keegan, LLP, Kingston (Derek J. Spada of counsel), for appellant.

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

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about July 9, 2010, which granted defendants' (collectively the City's) motion to renew a motion for summary judgment dismissing the complaint and, upon renewal, granted the motion for summary judgment, unanimously reversed, on the law, without costs, and the motion for summary judgment denied.

Plaintiff was injured when a tree fell on his car as he was driving on State Route 28 in Ulster County on reservoir property owned by the City. Plaintiff alleges that the City was negligent in failing to remove a diseased, decaying, and unstable tree from the perimeter of the roadway. The City moved unsuccessfully for summary judgment dismissing the complaint for lack of notice of the dangerous condition of the tree. It then moved for renewal,

based on the "new fact" that the tree was located within a 200-foot-wide permanent easement granted to the State in 1947 for the purpose of constructing and maintaining the roadway.

The City failed to show that it exercised due diligence in investigating the facts relevant to its liability or that it had a reasonable excuse for failing to present these facts, which it discovered in publicly available documents concerning its own property, on the prior motion (*see* CPLR 2221[e][2]; *Eddine v Federated Dept. Stores, Inc.*, 72 AD3d 487 [2010]; *Matter of Weinberg*, 132 AD2d 190, 209-210 [1987], *lv dismissed* 71 NY2d 994 [1988]). The interests of justice did not warrant successive motions for summary judgment (*see Jones v 636 Holding Corp.*, 73 AD3d 409 [2010]).

In any event, the City failed to demonstrate that it is absolved from liability in this case by the existence of a permanent easement on its property. Citing *Tagle v Jakob* (97 NY2d 165 [2001]), the City argues that, as the servient owner of the property, it had no duty to maintain the easement. In *Tagle*, the plaintiff was injured when he touched an uninsulated electric wire while climbing a tree on the defendant's property. The wire was owned by New York State Electric and Gas Co., which had an easement on the property for the maintenance of utility poles and overhead electric wires. The Court found that the property owner

had no duty to maintain the easement, and therefore could not be held liable to the plaintiff, because the record demonstrated that she lacked the special expertise required to maintain electric wires and could not take any "remedial" steps in connection with the wires without risking disruption of the utility's easement (97 NY2d at 168-169). Here, in contrast, there is evidence that the City possessed and maintained the forested area of its property beyond the State's easement, where it posted "No Trespassing" signs (*see Butler v Rafferty*, 100 NY2d 265, 270 [2003]), and there is no evidence that the City lacked the expertise required to remove diseased trees or that doing so would interfere with the State's easement. Contrary to the City's argument, the fact that the State has a duty to maintain the trees on the property to keep the highway safe does not mean that the City, as a landowner, does not also have a duty to maintain its property in reasonably safe condition (*see e.g. Bingham v New York City Tr. Auth.* 8 NY3d 176 [2007]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5921N Miroslaw Gosek, Index 106990/95
Plaintiff-Appellant,

-against-

Lunt Theatre Company, et al.,
Defendants-Respondents.

[And A Third Party Action]

– – – – –

Kay Construction Corp.,
Fourth-Party Plaintiff,

-against-

T&S Masonry, Inc.,
Fourth-Party Defendant-Respondent.

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

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Candice B. Ratner of counsel), for Lunt Theatre Company and Lunt Nederlander Corporation, respondents.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for T&S Masonry, Inc., respondent.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 13, 2010, which denominated plaintiff's motion for an order restoring the case to the calendar as a motion to reargue, and denied said motion, unanimously dismissed, without costs, as taken from a nonappealable order.

In 1995, plaintiff commenced this personal injury action to

recover for injuries he suffered in 1992, when he fell from a ladder while working at defendants' premises. In 1998, after plaintiff filed his note of issue, the parties entered into a stipulation agreeing that the case would be removed from the trial calendar and discovery would be completed. In August 2000, plaintiff appeared for a neurological exam, and defendants served expert exchanges in September 2000. On August 14, 2001, more than one year after the case was marked off, plaintiff moved to restore the case to the trial calendar.

The court denied plaintiff's motion on the ground that he failed to satisfy the requirements for vacating a dismissal based on abandonment pursuant to CPLR 3404, i.e., merit, a reasonable excuse for the delay, no intent to abandon the matter, and a lack of prejudice to the non-moving party (*Ware v Porter*, 227 AD2d 214 [1996]). On March 19, 2010, plaintiff again moved for an order restoring the action to the trial calendar, and alternatively sought renewal of the 2001 motion.

In light of the prior motion, which sought identical relief, as well as the fact that plaintiff did not submit any new evidence, the court properly considered plaintiff's motion as an untimely motion to reargue. Inasmuch as no appeal lies from the denial of a motion to reargue, and no appeal was taken from the original 2001 order, plaintiff's arguments addressed to that

determination are not properly before us (see CPLR 2221; *Jones v 170 E. 92nd St. Owners Corp.*, 69 AD3d 483 [2010]; *Stratakis v Ryjov*, 66 AD3d 411 [2009]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

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

5508 Paul Emposimato, Jr., et al., Index 601728/08
Plaintiffs-Appellants-Respondents, 590573/08

-against-

CIFC Acquisition Corp., et al.,
Defendants-Respondents-Appellants.

- - - - -

CIFC Acquisition Corp., Index No.590573/08
Third-Party Plaintiff-Respondent-Appellant,

-against-

Concordia International Forwarding Corp.,
Third-Party Defendant-Appellant-Respondent.

_____

Epstein Becker & Green, P.C., New York (Robert D. Goldstein of counsel), for appellants-respondents.

Stroock & Stroock & Lavan LLP, New York (Bruce H. Schneider of counsel), for respondents-appellants.

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Order and judgment (one paper), Supreme Court, New York County (Bernard J. Fried, J.), entered March 14, 2011, which granted the motion of defendant/third-party plaintiff CIFC Acquisition Corp. and defendant Jefferies Capital Partners IV, L.P. (JCP) for summary judgment dismissing the complaint and for partial summary judgment as to liability on CIFC's counterclaim and third-party claim only to the extent of issuing a declaratory judgment in defendants' favor on the first cause of action in the complaint and declaring that plaintiffs' purported termination of the parties' stock purchase agreement (SPA) by means of the

Termination Notice was not authorized under SPA § 8.1(e), and denied the cross motion of plaintiffs and third-party defendant for summary judgment dismissing the counterclaim and third-party claim, unanimously affirmed, without costs.

The motion court correctly found that in order to invoke the right to terminate pursuant to section 8.1(e) of the SPA, plaintiffs had to provide schedules to CIFC 30 days before the purported termination on June 6, 2008, that is, by May 7, 2008. Further, the schedules had to be final versions and in reasonable and customary form. Defendants established that the April 14, 2008 schedules were not "final" versions within the meaning of the SPA. Indeed, the e-mail cover letter, to which the schedules were attached, indicated that the schedules had not been seen by third-party defendant and were subject to further review. In addition, some of the schedules were missing required content and attachments and/or contained qualifying statements indicating that they could not be considered a final version. Moreover, given that plaintiffs sent CIFC at least two revised versions of the schedules after April 14, 2008, there was no basis upon which CIFC should have understood that the April 14 schedules were final versions. Accordingly, the motion court properly resolved the merits of the first cause of action, for a declaratory judgment against plaintiffs, and correctly issued a declaration

in favor of defendants (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

The motion court also correctly denied that branch of defendants' motion for summary judgment dismissing plaintiffs' second cause of action, for breach of the implied covenant of good faith and fair dealing. Contrary to defendants' contention, that cause of action was not limited to an allegation that they breached sections 5.1(b) and 5.1(c) of the SPA. Thus, the claim was not a substitute for a nonviable breach of contract claim (*compare Triton Partners v Prudential Sec.*, 301 AD2d 411, 411 [2003]).

Nor should the second cause of action have been dismissed as against JCP, since issues of fact exist as to whether JCP is the alter ego of CIFC. Indeed, there was evidence that, among other things, JCP formed CIFC for the purpose of acquiring third-party defendant and that CIFC had no assets and engaged in no business activities beyond signing the SPA. Moreover, claims involving alter ego liability are "fact-laden" and "not well suited for summary judgment resolution" (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1999]).

CIFC was not entitled to partial summary judgment as to liability on its counterclaim and third-party complaint, which seeks damages for plaintiffs' and third-party defendant's alleged

wrongful repudiation of the SPA. CIFC failed to demonstrate that, but for the alleged wrongful repudiation, it would have been ready, willing and able to fulfill its obligations under the SPA (*see Ross Bicycles v Citibank*, 200 AD2d 379, 380 [1994]; *see also Musick v 330 Wythe Ave. Assoc., LLC,* 41 AD3d 675, 676 [2007]; *Inter-Power of N.Y. v Niagara Mohawk Power Corp.*, 259 AD2d 932, 934 [1999], *lv denied* 93 NY2d 812 [1999]). Indeed, CIFC conceded that it was not satisfied with the schedules as they existed at the time of the purported termination of the SPA.

Plaintiffs were not entitled to summary judgment dismissal of the counterclaim for breach of contract. Contrary to their contention, the SPA was not a preliminary agreement. Indeed, the SPA does not refer to the negotiation or execution of any subsequent agreement and it expressly provides that it is binding on the parties (*compare IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213 n 2 [2009]). Further, the contents of the schedules were not material, open terms of the SPA, which could only become operative or effective with CIFC's consent. Rather, the contents are part of plaintiffs' and third-party defendant's performance obligations under the agreed upon and negotiated SPA. As for the various other disputes that arose between the parties, the motion court correctly noted that, among other things, they were not material terms of the SPA.

The motion court also properly found it premature to determine on this record that, at the time of the purported breach, the fair market value of the stock to be sold was equal to the contract price. Although the contract price constitutes evidence as to the fair market value of the stock at the time of the purported breach and is entitled to significant weight (*see Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d 273, 277 [1975]), there was a difference of opinion regarding third-party defendant's fair market value at the time of the purported breach.

The damages sought by CIFC are not consequential damages precluded by section 7.2(c) of the SPA. Rather, CIFC seeks expectation damages, which is the general measure of damages in a breach of contract case under New York law (*J.R. Loftus, Inc. v White*, 85 NY2d 874, 877 [1995]). In the case of a breach of a contract to sell securities, expectation damages are calculated as "the difference between the agreed price of the shares and the fair market value at the time of the breach" (*Aroneck v Atkin*, 90 AD2d 966, 966 [1982], *lv denied* 59 NY2d 601 [1983]; *see also Simon v Electrospace Corp.*, 28 NY2d 136, 145 [1971]). This formulation awards expectation damages to the extent of putting plaintiff in the same economic position he would have occupied had the breaching party performed the contract (*Oscar Gruss &*

Son, Inc. v Hollander, 337 F3d 186, 196 [2d Cir 2003]). Thus, by seeking the amount of the difference between the fair market value of the stock at the time of the alleged breach and the price for the stock agreed upon in the SPA, CIFC is not seeking consequential damages precluded by section 7.2(c) of the SPA (*see Schonfeld v Hilliard*, 218 F3d 164, 175-176 [2d Cir 2000]).

Lastly, the motion court properly declined to dismiss the third-party claim for breach of contract. There was evidence that, among other things, third-party defendant did not provide copies of its insurance policies and did not act in good faith, as required by the SPA.

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Abdus-Salaam, JJ.

5540 Lisa Ann Duac Kamps, et al., Index 406191/07
Plaintiffs-Respondents,

-against-

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

_____

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

Soren & Soren, Staten Island (Steven J. Soren of counsel),for respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered February 25, 2010, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Plaintiff Lisa Ann Duac Kamps fell and was injured as she stepped from a square concrete platform that abutted a subway exit stairwell at the street level. Although the platform matched the sidewalk in color, the photographic evidence shows that its perimeter was daubed with yellow paint, faded at the front edge, yet particularly visible at the left and right margins. The photographs also show that the platform ends are flush with the end of the subway enclosure and with the end of

the handrail on the right side of the subway stairwell, indicating that it was part of the stairwell and not part of the sidewalk. In light of this evidence, which showed that the platform was not a dangerous trap that caused plaintiff's fall, defendants met their prima facie burden of establishing entitlement to summary judgment (*see Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665, 666 [2010]; *Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [2009]).

In opposition, plaintiffs failed to submit evidence sufficient to show that the platform area created optical confusion so as to defeat defendants' prima facie showing (*compare Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92 [2011]; *Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 210-212 [1988]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

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

5602 The People of the State of New York, Respondent, Ind. 3942/07

-against-

Denzel Crawford, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David E. A. Crowley of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles J. Tejada, J. at suppression hearing; Michael J. Obus, J. at plea and sentencing), rendered October 16, 2008, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of 2 years, with 2 years' postrelease supervision, unanimously reversed, on the law, defendant's motion to suppress granted, the judgment of conviction vacated, and the indictment dismissed.

At the suppression hearing, a police officer testified that he and his two partners were patrolling in an unmarked car at night, when they observed defendant, who was walking on the street, adjust something in his right pants pocket by cupping his hand over the outside of the pocket and pulling upward. Defendant repeated this movement three or four times. The

officer further testified that the object in defendant's pocket created a bulge and looked heavy.

The officers pulled their car up next to defendant, identified themselves as the police, and asked if they could talk to him. Defendant complied and approached the car, with both hands in his pants pockets. When one officer asked defendant to take his hands out of his pockets, he obeyed and produced identification. During this exchange, the testifying officer observed the bulge in defendant's pocket more closely; it appeared to be made by a hard, five- or six-inch-long, oblong-shaped object, which the officer could not identify.

The officer who was driving asked defendant where he was headed, and defendant replied that he had come from the subway and was walking towards an apartment building. The officer then told defendant to back away from the car door, and after defendant complied, the officer opened the door and stepped out. Defendant then fled. Two of the officers chased defendant on foot at a distance of no more than 10 feet, while the third drove the car to cut defendant off. While pursuing defendant, the testifying officer saw him throw a gun onto the street. Shortly thereafter, the officers apprehended defendant and retrieved the weapon.

The officers lacked valid grounds for seizing defendant. In

evaluating the propriety of a police intrusion, we must consider whether it was justified at its inception and whether it was reasonably related in scope to the circumstances leading to the encounter (*People v De Bour*, 40 NY2d 210, 215 [1976]; *People v Cantor*, 36 NY2d 106, 111 [1975]). In *De Bour*, the Court of Appeals set forth a four-level test for evaluating street encounters that the police initiate. The first three levels are relevant: level one permits a police officer to request information from an individual and merely requires that the request be made for an objective, credible reason, which need not be an indication of criminality; level two - the common-law right of inquiry - permits a somewhat greater intrusion, short of a forcible seizure, and requires a founded suspicion that criminal activity is afoot; and level three, authorizing an officer to forcibly stop and detain an individual, requires a reasonable suspicion that the individual was involved in a crime (40 NY2d at 223; *see also People v Hollman*, 79 NY2d 181, 184-185 [1992]).

Here, based on the object in defendant's pocket, the officers may have had an objective, credible reason to request information from defendant (*see De Bour*, 40 NY2d at 223) and to ask him to remove his hands from his pockets as a precautionary measure (*see Matter of Anthony S.*, 181 AD2d 682, 682-683 [1992], *lv denied* 80 NY2d 753 [1992]). But the officers were not

justified in forcibly seizing defendant by chasing after and apprehending him. Defendant's flight, when accompanied by nothing more than the presence of an object in his pocket that was unidentifiable even at close range, did not raise a reasonable suspicion that he had a gun or otherwise was involved in a crime (*see People v Holmes*, 81 NY2d 1056, 1057-1058 [1993]; *People v Prochilo*, 41 NY2d 759, 763 [1977]; *People v Reyes*, 69 AD3d 523, 525-526 [2010], *lv dismissed* 15 NY3d 863 [2010]).

Because defendant threw away the gun while the officers were in hot pursuit, the physical evidence was tainted by the improper police action and should have been suppressed (*see People v Holmes*, 181 AD2d 27, 31-32 [1992], *affd* 81 NY2d 1056 [1993]). Contrary to the People's argument, defendant did not make a conscious and independent decision to abandon the gun, but instead discarded it in direct response to the pursuit (*see People v Pirillo*, 78 AD3d 1424, 1426 [2010]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5646 The People of the State of New York, Respondent,

Ind. 883/08

-against-

Jose Monclova,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at hearing; Gregory Carro, J. at jury trial and sentencing), rendered November 4, 2009, convicting defendant of grand larceny in the third degree, grand larceny in the fourth degree (two counts) and criminal possession of stolen property in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 7½ to 15 years, unanimously modified, on the law, to the extent of reducing the conviction of grand larceny in the fourth degree on count seven to petit larceny, and reducing the sentence on that conviction to time served, and otherwise affirmed.

The court properly denied defendant's suppression motion. The hearing court properly found that defendant's fiancee's consent to the police search of her apartment was voluntary (*see*

generally People v Gonzalez, 39 NY2d 122 [1976]). Defendant's other suppression claim is both unpreserved and unreviewable for lack of a proper factual record (*see e.g. People v Martin*, 50 NY2d 1029, 1031 [1980]).

The proof was insufficient for the conviction for fourth degree grand larceny under the seventh count of the indictment, with regard to the requirement that the value of the stolen laptop computer at the time of the theft exceeded one thousand dollars (*see* Penal Law §§ 155.20[1] and 155.30[1]). The People merely presented evidence that the original price of the computer in December 2004 was a little over $2,000, and that the computer was still functioning and in good condition at the time of the theft in December 2007. While "[p]roof of original cost may provide sufficient evidence of value where the difference between the cost of the item and the statutory threshold is substantial and where there is little risk that the item has depreciated in value below the statutory threshold" (*see People v Stein*, 172 AD2d 1060, 1060 [1991], *lv denied* 78 NY2d 975 [1991]), a jury must be able to "reasonably infer, rather than merely speculate, that the property ... has the requisite value to satisfy the statutory threshold" (*People v Lopez*, 79 NY2d 402, 405 [1992]). Based upon the evidence, the jury could only speculate whether the computer still had a value of more than $1000 in December

2007.

However, the evidence was sufficient as to the television that was the subject of count six. It had been purchased only nine months before the theft for approximately $1,500, and after it was stolen, the owner bought a replacement for about $1,300; furthermore, when the stolen television was returned to him, the owner preferred it to the newly purchased $1,300 substitute. This evidence constituted a sufficient basis for the jury to infer, rather than merely speculate, that the television's value at the time of the theft still exceeded $1,000.

We perceive no basis for reducing defendant's sentences for his convictions of grand larceny in the third degree and criminal possession of stolen property in the third degree.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5716 Briarpatch Limited, L.P., et al., Index 603364/01
Plaintiffs-Appellants,

-against-

Briarpatch Film Corp., et al.,
Defendants,

Verner Simon P.C., et al.,
Defendants-Respondents.

_____

Barry L. Goldin, New York, for appellants.

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

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered November 24, 2010, which granted the cross motion to dismiss the cause of action for violation of a restraining notice only to the extent of limiting the claim to conduct within one year after service of the notice, unanimously affirmed, without costs.

In a previous action, plaintiffs obtained a money judgment against defendant Robert M. Geisler and his then-partner John Roberdeau (the judgment debtors). Plaintiffs later learned that monies in which the judgment debtors had an interest were allegedly being received and disbursed through the judgment debtors' attorney Paul W. Verner and his law firm Verner Simon P.C. (together Verner). On June 13, 2001, plaintiffs served a

CPLR 5222(b) restraining notice on the judgment debtors, and on Verner as garnishee. Verner was subsequently found in contempt for violating the restraining notice a day after it was issued.

In 2001, plaintiffs brought this action against, inter alia, Geisler and Verner. The fourth amended complaint asserts a cause of action against Verner for further violations of the restraining notice. In particular, the complaint alleges that Verner received more than $525,000 in funds in which the judgment debtors had an interest and disbursed those monies in contravention of the restraining notice. According to the complaint, at the time of the disbursements, Verner knew that the judgment has not been satisfied or vacated.

A CPLR 5222(b) restraining notice "may be served on either the judgment debtor himself or . . . upon a third-party 'garnishee' -- a person who owes a debt to the judgment debtor or who is in possession of property in which the judgment debtor has an interest" (*Aspen Indus. v Marine Midland Bank*, 52 NY2d 575, 579 [1981]). Whereas a restraining notice served upon the judgment debtor is effective "until the judgment . . . is satisfied or vacated" (CPLR 5222[b]), the injunctive effect of a notice served upon a garnishee "continues for one year [after service] or until such time as the judgment is satisfied or vacated, whichever occurs first" (*Aspen Indus.*, 52 NY2d at 579;

see CPLR 5222[b]). Leave of court is required to serve more than one restraining notice upon the same person, and a restraining notice may be extended by motion pursuant to CPLR 5240 (*Matter of Kitson & Kitson v City of Yonkers*, 10 AD3d 21 [2004]).

Because Verner is a garnishee, the restraining notice expired one year after it was served upon him. Plaintiffs failed to obtain leave of court to either extend the notice or file a new one. Thus, the motion court properly limited this cause of action to conduct occurring within one year after Verner was served with the notice.

We reject plaintiffs' argument that an attorney for the judgment debtor, as an officer of the court, should not be subject to the one-year limitation set forth in CPLR 5222(b). Although we recognize that plaintiffs' allegations, if true, raise significant questions as to the propriety of Verner's conduct, the statute is clear. It unequivocally sets forth two distinct periods of restraint -- one for the "judgment debtor or obligor" and one for "a person other than the judgment debtor or obligor" (CPLR 5222[b]). Verner plainly falls within the latter

category. Had the Legislature wished to carve out the exception to the statute urged by plaintiffs, it could have done so.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5735 In re East 51st Street Crane Collapse Litigation. Index. 769000/08
104427/08
111098/08
108131/08

John Della Porta, et al.,
Plaintiffs-Respondents, 107759/08
103949/08
113949/08

-against- 108449/09

East 51st Street Development Company, LLC, et al.,
Defendants-Appellants.

New York Crane & Equipment Corporation, et al.,
Defendants.

[And A Third Party Action]

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Denise C. Bleidner, etc.,
Plaintiff-Respondent,

-against-

East 51st Street Development Company, et al.,
Defendants-Appellants,

New York Crane & Equipment Corp., et al.,
Defendants.

[And a Third Party Action]

– – – – –

Rosalie Stephens, etc.,
Plaintiff-Respondent,

-against-

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

East 51st Street Development Company, LLC, et al.,
Defendants-Appellants.

[And a Third Party Action]

– – – – –

Susan Jendersee, etc.,
Plaintiff-Respondent,

-against-

East 51st Street Development
Company, LLC, et al.,
Defendants-Appellants.

New York Crane & Equipment Corp., et al.,
Defendants.

[And A Third Party Action]

– – – – –

Jessica Gallone, etc.,
Plaintiff-Respondent,

-against-

East 51st Street Development
Company, LLC, et al.,
Defendants-Appellants,

New York Crane & Equipment Corp., et al.,
Defendants.

[And A Third Party Action]

– – – – –

Thalia M. Mazza, etc.,
Plaintiff-Respondent,

-against-

East 51st Street Development
Company, LLC, et al.,
Defendants-Appellants,

New York Crane & Equipment Corp., et al.,
Defendants.

[And A Third Party Action]

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Catherine M. Cohen, etc.,
Plaintiff-Respondent,

Michael J. Cohen, etc., et al.,
Plaintiffs,

-against-

East 51st Street Development
Company, LLC, et al.,
Defendants-Appellants,

Joy Contractors, et al.,
Defendants.

[And A Third Party Action]

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O'Melveny & Myers LLP, New York (Brad Elias of counsel), for East 51st Street Development Company, LLC, appellant.

Gallo Vitucci and Klar, LLP, New York (Kimberly A. Ricciardi of counsel), for Reliance Construction Group and RCG Group, Inc., appellants.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for Della Porta respondents.

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Order, Supreme Court, New York County (Karen S. Smith, J.), entered July 29, 2010, which granted the Della Porta plaintiffs' motion for partial summary judgment on the issue of defendants East 51st Street Development Company, LLC, Reliance Construction Group and RCG Group, Inc.'s (defendants) liability

under Labor Law § 240(1), unanimously affirmed, with costs. Appeals from orders, same court, Justice and entry date, insofar as they granted the Bleidner, Stephens, Jendersee, Gallone, Mazza and Cohen plaintiffs' motions for partial summary judgment on the issue of liability under Labor Law § 240(1), unanimously withdrawn in accordance with the terms of the stipulations of the parties.

Where, as here, it is undisputed that plaintiff John Della Porta was injured as a result of the collapse of a crane, a prima facie case of liability under Labor Law § 240(1) is established (*see Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [2003], *lv dismissed* 100 NY2d 556 [2003]*; Cosban v New York City Tr. Auth.*, 227 AD2d 160, 161 [1996]). Plaintiffs' alleged reliance on inadmissible reports is of no moment, given the undisputed facts.

Defendants have failed to raise an issue of fact as to whether they violated Labor Law § 240(1) and whether such violation proximately caused plaintiff John Della Porta's injuries (*see Cosban*, 227 AD2d at 161). The alleged failure of plaintiff's coworker to provide adequate safety devices, such as slings, does not raise an issue of fact. The existence of unused safety devices at the work site can bar recovery only if the devices were readily available at the work site; plaintiff

knew that they were available and that he was expected to use them; he chose not to use them "for no good reason"; and such choice caused the accident (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). Here, there was no evidence that plaintiff knew where to find the safety devices that defendants argue were readily available, or that he knew he was expected to use them but chose not to do so (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 11 [2011]). The rigging contractor's alleged failure to properly rig the crane also fails to raise an issue of fact. Indeed, the rigger's conduct was not "so far removed from any conceivable violation of the statute" as to constitute a superseding cause of the accident (*Hajderlli v Wiljohn 59 LLC*, 71 AD3d 416, 416 [2010], *lv denied* 15 NY3d 713 [2010]).

Contrary to defendant property owner's contention, Labor Law § 240(1) holds owners and general contractors absolutely liable for any breach of the statute even if they do not have a continuing duty to supervise the use of safety equipment (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). We reject defendant construction manager's argument that it is not an owner or general contractor and thus cannot be held liable under the statute. Pursuant to its contract with the property owner, the construction manager had supervisory authority and

control over the project and thus is vicariously liable as an agent of the owner (*see Castellon v Reinsberg*, 82 AD3d 635, 636 [2011]; *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [2010]). Summary judgment is not premature. Defendants have not shown that additional discovery is necessary (*see Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 418 [2009]). We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5838 In re Doreen L.,
M-4409 Petitioner-Appellant,

-against-

Dhaneswar R.,
Respondent-Respondent.

_____

Julian A. Hertz, Larchmont, for appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the children.

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Order, Family Court, Bronx County (Andrea Masley, J.), entered on or about August 9, 2010, which, after a fact-finding hearing, granted respondent father's motion to deny the petition for an order of protection, and dismissed the proceeding brought pursuant to article 8 of the Family Court Act, unanimously affirmed, without costs.

Family Court correctly found that petitioner failed to establish by a fair preponderance of competent evidence that respondent committed acts warranting an order of protection in her favor (*see* Family Ct Act §§ 832, 834). Petitioner argued before Family Court that she offered her testimony about the content of her conversation with an alleged hired assassin to show her state of mind. Accordingly, we decline to review the arguments, raised for the first time on appeal, that

petitioner's testimony should have been admitted for its truth under an exception to the hearsay rule (*see Matter of Patricia H. v Richard H.*, 78 AD3d 1435, 1437 [2010]). However, petitioner's testimony, coupled with the in camera statements made by two of the parties' children in a related article 6 proceeding, provided good cause for ACS to conduct a child protective investigation pursuant to Family Ct Act § 1034(1)(b).

M-4409 - *Doreen L. v Dhaneswar R.*

Motion to file untimely respondent's brief denied.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5874 The People of the State of New York, Respondent, Ind. 6000/06

-against-

William Monroe,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Bruce Allen, J.), entered on or about October 15, 2010, which denied defendant's CPL 440.10 motion to vacate a judgment, same court and Justice, rendered September 27, 2007, convicting defendant, on his plea of guilty, of conspiracy in the second degree, and denied defendant's CPL 440.46 motion for resentencing under the same conviction, unanimously affirmed.

Defendant is not entitled to withdraw his guilty plea on the ground that his promised sentence ran concurrently with other sentences that were reduced as the result of defendant's resentencing motion. He is also not entitled to a reduction of his sentence.

In the conspiracy case at issue on this appeal, defendant was sentenced, as promised, nunc pro tunc, to a sentence of 6 to

12 years to run concurrently with an aggregate term of 4½ to 9 years imposed in 2006 for two convictions of third-degree criminal possession of a controlled substance. Thus, the conspiracy conviction effectively added one and one-half to three years to the time defendant was already serving for the drug convictions.

In 2010, following defendant's successful CPL 440.46 motion, the Justice who had sentenced defendant on the drug convictions reduced those sentences to an aggregate term of three years, with two years' postrelease supervision. Defendant argues that since the gap between the conspiracy and drug sentences has now widened, "the removal or reduction of the preexisting sentence nullified a benefit that was expressly promised and was a material inducement to the guilty plea" (*People v Rowland*, 8 NY3d 342, 345 [2007]; *see also People v Pichardo*, 1 NY3d 126 [2003]).

What distinguishes this case from *Rowland* and *Pichardo* is that defendant's drug convictions and sentences were never reversed on appeal or otherwise invalidated. Instead, defendant invoked the ameliorative provisions of the Drug Law Reform Act to obtain a more lenient sentence. A concurrent sentence that subsequently proves to be invalid cannot be equated with a valid concurrent sentence that is subsequently reduced as the result

of a defendant's request for leniency. The former, but not the latter, may be viewed as an unfair inducement to plead guilty that affects the voluntariness of the plea.

The court also properly denied defendant's CPL 440.46 motion for resentencing on the conspiracy conviction. The statute applies only to convictions under article 220 of the Penal Law (CPL 440.46[1]; *see also People v Cagle*, 81 AD3d 425 [2011]).

We have considered and rejected defendant's remaining arguments.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5875 In re Kaina M.,

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

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

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about October 22, 2010, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated her a juvenile delinquent and imposed a conditional discharge. Given the seriousness of the underlying assault, which outweighed positive factors in appellant's background, this was the least restrictive dispositional alternative consistent with appellant's needs and

the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

The incident took place in a school, involved a weapon, and resulted in significant injuries to a fellow student, requiring 6 staples and 12 stitches.

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

ENTERED: NOVEMBER 1, 2011

CLERK

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

5876 Samuel Hirsch, Index 112198/06
Plaintiff-Appellant,

-against-

Stephen Fink,
Defendant-Respondent.

_____

Samuel Hirsch & Associates, PC, New York (Samuel Hirsch of counsel), for appellant.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (William T. McCaffery of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 28, 2010, which, in this legal malpractice action, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

As defendant did not represent plaintiff in the underlying accounting action at the time the conditional order of preclusion was issued or in the next 30 days, during which plaintiff was to provide outstanding discovery, he was not responsible for plaintiff's answer being stricken (*see Maksimiak v Schwartzapfel Novick Truhowsky Marcus, P.C.*, 82 AD3d 652 [2011]). Contrary to plaintiff's contention, his attorney-client relationship with defendant did not continue indefinitely simply because it was not terminated in writing (*see Leffler v Mills*, 285 AD2d 774, 776-777 [2001]). The record contains no

"indicia of an ongoing, continuous, developing and dependent relationship" between plaintiff and defendant (*see Muller v Sturman*, 79 AD2d 482, 485 [1981]), particularly where plaintiff engaged another lawyer. Nor could defendant have moved timely, i.e., within 30 days, to reargue the order to permit plaintiff to disregard overly broad discovery requests (*see* CPLR 2221).

To prevail in this legal malpractice action, plaintiff would have to show that but for defendant's negligence he would have obtained a better result in the underlying accounting action (*Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424 [2007]). To make that showing, plaintiff would have to litigate the issues of which cases belonged to the alleged partnership between himself and the underlying plaintiff and the fees to which he was entitled. However, those issues were raised and decided against plaintiff in the underlying action (*Frankel v Hirsch*, 38 AD3d 712 [2007]), where he had a full and fair opportunity to litigate them, and he is precluded by the

doctrine of collateral estoppel from re-litigating them in this action (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5877 Empire State Shipping Service, Ltd., et al., Plaintiffs-Appellants, Index 302438/08

-against-

Hanover Insurance Company, Defendant-Respondent.

_____

James F. Cirrincione, Bronx, for appellants.

Callan, Koster, Brady & Brennan LLP, New York (Michael P. Kandler of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about August 17, 2010, which denied plaintiffs' motion for summary judgment, and granted defendant insurer's cross motion for summary judgment dismissing the complaint and a declaration that it had no duty to defend or indemnify plaintiffs with regard to the underlying action, unanimously affirmed, with costs.

We reject defendant's argument that plaintiffs failed to preserve their contentions pertaining to the "accrual dates" of the underlying complaint's causes of action. While they may not have been framed in quite the same manner, plaintiffs' arguments can fairly be construed as having been made before Supreme Court and are therefore preserved (*see Howard S. v Lillian S.*, 62 AD3d 187, 190 [2009], *affd* 14 NY3d 431 [2010]).

The Businessowners Policy provides coverage for "bodily injury" but "only if" it is caused by an "occurrence" and the bodily injury "occurs during the policy period." Supreme Court properly determined that the first and second causes of action in the underlying action, which allege negligent and intentional infliction of emotional distress, do not fall within the scope of "bodily injury" because the earliest that harm is alleged to have occurred is in the fall of 2005, when the plaintiff in the underlying action learned of the alleged mishandling of her son's remains. This was over two years after plaintiff Empire cancelled its policies with defendant, effective June 20, 2003 (*see Melfi v Mount Sinai Hosp.*, 64 AD3d 26 [2009]) .

While we agree with plaintiffs that Supreme Court should not have characterized the only damages alleged in the underlying action as emotional distress, this error was harmless because coverage would not have been triggered in any event. The only causes of action for which this error could have triggered coverage are the third and fifth causes of action for negligence and negligent misrepresentation. It is alleged that the plaintiff in the underlying action "was caused, and shall in the future be caused, to suffer severe pain and suffering, severe emotional distress and harm, financial or economic loss, including but not limited to, present and future lost wages, and

other damages." While these causes of action may contain allegations that Empire was negligent during the policy period, there is no allegation that the plaintiff in the underlying action suffered "bodily injury" during the policy period.

We have considered plaintiffs' remaining contentions, and find them unpersuasive.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5878 In re Fairfax Financial Holdings Limited, et al., Petitioners-Appellants, Index 114574/10

New York City Police Department, Respondent-Respondent.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Jonathan E. Minsker of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Andrew S. Wellin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about June 24, 2011, denying the petition for production of a New York Police Department Internal Affairs Bureau investigative file, unanimously affirmed, without costs.

Upon review of the records sought, we agree with Supreme Court that they are not material and relevant as direct evidence

of petitioners' allegations in a New Jersey action (*see* Civil Rights Law § 50-a).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5879 The People of the State of New York, Ind. 160/04
Respondent,

-against-

Jaime Velez,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered November 13, 2008, resentencing defendant to a term of 5 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5881 The People of the State of New York, Respondent, Ind. 3605/07

-against-

Jahmal Nelson, Defendant-Appellant.

_____

Wilens & Baker, P.C., New York (Daniel S. Kratka of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J. at suppression hearing; Darcel Clark, J. at jury trial and sentencing), rendered June 4, 2010, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of 4 years, unanimously affirmed.

The hearing court properly denied defendant's suppression motion. In finding a lawful search and seizure, the court credited the testimony of the police witnesses and not that of the defense witnesses. There is no basis for disturbing the court's credibility determinations (*see generally People v Prochilo*, 41 NY2d 759, 761 [1977]).

At the hearing, the prosecutor extensively cross-examined a defense witness about his criminal history and prior bad acts. The court's rulings on the scope of that cross-examination were

proper exercises of discretion. In any event, there is no reasonable possibility that any errors in this regard affected the suppression ruling.

The trial court properly exercised its discretion in limiting defendant's attempt to impeach the credibility of the police witnesses by way of extrinsic evidence. In any event, any error in this ruling was harmless in view of the overwhelming evidence of guilt and the relative insignificance of the excluded evidence. Moreover, despite the court's ruling, defendant was able to elicit some of the excluded evidence from a defense witness.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5882 Michael Calogrides, et al., Index 16464/06
Plaintiffs-Respondents,

-against-

Spring Scaffolding, Inc.,
Defendant-Appellant,

Calistro Construction Corp.,
Defendant-Respondent,

West New York Restoration of CT, Inc., et al.,
Defendants.

– – – – –

[And A Third-Party Action]

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Rubin, Fiorella & Friedman, LLP, New York (Denise A. Palmeri of counsel), for appellant.

Paul B. Weitz & Associates, P.C., New York (Steven J. Zaloudek of counsel), for Calogrides respondents.

Wilson Elser Moskowitz Edelman & Dicker, LLP, New York (Matthew P. Ross of counsel), for Calistro Construction Corp., respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about August 24, 2010, which denied defendant/third-party plaintiff Spring Scaffolding, Inc.'s motion for summary judgment dismissing the complaint and all cross claims against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in Spring Scaffolding's favor dismissing the

complaint and all cross claims against it.

As it is undisputed that Spring is not an owner or contractor or agent for the purposes of Labor Law §§ 240(1) and 241(6), the causes of action under those Labor Law sections should be dismissed as against it (*see Morales v Spring Scaffolding, Inc.*, 24 AD3d 42 [2005]). The Labor Law § 200 and common-law negligence claims should be dismissed as against Spring because there is no evidence that Spring's initial installation of the sidewalk bridge was negligent or defective or that Spring otherwise breached any duty owed to plaintiff (*compare Morales*, 24 AD3d at 47 [citing evidence that parapetwall violated Industrial Code height requirement]; *Barraco v First Lenox Terrace Assoc.*, 25 AD3d 427, 428 [2006] [sidewalk bridge "appears not to have been built to code"]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5883-
5883A-
5883B In re Nakai H., and others,

Dependent Children Under the Age of Eighteen Years, etc.

Angela B.H.,
Respondent-Appellant,

St. Vincent's Services,
Petitioner-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Brenda Soloff of counsel), attorney for the children.

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Orders of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about August 5, 2010, which, upon a fact-finding of permanent neglect, terminated respondent mother's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding of permanent neglect (Social Services Law § 384-b[7][a]). The record shows that the agency made diligent efforts to encourage and strengthen respondent's relationship with the children by

referring her to parenting skills training, mental health therapy, housing assistance and a GED program, and by scheduling regular visitation (*Matter of Sheila G.*, 61 NY2d 368, 381 [1984]; *Matter of Fernando Alexander B. [Simone Anita W.]*, 85 AD3d 658, 659 [2011]). Despite these diligent efforts, respondent failed to complete a course of therapy or enroll in a GED program and refused a housing placement that would have led to the release and return of one of her children (*Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]; *Fernando*, 85 AD3d at 659).

A preponderance of the evidence demonstrates that it is in the best interests of the children to terminate respondent's parental rights so as to free them for adoption by the foster mother, with whom they have lived for over seven years (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that the children are thriving in the foster home and desire to be adopted by the foster mother. A suspended judgment is not warranted, given that the children need and desire permanence and that respondent has not overcome her

problems (*see Matter of Calvario Chase Norall W. [Denise W.]*, 85 AD3d 582, 583 [2011]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5887 Steven Lazu, Index 303839/08
Plaintiff-Appellant,

-against-

Harlem Group, Inc., et al.,
Defendants-Respondents.

_____

Law Office of Mark B. Rubin, Bronx (Sandra D. Janin of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Maryann Brigantti-Hughes, J.), entered on or about July 15, 2010, which, in an action for personal injuries sustained in a motor vehicle accident, granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence showing that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d). In opposition, plaintiff failed to raise a triable issue of fact.

The record demonstrates that plaintiff failed to submit evidence in admissible form with findings on his ranges of motion contemporaneous with the accident. Although the letter of his treating physician contained such contemporaneous

findings, it was unsigned, and "[s]tatements and reports by the injured party's examining and treating physicians that are unsworn or not affirmed to be true under penalty of perjury do not meet the test of competent, admissible medical evidence sufficient to defeat a motion for summary judgment" (*Migliaccio v Miruku*, 56 AD3d 393, 394 [2008]). Moreover, since the neurologist who examined plaintiff in response to defendants' motions relied on the treating physician's unsigned report, the conclusions based on those unsworn statements were likewise inadmissible (*see Clemmer v Drah Cab Corp*, 74 AD3d 660, 661 [2010]; *Hernandez v Almanzar*, 32 AD3d 360, 361 [2006]).

Furthermore, plaintiff's neurologist failed to address the findings of defendants' radiologist that plaintiff had degenerative changes at the L4/5 and L5/S1 levels that preexisted the accident. It is noted that the findings of plaintiff's radiologist that discs L4-S1 "show desiccative changes consistent with degenerative process" were consistent with the findings of defendants' radiologist, and supported the conclusion that plaintiff had a preexisting condition (*see Valentin v Pomilla*, 59 AD3d 184, 186 [2009]).

Dismissal of plaintiff's 90/180-day claim was also proper.

Plaintiff failed to submit medical proof in support of the claim that he was unable to perform substantially all his activities of daily living for the requisite period (*see Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516 [2011]).

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam,JJ.

5888 The People of the State of New York, Ind. 3219/06
Respondent,

-against-

Jamarr Fowler,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein 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 (David Stadtmauer, J.), rendered on or about April 20, 2010,

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: NOVEMBER 1, 2011

CLERK

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

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5890 Cleofoster Baptiste, Index 310317/09
Plaintiff-Appellant,

-against-

"John Doe", et al.,
Defendants-Respondents.

_____

H. Fitzmore Harris, P.C., New York, for appellant.

Lifflander & Reich, LLP, New York (Kent B. Dolan of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about March 10, 2011, which granted defendants' motion to dismiss the complaint, and denied plaintiff's motion for an extension of time to serve the summons and complaint and for a default judgment against defendants, unanimously affirmed, without costs.

Since plaintiff's filing of this action was untimely, it was a nullity, "and there was no service period to extend" (*Gonzalez v New York City Health & Hosps. Corp.*, 29 AD3d 369, 370 [2006]; *Croce v City of New York*, 69 AD3d 488 [2010]). In the absence of an action pending against them, defendants' own tardiness in moving to "dismiss" did not constitute a waiver of

the statute of limitations defense (*see* CPLR 3211[e]).

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: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5892 Hector Alvira, Index 22237/05
Plaintiff-Appellant,

-against-

Residential Management,
Defendant-Respondent.

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Edelstein & Grossman, New York (Jonathan I. Edelstein of counsel), for appellant.

Fischetti & Pesce, LLP, Garden City (John E. McLoughlin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered November 19, 2010, which, upon renewal, granted defendant's motion for summary judgment dismissing the complaint in its entirety and denied plaintiff's cross motion for partial summary judgment on the issue of liability, unanimously modified, on the law, to deny defendant's motion for summary judgment, and otherwise affirmed, without costs.

The court did not improvidently exercise its discretion by granting plaintiff's motion for renewal in light of "the strong public policy in favor of resolving cases on the merits" (*Acosta v State of New York*, 270 AD2d 164, 165 [2000]; *see Rancho Sante Fe Assn. v Dolan King*, 36 AD3d 460, 461 [2007]). However, upon renewal, the court erred in granting defendant's motion for summary judgment dismissing the complaint in its entirety.

Triable issues of fact exist as to whether plaintiff was defendant's special employee (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 359 [2007]; *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]).

On this record, plaintiff was not entitled to summary judgment on the issue of defendant's liability under Labor Law § 240. In addition to the special employee issue, there is a triable issue as to whether plaintiff was engaged in cleaning when he fell from a ladder.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5893 In re Manuel Martinez, Index 114000/09
Petitioner-Appellant,

-against-

State Commission on Judicial Conduct, et al.,
Respondents-Respondents,

_____

Manuel Martinez, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Patrick J. Walsh of counsel), for State Commission on Judicial Conduct, respondents.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for New York County Assistant District Attorney Joel Seidemann, respondent.

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Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered May 26, 2010, which granted the State Commission on Judicial Conduct's cross motion to dismiss the CPLR article 78 petition insofar as asserted against it, and denied and dismissed the petition as asserted against New York County Assistant District Attorney Joel J. Seidemann, unanimously affirmed, without costs.

In 2008, petitioner, a former lawyer, was convicted of murder in the second degree and solicitation in the second degree for having used his "mob connections" to hire a hit man to kill the estranged husband of a client he was representing in an acrimonious divorce proceeding. The respondent Assistant

District Attorney prosecuted the case, and a Supreme Court Justice presided over the trial. While serving his sentence, petitioner filed a complaint against the trial judge with the Commission, alleging improper conduct during the trial. The Commission dismissed the complaint. Meanwhile, the Department of Corrections (DOCS) placed the names of the 49 witnesses who had testified against petitioner at the trial on petitioner's "Negative Correspondence List," pursuant to the ADA's request, after one of the witnesses called and informed the ADA that petitioner had sent letters to her at her place of business. Petitioner commenced this CPLR article 78 proceeding seeking to compel the Commission to thoroughly investigate his complaint against the trial judge, to prohibit the ADA from compelling the DOCS to impose the Negative Correspondence List, and to compel the ADA to withdraw his request and cancel the list.

The court properly concluded that the petition, as asserted against the Commission, is time-barred (*see* CPLR 217[1]). Petitioner filed his complaint on May 6, 2008, and the Commission informed him of its dismissal by letter dated January 20, 2009. As petitioner acknowledged receipt of the dismissal of the complaint in his January 26, 2009 letter, he had until May 26, 2009, at the latest, to file the petition. He did not do so until October 6, 2009. Even if the merits were

considered, dismissal of the petition is warranted. The Commission has the authority to "dismiss the complaint if it determines that the complaint on its face lacks merit" (Judiciary Law § 44[1]), and its "determination whether or not a complaint on its face lacks merit involves an exercise of discretion that is not amenable to mandamus" (*Mantell v New York State Commn. on Jud. Conduct*, 277 AD2d 96, 96 [2000], *lv denied* 96 NY2d 706 [2001]).

The court also properly dismissed the petition as asserted against the ADA. Aside from petitioner's failure to exhaust his administrative remedy, a writ of prohibition did not lie here, as the ADA was not acting in a judicial or quasi-judicial capacity. Accordingly, the ADA did not exceed any legal authority, when he wrote the letter to DOCS requesting that DOCS take all legal and proper steps to prevent petitioner from harassing any of the People's witnesses. The ADA was not "representing the State in its efforts to bring individuals accused of crimes to justice" (*Matter of McGinley v Hynes*, 51 NY2d 116, 123 [1980], *cert denied* 450 US 918 [1981]; *see also Matter of Schumer v Holtzman*, 60 NY2d 46, 51-52 [1983]). Nor was mandamus relief available to compel the ADA to direct DOCS to disregard his request to impose the Negative Correspondence List and to cancel the list, as the ADA had no duty and was not

mandated by law to direct DOCS to act (*see Matter of Blase v Axelrod*, 67 NY2d 642 [1986]). We have considered petitioner's remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5895 Gladys Rosenblum, Index 109743/05
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

"Does" 1-10,
Defendants.

_____

The Law Office of Jeffrey S. Schwartz, LLC, Mineola (Jeffrey S. Schwartz of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 20, 2010, which, in this action for personal injuries allegedly sustained when plaintiff tripped in a pothole while walking within a crosswalk and fell to the ground, granted defendant City of New York's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record demonstrates that the City did not receive prior written notice of the defect pursuant to Administrative Code of the City of New York § 7-201(c)(2). Accordingly, the burden shifted to plaintiff to establish one of the exceptions to the prior written notice requirement. The only possible exception applicable in this case is that the City's affirmative act of

negligence immediately resulted in the existence of a dangerous condition *(see Yarborough v City of New York*, 10 NY3d 726 [2008]; *Oboler v City of New York*, 8 NY3d 888 [2007]). Contrary to plaintiff's contention, "constructive notice of a defect may not override the statutory requirement of prior written notice of a [roadway] defect" (*Amabile v City of Buffalo*, 93 NY2d 471, 475-476 [1999]).

Here, a Department of Transportation search of its records revealed that pothole repair and resurfacing work had been performed and completed by the City at the subject location in June 2002, approximately two years before plaintiff's accident. Plaintiff offered no evidentiary support for her claim that the work performed in 2002 immediately resulted in the defective condition complained of in 2004 (*see Ocasio v City of New* York, 28 AD3d 311 [2006]; *Bielecki v City of New York*, 14 AD3d 301 [2005]). The mere eventual emergence of dangerous conditions as a result of wear and tear, and environmental factors, does not constitute an act of affirmative negligence (*see Hyland v City of New York*, 32 AD3d 822 [2006]). Furthermore, "[t]he...failure to maintain or repair a roadway constitutes an act of omission rather than an affirmative act of negligence" (*Farrell v City of New York*, 49 AD3d 806, 808 [2008]).

We have considered plaintiff's remaining arguments,

including her claim that further discovery was necessary, and find them unavailing.

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

ENTERED: NOVEMBER 1, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5896N Robert J. Manzari, et al., Index 104755/10
Plaintiffs-Respondents,

-against-

John R. Burrows, etc., et al.,
Defendants-Appellants,

"Jane Doe," etc., et al.,
Defendants.

_____

Sheldon Farber, New York, for appellants.

Robert Dembia, P.C., New York, for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 29, 2011, which, in this action to recover for alleged personal injuries sustained by plaintiff Robert J. Manzari while riding a horse at a stable owned and operated by defendants-appellants, denied defendants' motion to change venue to Delaware County, unanimously affirmed, without costs.

Defendants failed to sustain their burden of showing entitlement to a discretionary change of venue pursuant to CPLR 510(3) (*see Aretakis v Tarantino*, 300 AD2d 160 [2002]). In particular, defendants failed to present "affidavits or other proofs" from material witnesses claiming that they would be inconvenienced by testifying in New York County (*Herrera v R.*

Conley Inc., 52 AD3d 218, 219 [2008]). Even if such affidavits are not required, defense counsel's assertion that the inconvenience was "obvious" and "manifest," is insufficient to meet defendants' burden (*see Hernandez v Rodriguez*, 5 AD3d 269, 270 [2004]). In addition, defendants failed to show that the testimony of the purportedly inconvenienced nonparty witnesses was material and necessary (*Argano v Scuderi*, 6 AD3d 211, 212 [2004]).

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

ENTERED: NOVEMBER 1, 2011

CLERK