SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 10, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5170 Kenzie Godfrey, Index 7963/02
Plaintiff-Respondent-Appellant,

-against-

G.E. Capital Auto Lease, Inc.,
Defendant-Respondent,

Dawn M. Altieri, et al.,
Defendants,

Balhar Singh, et al.,
Defendants-Appellants-Respondents.

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Mauro Goldberg & Lilling LLP, Great Neck (Katherine Herr Solomon of counsel), for appellants-respondents.

Ronemus & Vilensky, LLP, Garden City (Lisa M. Comeau of counsel), for respondent-appellant.

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

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered on or about April 29, 2009, which granted plaintiff's and defendants Altieri and Sgarlato's motions to set aside the jury verdict finding Altieri 100% responsible for the accident to the extent of apportioning 50% of the liability to

defendant Adjei; denied plaintiff's motion to set aside the verdict as to defendant G.E. Capital Auto Lease, Inc.; and granted G.E.'s and Altieri and Sgarlato's motions to set aside the verdict and order a new trial on damages and the extent to which plaintiff's failure to use an available seat belt proximately caused her injuries, unanimously modified, on the law and the facts, to deny plaintiff's and Altieri and Sgarlato's motions to set aside the jury verdict finding Altieri 100% responsible for the accident, to reinstate the awards for past and future lost earnings and for future medical costs, to award plaintiff $133,652 for past medical costs, and to direct a new damages trial on the issue of future pain and suffering unless, within 30 days after service of a copy of this order, plaintiff stipulates to a reduction of the award for future pain and suffering from $3,332,000 to $2.5 million, all such damages awards subject to the new trial on the issue of mitigation directed by the court; and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against Adjei.

On August 30, 2001, plaintiff was a passenger in the rear seat of a taxi operated by defendant Adjei. It collided at an intersection, controlled by traffic lights in each direction,

with an automobile operated by defendant Altieri. Altieri was driving the vehicle with the consent of defendant Sgarlato, who in 1995 leased the car from defendant G.E. Capital Auto Lease, Inc. (GE). She purchased it outright from GE in 1999. Although she entered into a retail installment sales contract with GE at that time, Sgarlato did not complete the paperwork necessary to transfer title to herself until 2002, after the accident.

Altieri testified at trial that she had the right of way and was driving within the speed limit. Adjei failed to comply with a subpoena requiring him to testify. However, according to his deposition testimony, which was read to the jury, he proceeded within the speed limit through a green light. Plaintiff was not wearing a seatbelt and she hit her head on the taxi's partition. She did not recall whether the taxi was equipped with a seatbelt. An accident reconstruction specialist retained by Altieri and Sgarlato testified that the particular model of the taxi driven by Adjei was equipped with rear shoulder and lap belt harnesses. Had the seatbelts been worn, the expert stated, they would have restrained plaintiff from contacting the partition. He conceded that plaintiff still could have hit her head on the seat in front, but the impact would not have been as forceful.

Plaintiff was a college student concentrating in physics at

the time of the accident. She testified that in the week following the accident, she could not focus or keep her normal pace, and she felt dizzy and had terrible pain in her head. She missed a number of her classes, and sometimes slept for 20 hours at a time. About a week after the accident, she sought treatment at the emergency room at Bellevue Hospital, where she was admitted for two days. Plaintiff testified that when she resumed her classes that fall, she had difficulty keeping her schedule straight, doing easy equations, following instructions, and retaining things she had read. She stated that she registered with the office for students with disabilities, which allowed her more time for assignments and exams and gave professors leeway in grading. She completed the semester and passed all of her classes, but ultimately failed to complete her bachelor's degree.

Plaintiff also claimed at trial that after the accident she began feeling depressed and lethargic, and began to experience fear of leaving her house, sensitivity to lights, and difficulty with noise and crowds, which made her feel very disoriented. She sought treatment from a psychotherapist, and continues to be treated by a neuropsychologist, who sets goals and helps keep her organized. A few months after the accident, plaintiff averred, she began experiencing seizures, which involved blackouts, severe

muscle spasms, cramping in her extremities, and incontinence. She maintained that she suffers severe headaches almost daily and takes several medications. She participates in a program which provides her with some home care assistance and a living skills coordinator to help with activities of daily living. She testified that she has tried to work, taking administrative jobs and hostess positions at restaurants, but she is frequently confused and unable to sustain the necessary pace.

Plaintiff's medical evidence established that she suffered a traumatic brain injury, a diagnosis that was not rebutted by any medical evidence submitted by defendants. Her treating psychiatrist testified that plaintiff's symptoms were causally related to the accident, that her prognosis was "poor," and that she will need psychiatric care for the remainder of her life. Her treating neurologist similarly opined that plaintiff's condition was permanent, and was solely related to the trauma suffered because of the accident. He predicted that plaintiff would suffer from serious lifelong impairments to her memory, verbal skills, and reasoning ability, as well as depression, and would need medication that impairs her liver and causes other side effects. According to the neurologist, plaintiff will require home assistance for the rest of her life, as well as

regular neurological visits, and her condition and the medications will make her unable to work. A neuropsychologist who treated plaintiff rendered a similar opinion.

In support of her claim for economic damages, plaintiff proffered the testimony of Brian Schuster, a neuropsychologist. Dr. Schuster testified that plaintiff had scored in the "very superior" range on a battery of non-verbal assessment tests he administered, and that she is a "very bright person." However, on verbal assessment tests, he testified, plaintiff's scores were "average." Although he noted that she exhibits knowledge of college level math, she solved problems slowly. Dr. Schuster opined that plaintiff had sustained an injury in the left hemisphere of her brain, which is associated with language, and that, although she demonstrated no problem with her motor skills, her language skills are "average." Plaintiff could not be expected to hold a job because an employer could not rely on her to show up or be able to function if she did.

Dr. Schuster opined that had plaintiff not been injured, she would have been able to perform any number of highly-skilled professional jobs, even though she had no clear vocation before the accident. These jobs were identified by entering plaintiff's profile in a database maintained by the Department of Labor.

They included certain positions which Dr. Schuster testified were consistent with plaintiff's interests in physics and mathematics, such as civil engineer and pharmacist. According to Dr. Schuster, the average salary for these jobs was $72,981.47 per year, as reflected in 2005 wages. Finally, Dr. Schuster testified regarding a life-care plan he had prepared regarding plaintiff, which identified the various elements of care, tests, medication and equipment plaintiff would need over the course of her life, as well as the current cost of each item.

Plaintiff also called Dr. Alan Leiken, an expert economist. Dr. Leiken opined that, assuming plaintiff would have left the work force at age 62, her total income loss would be $5,373,411, which includes an additional 25% in employer-provided benefits. Dr. Leiken's testimony also included his opinion about the cost of lifetime care of plaintiff based on her statistical life expectancy of 80.6 years. He stated that the total cost would be $5,982,751. The parties stipulated at trial that plaintiff had already incurred medical expenses in the amount of $133,652.

Defendants called two experts who disputed plaintiff's request for lost earnings. Dr. Armando Rodriguez, a professor of economics and finance, testified that Dr. Leiken's and Dr. Schuster's reports regarding plaintiff's claimed loss of earnings

were methodologically flawed and insupportable. Specifically, he opined that no legitimate basis existed for Dr. Schuster's projection, utilized by Dr. Leiken in his calculations, that plaintiff would be able to earn $72,900 upon graduation, since she had no proven track record of earning significant income. Dr. Rodriguez also maintained that additional flawed assumptions in Dr. Leiken's report further undermined his calculations of future lost earnings and medical expenses. For instance, he testified, Dr. Leiken had failed to account for job maintenance expenses, erroneously assumed that plaintiff would have worked continuously until the age of 62 without any period of unemployment, applied too high a percentage to calculate annual wage increases, and incorrectly double-counted benefit amounts which are already factored into wages. He stated that Dr. Leiken's figures for annual increases in medical care were also overinflated by .5%, which amounts to a significant difference when calculated over 30 years.

Rosalind Zuger, an expert vocational consultant, testified that she looked at medical records, interviewed plaintiff, and administered four "map reading" tests, which are used to assess traumatic brain injury victims' ability to process information. In Ms. Zuger's opinion, plaintiff had 100% accuracy, performed

with no hesitation, and organized the material and information well. She pointed out that plaintiff had apparently not tried any vocational program offered by rehabilitation agencies to evaluate what she was able to do, even though the services of the New York State Rehabilitation Agency is free of charge. Zuger testified that in her view, plaintiff is capable of working and that she has placed individuals in jobs who have disabilities similar to or worse than plaintiff's.

At the close of the evidence, plaintiff moved for a directed verdict against Adjei based on his failure to appear and testify at trial. The court denied the motion. However, it gave a missing witness charge, instructing the jury that, if it did not find Adjei's explanation for his absence reasonable, it could conclude that his testimony would not have supported his case, and draw the strongest inference against him.

The court also denied plaintiff's request for a detailed charge on the issue of ownership under the Vehicle and Traffic Law, but charged that the jury "must consider . . . whether GE is also an owner of the vehicle owned by . . . Sgarlato," that GE "cannot be held responsible for this accident unless [the jury] determine[d] that GE was the owner of the Jeep at the time the accident occurred," and that plaintiff bore the burden of proof

by a preponderance of the evidence. GE objected to any charge on ownership.

The jury returned a verdict that Altieri was completely responsible for the accident. It found that GE was not an owner of the vehicle operated by Altieri at the time of the accident. The jury awarded plaintiff damages for past pain and suffering in the amount of $260,000, and in the amount of $3,332,000 for future pain and suffering. It awarded her $286,176 for past lost earnings and $928,219 for future lost earnings. As for future medical costs, the jury awarded plaintiff $5,982,751. It did not award any money for past medical expenses. Finally, although the jury found that "a reasonably prudent person in plaintiff's position [would] have used an available seatbelt," it found that none of her injuries were caused by her failure to use a seatbelt.

All parties moved to set aside the verdict. Plaintiff moved to set aside the verdict that Adjei was not negligent, and that GE was not an owner of the vehicle. She also sought an increase in the damages awarded by the jury for her past and future lost earnings. Altieri and Sgarlato cross-moved to set aside the verdict as to Altieri's and Adjei's relative degrees of culpability; for a new trial on the issues of liability and

damages; and for a new trial on the issue of plaintiff's failure to use an available seatbelt. GE conditionally cross-moved, in the event the court determined that GE was an owner of the vehicle, to set aside the damages verdict and for a new trial on the issue of damages; and to set aside the jury's finding that plaintiff's injuries were not caused by her failure to use an available seatbelt.

The court granted plaintiff's motion for a directed verdict against Adjei and directed that judgment be entered against him finding him negligent in the operation of his taxi and apportioning 50% liability against him. This was based "upon the unrebutted testimony" of Altieri that Adjei ignored a red light and the fact that he did not appear at trial. The court denied plaintiff's motion to set aside the verdict with respect to GE, holding that GE was not, as a matter of law, an owner of the Jeep. Finally, without explanation, the court granted a new trial on damages and the issue of "to what extent her failure to use an available seatbelt contributed to her damages."

A jury's verdict may be reversed on the grounds of legal insufficiency only where "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the

basis of the evidence presented at trial" (*Cohen v. Hallmark Cards,* 45 NY2d 493, 499 [1978]). Here, applying that standard, the jury's conclusion that Altieri was fully responsible for the accident should not be disturbed. Despite the conflicting testimony, the jury could fairly have concluded that Adjei failed to see Altieri, not because he was negligent, but because Altieri's vehicle either was blocked from view by other cars or drove through a red signal (*see D'Onofrio-Ruden v Town of Hempstead*, 29 AD3d 512, 513-514 [2006]). The record presents no grounds for disturbing the jury's determination that Adjei's version of events was more credible than Altieri's (*see Lunn v County of Nassau*, 115 AD2d 457, 458-459 [1985]).

Further, to the extent it apportioned 50% of the responsibility to Adjei as a penalty for his failure to appear at trial, the court erred. The missing witness charge was a sufficient sanction for Adjei's absence and there is no basis for disturbing the jury's conclusion that, notwithstanding the adverse inference, Altieri was not credible in her testimony as to how the accident occurred.

Concerning GE's liability, title to a motor vehicle is transferred when the parties intend such transfer to occur (*see Potter v Keefe*, 261 AD2d 864 [1999]). Thus, title to a vehicle

may pass to a purchaser when she takes delivery of it, notwithstanding that formal registration of the vehicle in the purchaser's name occurs later (*see Pearson v Redline Motor Sports*, 271 AD2d 222 [2000]). Here, even though the registration and license plates of the vehicle driven by Altieri were still in GE's name at the time of the accident, the evidence established that GE delivered an executed certificate of title and possession to Sgarlato on September 10, 1999. Although Sgarlato did not retitle the vehicle in her name until after the accident, the title document evidences that the sale occurred, and GE became a mere lienholder, as of September 10, 1999 (*see* Vehicle and Traffic Law §§ 128, 2113(b), (c); *Potter*, 261 AD2d at 865-866). It is academic that the court refused to charge the jury on the meaning of "ownership" under the Vehicle and Traffic Law. The facts firmly establish that, under any definition of the term, GE was not still an owner at the time of the accident. Indeed, the court could have decided the question as a matter of law.

We turn now to the damages awards. Proof of lost earnings must be established with reasonable certainty (*Estate of Ferguson v City of New York*, 73 AD3d 649, 650 [2010]). In considering whether a jury's damages award is inconsistent with the evidence, we are, again, guided by the notion that the jury's conclusions

should be overturned only where they are essentially irrational (*see Freeman v Kirkland*, 184 AD2d 331, 332 [1992], citing *Cohen v Hallmark Cards*, 45 NY2d 493). Plaintiff argues that she established all of her lost earnings within that standard through the testimony of Dr. Schuster and Dr. Leiken, and asks us to increase the jury award accordingly. Defendants, on the other hand, urge us to adopt the testimony of their experts, who opined that plaintiff was not entitled to any lost earnings award. They place much emphasis on the fact that plaintiff continued to attend classes after the accident, and fault her for not submitting any evidence to support her testimony that she received special accommodations from the school's office for students with disabilities.

The jury's damages award apparently reflects the fact that the jury accepted portions of the testimony of both sets of experts. It was not irrational for the jury to conclude that plaintiff's ability to realize her full work potential would be impaired because of the accident. After all, defendants presented no medical evidence to rebut plaintiff's medical experts' opinions that she suffered a traumatic brain injury that made it very difficult for her to carry out routine activities. Moreover, the jury was entitled to believe plaintiff's testimony

that she was able to continue some courses after the accident only with accommodations, notwithstanding the lack of additional evidence of such accommodations. On the other hand, it was not necessarily inconsistent for the jury to reject plaintiff's experts' opinions that she was utterly incapable of working in *any* capacity, or to question their calculations of what her earning capacity would have been if the accident did not occur. Indeed, the jury's lost earnings award reflects that the jury simply did not view the claim for lost earnings as an all-or-nothing proposition, but attempted to strike a balance between the parties' positions. Accordingly, the court erred in rejecting the jury's findings on lost earnings.

As for medical expenses, defendants argue that the award to plaintiff of the entire cost of the life care plan espoused by Dr. Leiken is inconsistent with the jury's slashing of the lost earnings sought by plaintiff. We disagree. The jury did find that plaintiff would forfeit nearly $1,000,000 in earnings over the course of her life as a result of the accident. This confirms that the jury believed that plaintiff sustained a significant impairment to her health, and it would not have been irrational for it to conclude that she required all of the medical attention included in the plan. Further, the jury could

have rationally concluded that, to the extent plaintiff would be able to earn some sort of living in the future, she could only do so with significant medical care and other treatment. While defendants claim that Dr. Leiken exaggerated the growth rate for medical care (5% per year), Dr. Rodriguez' testimony concerning the proper rate, which was limited to the statement that "I think it was 4.5," was equivocal and unsupported. Accordingly, we cannot conclude that the jury improperly adopted Dr. Leiken's figure. Nor are there any other grounds to find that the IAS court properly vacated the award for future medical expenses.

As to plaintiff's claim for past medical expenses, the jury's failure to award plaintiff any recovery for such damages is inconsistent with its liability finding. Moreover, the parties' stipulation that the fair and reasonable value of past medical expenses was $133,652 should be enforced (*see Sanfilippo v City of New York*, 272 AD2d 201 [2000], *lv dismissed* 95 NY2d 887 [2000]).

On the issue of mitigation, we reject plaintiff's argument that defendants failed to establish the presence of seatbelts. Defendants' accident reconstruction expert gave sufficient testimony concerning the likelihood that the taxi was equipped with seatbelts to allow the jury to conclude that it was. As to

the effect of plaintiff's failure to utilize a seatbelt, it is well settled that a plaintiff's failure to do so goes to mitigation of damages only, not to comparative liability (*see Spier v Barker*, 35 NY2d 444, 450 [1974]; *Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 207 [2001]; *see* PJI 2:87.1). Defendants argue that the jury's finding that plaintiff should have used a seatbelt was inconsistent with its conclusion that none of her injuries were caused by her failure to use a seatbelt.

We agree. The accident reconstruction expert testified that plaintiff's head injuries would not have been so severe if she had been wearing a seatbelt. Plaintiff's own treating neurologist testified to the same effect. Plaintiff offers no plausible explanation for how the jury could have found her negligent but failed to account for her conduct in making its damages award. Accordingly, the court correctly ordered a new trial to determine the amount by which plaintiff's total damages should be reduced because of her failure to use a seat belt.

Finally, the jury's award for future pain and suffering deviates from what would be reasonable compensation to the extent indicated (CPLR 5501[c]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4200 Victor Munoz, et al., Index 110826/07
Plaintiffs, 116174/07
590086/08
-against- 590617/08
590618/09
Hilton Hotels Corporation, et al., 590690/09
Defendants. 590847/09
- - - - -
FC 42 Hotel LLC,
Third-Party Plaintiff,

-against-

Sunstone Hotel Properties, Inc.,
doing business as Hilton Times Square,
Third-Party Defendant.
- - - - -
[And A Fourth-Party Action]
- - - - -
Sunstone 42nd Street, LLC, et al.,
Fifth-Party Plaintiffs-Respondents,

-against-

Sunstone Hotel Properties, Inc.,
Fifth-Party Defendant-Appellant,

First New York Partners
Management, LLC, et al.,
Fifth-Party Defendants.

[And Other Actions]

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Cozen O'Connor, New York (John J. McDonough of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 27, 2010, which, to the extent appealed from as limited by the briefs, denied appellant Sunstone Hotel Properties, Inc.'s (SHP) cross motion for summary judgment on its fifth-party claim for contractual indemnification against respondent Sunstone 42nd Street Lessee, Inc., unanimously affirmed, without costs.

Under controlling Maryland precedent (*Mass Tr. Admin. v CSX Transp., Inc.*, 349 Md 299, 309-310, 708 A2d 298, 303-304 [1998]), the contract's indemnification provision unequivocally provides that respondent hotel owner is to indemnify appellant hotel manager for all acts arising from appellant's performance of the contract. However, Maryland law also provides that in construing a contract relating to the construction, repair, or maintenance of a building or structure, an indemnification provision is void and unenforceable as against public policy if it would operate to indemnify a party for liability for damages proximately caused by that party's sole negligence (Md Code Ann, Cts & Jud Proc § 5-401(a); *Heat & Power Corp. v Air Prods. & Chems., Inc.*, 320 Md 584, 592-593, 578 A2d 1202, 1206 [1990]). Since we note, upon review of the record, that a triable issue of fact remains as to

whether appellant's sole negligence was the proximate cause of plaintiff's injuries, denial of summary judgment was proper (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

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

5354 The People of the State of New York, Respondent, Ind. 4240/00 3276/00

-against-

Jarmaine Scutchins, etc., Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot 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 (Edward J. McLaughlin, J.), entered on or about May 25, 2010, which denied, on the ground of ineligibility, defendant's CPL 440.46 motion to be resentenced, unanimously reversed, on the law, and the matter remanded for further proceedings on defendant's resentencing motion.

Defendant is eligible for consideration for resentencing even though he had been released from custody on his drug conviction but reincarcerated for a parole violation (*see People v Paulin*, 17 NY3d 238 [2011]), and even though he was again

paroled while his application was pending (*see People v Santiago*, 17 NY3d 246 [2011]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5391 Joan Banach, Index 600918/09
Plaintiff-Appellant,

-against-

The Dedalus Foundation, Inc.,
Defendant-Respondent.

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Emery Celli Brinckerhoff & Abady LLP, New York (Jonathan S. Abady of counsel), for appellant.

Pryor Cashman LLP, New York (Perry M. Amsellem of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 8, 2010, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the first, second and third causes of action, unanimously affirmed, with costs.

In March 1981, Robert Motherwell, a noted abstract expressionist artist, hired plaintiff as his curator, cataloguer and assistant. Over time, plaintiff's duties expanded to include preparing major museum exhibitions of Motherwell's work, and assisting authors writing about Motherwell. Plaintiff went on to co-author two definitive books about Motherwell and also developed a close personal relationship with the artist. Also in 1981, the Motherwell Foundation was founded and incorporated in

Connecticut, to foster the public understanding and appreciation of the work of Motherwell and other modern artists. In May 1991, the name of the foundation was changed to the Dedalus Foundation. At the time this action was commenced, Dedalus maintained its principal office in New York City.

In 1991, plaintiff was elected by Dedalus's board of directors to be corporate secretary. She also was made a board member. In addition to these positions, plaintiff was employed as Dedalus's curator, then as its director. In August 2008, when Dedalus terminated her association with the organization, plaintiff held the office of vice president.

When plaintiff was first named secretary in 1991, the president of Dedalus was Richard Rubin. In January of that year, Motherwell sent a letter on his personal stationery to Rubin, which plaintiff typed and which stated in pertinent part as follows:

> "To put in writing several points that we discussed yesterday, they are as follows:
> 1. That Richard Rubin, [plaintiff] and Mel Paskell shall be employed at <u>a minimum</u> of their present salaries (with cost of living adjustments annually) as long as each chooses to remain after my death, as employees of the Motherwell Foundation."

Motherwell died less than six months after he wrote the letter.

His last will and testament provided, "In order to ensure continuity in the handling of my affairs, I hereby authorize my Executors and Trustees to employ my valued assistants and friends, MEL PASKELL and JOAN BANACH, for as long a period of time as my Executors and Trustees shall believe necessary and appropriate." Plaintiff contends that "on multiple occasions" in the years after Motherwell's death, Rubin assured her that "her position was secure in accordance with Motherwell's written intentions."

Beginning in 2002, plaintiff served on a Dedalus committee which was responsible for authenticating pieces of art purported to have been created by Motherwell. In 2008, the committee hired nonparty Jack Flam as its director. Plaintiff asserts that Flam was unqualified and lacked the requisite expertise in Motherwell's work, which led him to falsely authenticate certain works. Plaintiff was vocal about Flam's alleged incompetence and complained that he was damaging Dedalus's reputation. According to plaintiff, Flam retaliated against her by seeking to discredit her and ultimately persuading the foundation to remove her from the board and terminate her employment.

Plaintiff then commenced this action against Dedalus. As is relevant to this appeal, the first cause of action in the amended

complaint is based on Motherwell's January 31, 1991 letter to Rubin. It alleges that defendant "entered into a valid and binding contract with Banach under which she would forego other employment in exchange for lifetime employment at" Dedalus. In the alternative, the third cause of action alleges that the letter constituted a contract between Motherwell and Dedalus and that plaintiff was a third-party beneficiary thereof. The second cause of action is for promissory estoppel and alleges that Dedalus, through Rubin and Motherwell, promised that plaintiff would be guaranteed a lifetime position, if she so chose, with the foundation, and that she reasonably relied on that promise.

Dedalus moved to dismiss pursuant to CPLR 3211(a)(1) and (7). It argued that any promise of lifetime employment made by Motherwell or Dedalus to plaintiff was not binding, because, under both New York and Connecticut law, lifetime employment contracts are considered to be for an indefinite time period and are thus terminable at will. Dedalus further argued that the contract was void under Connecticut law, since corporate directors have no authority to hire employees on a lifetime basis. Dedalus also maintained that, even if the contract was otherwise valid, it was not supported by consideration. Finally, Dedalus asserted that plaintiff's claim for promissory estoppel

should be dismissed because plaintiff did not allege that she detrimentally relied on any promise by Dedalus.

The court granted the motion in its entirety. It held that, under either Connecticut law or New York law, plaintiff could not state a cause of action. The court agreed with Dedalus that its board was without power to hire plaintiff for life, and that the purported contract for lifetime employment was deemed to be terminable at will because of its indefinite duration. The court further stated that the contract was not supported by consideration and that, at best, plaintiff supported her promissory estoppel claim with "conclusory assertions that she detrimentally relied on the alleged promise of permanent employment." Finally, the court stated that Motherwell's will superceded the letter concerning plaintiff's employment, and thus extinguished "any presumptive limitation on [Dedalus'] ability to terminate [plaintiff's] employment."

On this appeal, plaintiff contends that Connecticut law governs this dispute. Dedalus does not take a position as to whether Connecticut or New York law applies, maintaining that it would prevail under either.

Under Connecticut law, "permanent" employment contracts are, as a general rule, terminable at will (*D'Ulisse-Cupo v Board of*

Directors of Notre Dame High School, 202 Conn 206, 212 n 1, 520 AD2d 217, 220 n 1 [1987]). However, plaintiff correctly notes that parties are free to enter into contractual arrangements which provide for employment that can only be terminated for cause (*see e.g. Torosyan v Boeringer Ingelheim Pharm., Inc.* (234 Conn 1, 662 A2d 89 [1995]; *Coelho v Posi-Seal Intl., Inc.*, 208 Conn 106, 544 A2d 170 [1988]). In *Torosyan*, for example, the trial evidence revealed that the plaintiff had made clear to the defendant during the interview process that he was seeking long-term job security and that one of the interviewers told the plaintiff that he hoped the plaintiff would "stay forever." The *Torosyan* court held that, because the employment manual provided that management had the right to discharge employees only for cause, the plaintiff had established an implied employment contract that was not at will (234 Conn at 13-18, 662 A2d at 96-99). In *Coelho*, the court concluded that "there was sufficient evidence to permit the jury to find that the parties had an implied agreement that, so long as he performed his job properly, the plaintiff would not be terminated as a result of conflicts between [the defendant's] quality control and manufacturing departments" (208 Conn at 114, 544 A2d at 174). This evidence included statements by the defendant's president such as "[i]f

you come to work with us, you'll never have to worry . . . Those people that join us now are going to grow with us into the future" (208 Conn at 110, 544 A2d at 173).

Dedalus disagrees and argues that this case is controlled by the holding in *Solomon v Hall-Brooke Found., Inc.* (30 Conn App 129, 619 A2d 863 [1993], *aff'g* 1992 WL 31947 [App. Ct. of Conn [1993]). In that case, the plaintiff purchased a private psychiatric hospital, which she administered. Two years later, she created a foundation to run the hospital as a non-profit organization. She negotiated an employment contract with the foundation which provided for her employment as the foundation's executive director until age 65 or her retirement, whichever came sooner, and which could not be terminated unless the plaintiff was convicted of theft, fraud or embezzlement in connection with the foundation. When the defendant found that the plaintiff was attempting to exert too much influence on the foundation, it terminated her, and she invoked the agreement. The court declined to enforce the agreement, stating that:

> "Connecticut statutes give directors or trustees of corporations like Hall-Brooke the right to manage the activities, property and affairs of the corporation. C.G.S. § 33-447[a]. This right includes the right to appoint officers and to remove officers, with or without cause, but without prejudice to

> their contract rights, if any. C.G.S. § 33-453[a],[b]. '*There is some authority that directors have no power to hire an employee on a lifetime basis . . . such cases are generally based on the theory that a board of directors, in selecting the management personnel of the corporation, should not be allowed to hamstring future boards in the overall supervision of the enterprise and the implementation of changing corporate policy*' (*Osborne v. Locke Steel Chain Co.*, 153 Conn. 527, 537 [1966]" (*Solomon*, 1992 Conn. Super. LEXIS 297, at *75-77 [emphasis added, additional citations omitted]).

The facts of this case are more similar to those in *Solomon* than to the cases cited by plaintiff. As in *Solomon*, plaintiff was an insider in a key management position when Motherwell made her a lifetime employee. Motherwell's decision to ensure her continued employment as a major decision-maker in the organization effectively deprived the board of directing the future of the foundation. In *Torosyan* and *Coelho* and the other cases cited by plaintiff, the plaintiff was not in a high-level management position as was plaintiff here. Accordingly, the public policy concerns articulated in *Solomon* were not present in *Torosyan* and *Coelho*. It is further noted that in the cases upon which plaintiff relies, the employer reserved the right to terminate the employee for cause. The agreement at issue here does not contain any such language, making the obligation on

Dedalus even more onerous than the situation in *Solomon*.

Plaintiff argues that, even if there was no express or implied contract for Dedalus to employ her for life, one should be created by estoppel. In support of this argument, she points to the various promises and reassurances allegedly made to her by Motherwell and Rubin, and claims that she acted reasonably in reliance on those statements. She alleges in her amended complaint that she "continuously relied on the guarantee of lifetime employment when making decisions about her professional future."

Under Connecticut law, "[t]o succeed on a claim of promissory estoppel, the party seeking to invoke the doctrine must have relied on the other party's promise . . . [T]he asserted reliance . . . must result in a detrimental change in the plaintiff's position." *Stewart v Cendant Mobility Servs. Corp.*, 267 Conn 96, 112-13, 837 A2d 736, 746 (2003). Here, the amended complaint nowhere alleges detrimental reliance. At most, it vaguely alleges that plaintiff relied on promises of lifetime employment when contemplating her future. Such bare allegations are insufficient to support a claim for promissory estoppel (*see Janicki v Hospital of St. Raphael,* 46 Conn Supp 204, 211, 744 A2d 963, 966-967 [1999]). In any event, to the extent that plaintiff

does allege reliance, it is based on her having foregone seeking out other employment opportunities based on the representations she received. However, "[i]f the claimed reliance consists of the promisee's forbearance rather than an affirmative action, proof that this forbearance was induced by the promise requires a showing that the promisee *could have* acted . . . Implicit in this principle is the requirement of proof that the plaintiff actually *would have acted* in the absence of the promise" (*Stewart*, 267 Conn at 113, 837 A2d at 747 [internal quotations and citations omitted]).

Plaintiff relies on *Stewart* in contending that she was not required to allege (or even prove) the existence of specific opportunities which would have been available to her if she had decided to leave Dedalus. However, in *Stewart*, trial evidence revealed that the plaintiff, a highly-skilled saleswoman, would have had numerous opportunities in her industry if she had decided to look for a new job (267 Conn at 111-112, 837 A2d at 746). Here, plaintiff's entire professional life had been devoted to the artwork of Motherwell. Given such a narrow specialty, it cannot be assumed that there would have been such a plethora of job openings, if any. Further, in *Stewart* the plaintiff testified at trial that she would have left the

defendant's employ if it hadn't given her certain assurances of continued employment. Here the amended complaint cannot be construed as alleging that plaintiff would have left Dedalus if not for Motherwell's and Rubin's reassurances. Indeed, the fact that Dedalus was probably one of the only places, if not the only place, that plaintiff could have applied her expertise in the works of Motherwell suggests that she would likely not have sought a job somewhere else. Accordingly, plaintiff did not sufficiently allege a cause of action for promissory estoppel.

Plaintiff argues, for the first time on appeal, that Motherwell and Rubin had apparent authority sufficient to bind Dedalus to a lifetime employment contract. This is a factual issue which Dedalus may have obviated below. Accordingly, we may not consider it *(see e.g. Gouldborne v Approved Ambulance & Oxygen Serv.*, 2 AD3d 113, 114 [2003], *lv denied* 3 NY3d 605 [2004]).

Based on Connecticut law, we find that any contract between

plaintiff and Dedalus to employ her for life was void as against public policy. Thus, we need not determine whether such an agreement was supported by consideration or whether it was superceded by Motherwell's will.

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

ENTERED: NOVEMBER 10, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5515 The People of the State of New York, Ind. 216/02
Respondent,

-against-

Isaiah Matthews,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Marcy Kahn, J.), entered on or about July 19, 2010 which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded to Supreme Court for further proceedings on the motion.

At the time he filed his application, defendant was eligible for consideration for resentencing even though he had been released from custody on his drug convictions but reincarcerated for parole violations (*see People v Paulin*, 17 NY3d 238 [2011]), That he was released on parole again while this appeal was

pending did not bar defendant from obtaining resentencing (*see* *People v Santiago*, 17 NY3d 246 [2011]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

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

5846 In re Everard Brown, Index 113658/08
Petitioner-Respondent,

-against-

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

_____

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

Richard E. Casagrande, New York (Ariana A. Gambella of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered on or about March 25, 2010, in this article 78 proceeding, declaring that respondents' determination, dated June 13, 2008, which evaluated petitioner's performance for the 2007-2008 school year as unsatisfactory and discontinued his service as a probationary teacher, was in violation of lawful procedure, and remitting the matter to respondents for further proceedings, unanimously reversed, on the law, without costs, respondents' termination of petitioner's employment reinstated, the petition denied and the proceeding dismissed.

Petitioner was a probationary teacher in the New York City School System for three years. He was terminated at the end of

his third year in 2008. Pursuant to a review procedure set forth in the parties' collective bargaining agreement, petitioner appealed to the Department of Education's Office of Appeal and Review.

At a hearing, petitioner's supervisors, Principal Weissbrot and Assistant Principal Bausch, were called as witnesses by the Department of Education (DOE). They both similarly testified about petitioner's poor performance in class management and engagement of students. DOE also presented petitioner's Annual Professional Performance Review and Report on Probationary Service of Pedagogical Employee (APPR) for the period of August 30, 2007 to June 2008. The APPR, which was signed by Principal Weissbrot, reflected a "U-rating" in that calendar year for petitioner. Besides cross-examining DOE's witnesses, petitioner pointed out that the APPR report was deficient in several respects, namely that no documentation was annexed to the APPR as required by the rating handbook promulgated by the Chancellor, and that sections of the report were left blank.

The Chancellor's Committee Report issued in September 2009 unanimously agreed with the principal's recommendation to deny petitioner his Certification of Completion of Probation effective

August 28, 2008. In this article 78 proceeding brought by petitioner, Supreme Court found that the determination to discontinue petitioner's employment was rationally based. Nevertheless, the court granted the petition on the ground that the APPR report was not in strict compliance with the procedures set forth in the Rating Handbook promulgated by the Chancellor. We now reverse.

Petitioner has failed to demonstrate that his termination of employment as a probationary teacher was arbitrary and capricious or in bad faith. Indeed, petitioner does not dispute that the evidence adduced at the hearing from the principal and assistant principal provided ample ground for his discontinuance. The principal and the assistant principal described petitioner's poor performance in class management and engagement of students. Significantly, their individual assessments were based on their personal classroom observations. Under these circumstances, any deficiencies in the APPR report do not render the determination to discontinue his employment arbitrary and capricious since the

hearing testimony provided ample grounds for his termination (*see Matter of Sorrell v Board of Education of City School District of City of N.Y.*, 168 AD2d 453 [1990]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5953 Harbhajan Singh, formerly known as Bhajan Rakkar, Plaintiff-Appellant, Index 114166/05

-against-

Actors Equity Holding Corporation, et al., Defendants-Respondents.

_____

Law Offices of Neil Kalra, P.C., Forest Hills (Neil Kalra of counsel), for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Mark Alan Taustine of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered February 23, 2010, which, in this action for personal injuries sustained when plaintiff allegedly tripped on a bent piece of metal nosing and fell down a flight of stairs in a building owned and managed by defendants, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's argument that summary judgment should not have been granted because defendants failed to include signed, sworn copies of the deposition transcripts, is raised for the first time on appeal and thus, is precluded from review (*Ta-Chotani v Doubleclick, Inc.*, 276 AD2d 313 [2000]). Were we to consider the

argument, we would find that the signed, sworn documents were in defendants' possession and could have been provided to the motion court had defendants been notified of the omission. Moreover, the deposition transcripts are admissible as plaintiff's own admission since the transcripts had been certified as accurate by the court reporter (*Morchik v Trinity School*, 257 AD2d 534, 536 [1999]).

Dismissal of the complaint was proper since there are no triable issues as to whether defendants created or had notice of any purported defect to the subject stair. Plaintiff did not see the alleged defect and there had been no complaints of it. Plaintiff's affidavit submitted in opposition to the motion fails to raise a triable issue of fact as it was not consistent with his deposition testimony (*see Telfeyan v City of New York*, 40 AD3d 372, 373 [2007]). Furthermore, plaintiff's expert affidavit fails to raise an issue as to whether defendants had constructive

notice of the defect since the expert's observations occurred almost two and a half years after the accident (*see e.g. Glover v New York City Tr. Auth.*, 60 AD2d 587, 588 [2009]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5954-
5954A-
5954B

Index 401385/06

The City of New York,
Plaintiff-Appellant,

-against-

Investors Insurance Company of America,
Defendant-Respondent.

_____

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

Lester Schwab Katz & Dwyer, LLP, New York (Aaron Brouk of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered May 26, 2010, dismissing the complaint, unanimously modified, on the law, to strike the decretal paragraph dismissing the complaint and to substitute therefor a declaration that defendant has no duty to defend or indemnify plaintiff in the underlying action, and, as so modified, affirmed, without costs. Appeal from orders, same court and Justice, entered April 19, 2010, which denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment, dismissed without costs, as subsumed in the appeal from the aforesaid judgment.

As an additional insured under the policy issued by

defendant, plaintiff had, in the absence of an express duty, an implied duty, independent of the named insured's obligation, to provide defendant with timely notice of the occurrence for which it seeks coverage (*see Structure Tone v Burgess Steel Prods. Corp.*, 249 AD2d 144 [1998]; *Thomson v Power Auth. of State of N.Y.*, 217 AD2d 495, 497 [1995]). The notice it served 13 months after receiving the underlying plaintiff's notice of claim was untimely as a matter of law (*see 1700 Broadway Co. v Greater N.Y. Mut. Ins. Co.*, 54 AD3d 593, 593 [2008]).

Nor may plaintiff rely upon the named insured's timely notice of the underlying *action* to satisfy its duty to provide timely notice of the *occurrence*, since the duty under the policy to notify of an occurrence is distinct from the duty to notify of any claim or suit brought thereon (*see American Tr. Ins. Co. v Sartor*, 3 NY3d 71, 75 [2004]; *Steadfast Ins. Co. v Sentinel Real Estate Corp.*, 283 AD2d 44, 54 [2001]). Moreover, plaintiff's obligation to provide timely notice was independent of the named insured's obligation because its interests were adverse to those of the named insured "from the moment the [amended] complaint was

served naming them both as defendants" (*1700 Broadway Co.*, 54 AD3d at 594; *City of New York v Welsbach Elec. Corp.*, 49 AD3d 322, 322 [2008]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5955-
5956 Index 21166/05

Zakkarie Carlucci, etc., et al.,
Plaintiffs-Respondents,

-against-

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

Merriam LLC, et al.,
Defendants,

Star Housing, et al.,
Defendants-Appellants-Respondents.

_____

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

Law Offices of Curtis Vasile, P.C., Merrick (Melissa L. Johnston of counsel), for appellants-respondents.

O'Connor Redd LLP, White Plains (John P. Grill of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 23, 2010, which, to the extent appealed from as limited by the briefs, denied defendants Star Housing and York Management's motion for summary judgment dismissing the complaint as against them, and granted plaintiffs' application to compel the deposition of Linda Gibbs, former Commissioner of the New York City Department of Homeless Services, unanimously modified, on the law and the facts, to deny plaintiffs' application, and

otherwise affirmed, without costs.

The infant plaintiff allegedly sustained injuries as a result of exposure to lead while residing in a privately owned apartment in which he and his mother had been placed by the New York City Department of Homeless Services (NYCDHS). Defendants Star Housing and York Management contend that since they neither owned nor were in exclusive control of the apartment building, they are not liable for the infant plaintiff's injuries. However, the record evidence presents issues of fact whether Star and York, as managing agents of the portion of the building used by NYCDHS, created or contributed to the creation of the lead hazard by causing their agents to remove insulation and scrape lead paint off pipes in the apartment (*see German v Bronx United in Leveraging Dollars*, 258 AD2d 251 [1999]). This evidence includes correspondence between NYCDHS and York concerning repairs required in the apartment and performed by York and testimony that Star ran the homeless program, that Star caseworkers maintained an office on site to assist clients who needed repairs in their units, and that a construction company owned by a Star employee actually performed the repairs on the pipes.

Plaintiffs failed to show that information provided by

former Commissioner Gibbs about the alleged policy disagreement within NYCDHS would be material and necessary to their prosecution of this action, which alleges negligent inspection and repair of the subject apartment, or that material and necessary information could not be obtained through document production and the deposition of other city officials (*see Colicchio v City of New York*, 181 AD2d 528 [1992]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5957-
5958-
5958A In re Juliana Victoria S. and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Benny William W.,
Respondent-Appellant,

Jewish Child Care Association
of New York,
Petitioner-Respondent.
- - - - -
Azmara N.G.,
Petitioner-Appellant,

Jessica Stephanie S., et al.,
Respondents.

_____

Louise Belulovich, New York, for Azmara N.G., appellant.

Tennille M. Tatum-Evans, New York, for Benny William W., appellant.

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

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

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about November 16, 2010, which, to the extent appealed from, upon a fact-finding determination that respondent father permanently neglected the child Julianna,

terminated his parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs. Orders, same court and Judge, entered on or about September 29, 2010, which, in a proceeding pursuant to article 6 of the Family Court Act, dismissed the great-aunt's petitions for custody of the subject children, unanimously affirmed, without costs.

Clear and convincing evidence support the finding that the father permanently neglected Julianna (Social Services Law § 384-b[7][a],[f]; § 384-b[3][g][i]). The record shows that the agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, referring the father to anger management, domestic violence, and parenting skills classes, and by scheduling regular visits with the child (*see Matter of Lady Justice I.*, 50 AD3d 425, 426 [2008]). Despite these efforts, the father failed to consistently visit the child and engage in the required services during the statutorily relevant time period (*see id.*). To the extent the father attended therapy sessions, there is no evidence that he gained insight or otherwise benefitted from them (*see Matter of Alexander B. [Myra R.]*, 70 AD3d 524, 525 [2010], *lv denied* 14

NY3d 713 [2010]).

A preponderance of the evidence supports the finding that termination of the father's parental rights is in the best interest of Julianna (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The father failed to preserve his claim that a suspended judgment is warranted (*see Matter of Omar Saheem Ali J. [Matthew J.]*, 80 AD3d 463 [2011]). In any event, that disposition is not appropriate, given that the father's situation has not improved and that Julianna is thriving in the foster home where she lives with her sister and where her special needs are being met (*id.*).

The weight of the evidence supports the finding that it is in the children's best interests to dismiss the great-aunt's custody petitions (*see Matter of Tiffany Malika B.*, 215 AD2d 200, 201 [1995], *lv denied* 86 NY2d 707 [1995]). The record shows that the children are thriving in the foster home where they have lived for most of their lives. By contrast, the children have

had little, if any, relationship with the great-aunt, whom they have seen infrequently.

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

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5961-
5962 Index 310098/08

Michael E. Yant,
Plaintiff-Respondent,

-against-

Mile Square Transportation, Inc., et al.,
Defendants-Appellants.

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Mauro Lilling Naparty LLP, Great Neck (Jennifer B. Ettenger of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered April 14, 2010, which granted plaintiff's motion for summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered on or about April 12, 2011, which, insofar as appealable, denied defendants' motion to renew, unanimously dismissed, without costs, as moot.

Plaintiff established his entitlement to judgment as a matter of law by stating that he was injured when defendants' school bus hit the rear of the bus on which he was riding (*see Johnson v Phillips*, 261 AD2d 269, 271 [1999]). In opposition, defendants raised a triable issue of fact by attaching the

complete police accident report, which listed all of the passengers on the buses and did not include plaintiff's name. This document, which was admissible as a business record (*see Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 396 [2003], *lv dismissed in part, denied in part* 100 NY2d 636 [2003]), raised the question of whether plaintiff was actually a passenger on the bus (*see Perry v City of New York*, 44 AD3d 311 [2007]). Accordingly, plaintiff's motion should have been denied and defendants should have been permitted to conduct discovery to determine whether or not plaintiff was indeed a passenger (*see* CPLR 3212[f]; *Bartee v D & S Fire Protection Corp.*, 79 AD3d 508 [2010]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5963 In re Leonard Finkel, Index 108091/10
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent,

New York State Division of Human Rights,
Respondent.

_____

The Rosenthal Law Firm, PC, New York (Douglas Rosenthal of counsel), for appellant.

Sonya M. Kaloyanides, New York (Mindy Merdinger Blackstock of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered November 4, 2010, dismissing this article 78 proceeding to annul respondent New York State Division of Human Rights' determination, dated April 23, 2010, which dismissed petitioner's complaint for lack of jurisdiction, unanimously affirmed, without costs.

The court correctly determined that the complaint filed with respondent New York State Division of Human Rights in 2010 was barred under the doctrine of res judicata because the complaints filed by petitioner in federal court in 1990 and 1991 were based on the same transaction as the 2010 petition, and were dismissed

on the merits (*see Zito v Fischbein Badillo Wagner Harding*, 80 AD3d 520, 521 [2011]; *Bettis v Kelly*, 68 AD3d 578, 579 [2009]). Moreover, the 2010 complaint fails to allege any additional damages that were separate and distinct from those generated by respondent New York City Housing Authority's misconduct in 1988 (*see Lusk v Weinstein*, 85 AD3d 445, 446 [2011], *lv denied* 17 NY3d 709 [2011]).

Contrary to petitioner's contention, the Lilly Ledbetter Fair Pay Act of 2009 (the Fair Pay Act) does not apply to payments made pursuant to a pension structure because the language of the statute itself provides that "[n]othing in this Act is intended to change current law treatment of when pension distributions are considered paid" (Pub L 111-2, § 2[4] [2009]). Instead, "'[t]he [Fair Pay] Act preserves the existing law concerning when a discriminatory pension distribution or payment occurs, i.e., upon retirement, not upon the issuance of each check'" (*Zimmelman v Teachers' Retirement Sys.*, 2010 US Dist LEXIS 29791, *30, 2010 WL 1172769, *10 [SD NY 2010], quoting *Tomlinson v El Paso Corp.*, 2009 US Dist LEXIS 77341, *9, 2009 WL 2766718, *3 [D Colo 2009]; *see Sullivan v City of New York*, 2011 US Dist LEXIS 36383, *8-10, [SD NY 2011]). Since petitioner began receiving retirement

compensation in 1996, the Fair Pay Act does not "reset" the statute of limitations for the claims related to failure to pay back wages ordered in a prior action, or any of the other claims.

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5964 The People of the State of New York, Ind. 1483/08
Respondent,

-against-

Javaughn Springer,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about December 18, 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 10, 2011

CLERK

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

Tom J.P., Andrias, Acosta, Freedman, Richter, JJ.

5965 Kolmar Americas, Inc., Index 602552/08
Plaintiff-Appellant,

-against-

Bioversal Inc., etc.,
Defendant-Respondent.

_____

Kelley Drye & Warren LLP, New York (James E. Nealon of counsel), for appellant.

Fulbright & Jaworski L.L.P., New York (James H. Neale of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered on or about April 13, 2010, which granted defendant's motion for partial summary judgment on its third counterclaim, unanimously affirmed, without costs.

Plaintiff's attempt to insert ambiguity into the applicable tax clause contained in the General Terms and Conditions (GTC) of the agreement between the parties which required plaintiff to pay defendant all taxes "paid or incurred by [defendant] directly or indirectly with respect to the product sold," is unpersuasive. "A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Excel Graphics Tech. v CFG/AGSCB*, 1 AD3d 65, 69 [2003], *lv dismissed* 2 NY3d 794 [2004]). Contrary to plaintiff's

argument, the language employed in the contract should not be modified by, or read together with, the "Title and Risk of Loss" provision. Nor should the term "indirectly" be read narrowly as such a reading would render the counterpart term covering taxes paid "directly," meaningless, and run afoul of the "cardinal rule of construction that a court adopt an interpretation that renders no portion of the contract meaningless" (*Diamond Castle Partners v IAC/Interactive Corp.*, 82 AD3d 421, 422 [2011]).

Article 2 of the UCC does not authorize the introduction of parole evidence to vary the plain meaning of the GTC tax clause. Extrinsic evidence does not merely "explain" or "supplement" a contractual term within the meaning of UCC 2-202 when the purported explanation or supplement actually contradicts the unambiguous contractual terms (*see* UCC 2-202; *Intershoe, Inc. v Bankers Trust Co.*, 77 NY2d 517, 523 [1991]).

The motion court's grant of partial summary judgment while directing that an inquest be held after discovery is completed was a provident exercise of its "wide discretion" (*see Robert Stigwood Org. v Devon Co.*, 44 NY2d 922, 923-24 [1978]). Pursuant to the motion court's order, at the inquest, defendant will bear the burden of proving its damages, i.e., the amount it paid or incurred, directly or indirectly, with respect to Florida fuel

taxes in connection with the subject contract.

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 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5966 Vulcan Power Company, etc., Index 600712/09
Plaintiff-Respondent,

-against-

Stephen M. Munson,
Defendant,

Soo Min Fay, et al.,
Defendants-Appellants.

_____

Law Offices of Daniel L. Abrams, PLLC, New York (Daniel L. Abrams of counsel), for appellants.

Cohen and Gresser, LLP, New York (Daniel H. Tabak of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered December 3, 2010, which granted the motion of plaintiff, Vulcan Power Company, for summary judgment and declared as legal and binding a disputed stockholder's agreement, unanimously affirmed, without costs.

Defendants-appellants and defendant Munson, their representative, signed the stockholders agreement without reading it. Defendants-appellants, in fact, never requested a copy of the agreement, depending instead on the representations of Munson, who, in turn, depended upon the representations of people whose interests were at odds with his and who he believed to be

untrustworthy. As a result, defendants are bound by the terms of the stockholders agreement (*see Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [2008], *lv dismissed* 12 NY3d 748 [2009]; *see also Pimpinello v Swift & Co.*, 253 NY 159, 162-163 [1930]). Defendants' argument that the holding in *Sorenson* does not apply to signers of loose signature pages is without merit. A signer's duty to read and understand that which it signed is not "diminished merely because [the signer] was provided with only a signature page" (*Hotel 71 Mezz Lender LLC v Falor*, 64 AD3d 430, 430 [2009]; *see also Friedman v Fife*, 262 AD2d 167, 168 [1999]).

Defendants' failure to read the stockholders agreement also precludes its fraud in the execution defense (*see First Natl. Bank of Odessa v Fazzari*, 10 NY2d 394, 397-398 [1961] [finding a non-English speaker negligent for not asking his wife to read a document of obvious legal import, especially where he had done so in the past]; *see also Sorenson*, 52 AD3d at 266 ["negligent failure to read [an] agreement [precludes the assertion of]

justifiable reliance, an essential element of fraud in the execution"]).

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

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5967 The People of the State of New York, Ind. 5301/09
Respondent,

-against-

Tyrone Ross,
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 (Patricia Curran of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered June 28, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 9 years, unanimously affirmed.

By failing to object, or by failing to make specific objections on the same grounds raised on appeal, defendant did not preserve his challenges to the prosecutor's summation (*see People v Balls*, 69 NY2d 641 [1986]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The comments at issue were based on reasonable inferences drawn from the evidence and were fair

response to defense counsel's attacks on the credibility of the People's witnesses (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5969 The People of the State of New York, Respondent, Ind. 4988/08

-against-

Cesar Mendez, Defendant-Appellant.

_____

Patrick A.H. Watts, Bronx, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered September 15, 2009, as amended October 8, 2009, convicting defendant, after a jury trial, of burglary in the first degree (two counts), robbery in the first degree (two counts), robbery in the second degree, and kidnapping in the second degree (two counts), and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (*see People v*

Danielson, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant's fingerprint found on a piece of duct tape used to tie up one of the victims was sufficient to support the conviction (*see People v Steele*, 287 AD2d 321, 322 [2001], *lv denied* 97 NY2d 682 [2001]). The circumstances negated any reasonable possibility that defendant innocently placed his fingerprint on the outer surface of the roll of duct tape on some hypothetical occasion, and that the same part of the tape he touched ended up being used in the crime.

Furthermore, there was other evidence of defendant's guilt, consisting of defendant's recorded jailhouse telephone conversations, and defendant's challenges to the admissibility of this evidence are without merit. The jury could have reasonably interpreted these conversations as evincing a consciousness of guilt (*see People v Yazum*, 13 NY2d 302 [1963]), as well as circumstantially implicating defendant in the crime. For example, at one point defendant referred to someone as "the one that did it with me and [another person]."

We perceive no basis for reducing the sentence.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5971-
5972 Index 20100/06

Nathaniel Robinson,
Plaintiff-Respondent-Appellant,

-against-

New York City Housing Authority,
Defendant-Appellant-Respondent.

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

Alpert, Slobin & Rubenstein, LLP, New York (Gary Slobin of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered October 29, 2010, which, insofar as appealed from, in this action for personal injuries, granted the branch of plaintiff's cross motion seeking to amend his pleadings to add a claim for violation of Multiple Dwelling Law (MDL) § 62, and granted that part of the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing plaintiff's claim for common-law negligence, unanimously modified, on the law, to grant defendant's motion in its entirety and to deny plaintiff's cross motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of NYCHA dismissing the complaint.

Plaintiff's cross motion to amend his complaint and bill of particulars to assert a claim under MDL 62 was untimely since the claim is based on a theory not previously advanced and the applicable statute of limitations has expired (*see* CPLR 203[f]). The new theory went beyond mere amplification of the pleadings, constituting a new, distinct, and independent theory of liability (*Lopez v New York City Hous. Auth.*, 16 AD3d 164, 165 [2005]). In any event, even had plaintiff timely asserted this claim, MDL 62 is inapplicable here where the structure from which plaintiff allegedly fell was an overhang, not a roof, terrace, or other structure under the ambit of MDL 62.

Furthermore, NYCHA established its entitlement to judgment as a matter of law by establishing that it had no notice of any defective or unsafe condition necessary to sustain a General Municipal Law § 205-e claim based on either MDL 78 or 62

(*Fernandez v City of New York*, 84 AD3d 595, 596 [2011]). For the same reason, the motion court properly dismissed the common-law negligence claim.

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Freedman, Richter, JJ.

5973 Samuel N. Goldstein, etc., et al., Index 15576/00
Plaintiffs-Appellants,

-against-

Wendy B. Silverstein, M.D.,
Defendant-Respondent.

_____

Law Offices of Daniel A. Thomas, P.C., New York (Daniel A. Thomas of counsel), for appellants.

Dwyer & Taglia, New York (Peter R. Taglia of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about July 1, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to vacate the dismissal of this medical malpractice action and restore the action to the trial calendar, deemed appeal from judgment, same court and Justice, entered September 13, 2010, dismissing the complaint (CPLR 5501[c]), and, so considered, the judgment unanimously affirmed, without costs.

Plaintiff improperly argues for the first time on appeal that dismissal of the action pursuant to CPLR 3404 was incorrect because the striking of the action from the trial calendar had returned the case to its pre-note of issue status (*see Nieman v Sears, Roebuck & Co.*, 4 AD3d 255, 255 [2004]). Plaintiff neither

made a motion to restore the matter to the calendar within one year nor proffered an affidavit demonstrating that he had a meritorious cause of action.

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5974N Panasia Estate, Inc., Index 104355/09
Plaintiff-Appellant,

-against-

Daniel R. Broche, etc.,
Defendant-Respondent,

Property 51 LLC, et al.,
Defendants.

_____

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (Robert M. Milner of counsel), for appellant.

Andrew Weltchek, New York, for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 28, 2011, which denied plaintiff's motion for leave to serve a third amended complaint pursuant to CPLR 3025(b), unanimously affirmed, without costs.

Although motions for leave to amend may be granted on the eve of trial (*see* CPLR 3025[c]; *Reyes v City of New York*, 63 AD3d 615, 616 [2009], *lv denied* 13 NY3d 710 [2009]), the motion court properly denied plaintiff's motion because defendants would be unduly prejudiced by the proposed amendment, which seeks to add a new theory of liability (*see Spence v Bear Stearns & Co.*, 264 AD2d 601 [1999]). The record reveals that discovery, which had been tailored to the theories of liability set forth in the

second amended complaint, was nearly complete and the filing date of the note of issue was imminent (*see Chichilnisky v Trustees of Columbia Univ. in City of N.Y.*, 49 AD3d 388 [2008]). Plaintiff sought this amendment 18 months after the action was commenced, after it had amended its complaint twice, and after it and defendants had submitted motions for summary judgment that Supreme Court had resolved (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20 [2003]).

Furthermore, the proposed amendment, wherein plaintiff seeks specific performance of an oral modification of the parties' contract, is lacking in merit (*see e.g. Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [2009], *lv dismissed* 12 NY3d 880 [2009]). Plaintiff's conduct, as alleged in the proposed third amended complaint, does not unequivocally refer to the purported oral modification, and thus does not fall within

the partial performance exception to General Obligations Law § 5-703(4) (*see Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235 [1999]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5975N Elvis Castellanos, Index 23018/05
Plaintiff,

-against-

CBS Inc., et al.,
Defendants.
- - - - -
The Taub Law Firm, PC,
Nonparty Appellant,

-against-

Keogh Crispi, P.C.,
Nonparty Respondent.

_____

The Taub Law Firm, PC, New York (Elliot H. Taub of counsel), for appellant.

Levine & Gilbert, New York (Harvey A. Levine of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered April 25, 2011, which, in a dispute between plaintiff's outgoing and incoming counsel as to the division of a contingency fee earned in a personal injury action, apportioned 60% of the fee to plaintiff's incoming attorneys and 40% to the outgoing attorneys, unanimously modified, on the facts, to amend the amount of the net contingency fee from $116,660 to $115,314.61, and otherwise affirmed, without costs.

The motion court providently exercised its discretion in

apportioning the contingency fee (*see Garrett v New York City Health & Hosps. Corp.*, 25 AD3d 424, 425 [2006]). The court properly considered all relevant factors, including time spent on the case, the quality of the work performed, and the amount recovered (*see Diakrousis v Maganga*, 61 AD3d 469 [2009]). We modify solely to correct the amount of the total fee to be apportioned.

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

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5976 The People of the State of New York, Ind. 5076/07
Appellant,

-against-

Ronald Sudol,
Defendant-Respondent.

_____

Cyrus R. Vance, Jr., District Attorney, New York (Susan Gliner of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (John Cataldo, J.), entered on or about April 30, 2009, which granted defendant's CPL 330.30(1) motion to set aside a verdict convicting defendant of gang assault in the second degree and assault in the third degree, dismissed the gang assault count, and ordered a new trial on the third-degree assault count, unanimously reversed, the entire verdict reinstated, and the matter remanded for sentencing.

A motion to set aside the verdict may be granted only if it alleges grounds that, if raised on direct appeal, "would require a reversal or modification of the judgment as a matter of law by an appellate court" (CPL 330.30[1]). Since a trial court lacks this Court's interest of justice jurisdiction, its power is far

more limited, and it may only grant a CPL 330.30(1) motion where the error alleged has been preserved by a proper objection at trial (*People v Everson*, 100 NY2d 609 [2003]).

The motion court, which had also presided at trial, set aside the gang assault conviction on the ground of legal insufficiency with respect to the element of serious physical injury. It also determined that defendant was entitled to a new trial on the remaining count because of prosecutorial improprieties in cross-examination of defendant and in summation. The motion court concluded that defendant had preserved all of these issues. However, we find that none of these issues were preserved under the standards of preservation set forth by the Court of Appeals.

At trial, defendant moved for a trial order of dismissal, but did not challenge the sufficiency of the evidence that the victim sustained a serious physical injury. While defense counsel may have argued to the jury that this element was unproven as a matter of fact, he never argued to the court that it was unproven as a matter of law. Accordingly, this claim is unpreserved (*see People v Gray*, 86 NY2d 10 [1995]), and the motion court lacked authority to set aside the verdict on that ground.

However, the court's ruling on the merits was correct. The evidence was insufficient to establish that the victim suffered serious physical injury (*see* Penal Law § 10.00[10]) as a result of the attack. The fracture to the orbital socket of the victim's eye was surgically repaired and the victim suffered no lasting ill effects beyond an occasional twitching of his eye (*see People v Rosado*, __ AD3d __, 2011 NY Slip Op 06936 [2011]). Nevertheless, given the current procedural posture, we are unable to affirm on this ground, and are constrained by CPL 470.05(1) to await a postsentencing appeal by defendant to consider the question of whether the sufficiency claim should be addressed under our interest of justice or weight of the evidence review powers (*see People v Goodfriend*, 64 NY2d 695 [1984]; *People v Ponnapula*, 229 AD2d 257, 274 [1997], *lv denied* 94 NY2d 951 [2000]; *People v Sadowski*, 173 AD2d 873, 873-874 [1991]).

The motion court also set aside the verdict on the ground that the prosecutor improperly cross-examined defendant about an Internet statement he made, in which defendant expressed an anti-police and anti-authority bias. However, the record fails to support the court's finding that defendant preserved this issue by way of a specific objection.

In any event, regardless of preservation, none of the bases

on which the court faulted this cross-examination was a sufficient ground on which to order a new trial. The cross-examination did not implicate the court's *Sandoval* ruling or defendant's right to notice under CPL 240.43, because it only involved an attitude, not "criminal, vicious or immoral conduct." While the prosecutor failed to read the complete statement, defense counsel could have provided the full context by introducing the remainder of the statement (*see People v Torre*, 42 NY2d 1036 [1977]), but failed to do so. Finally, the statement had some impeachment value regarding an aspect of defendant's testimony. While the trial court could have chosen to exercise its discretion to exclude the statement as unduly prejudicial, its failure to do so did not entitle defendant to a new trial as a matter of law.

The court also set aside the verdict on the ground of a series of alleged improprieties in the prosecutor's summation. With the possible exception of a remark that defendant challenged as shifting the burden of proof, none of his challenges to the summation were properly preserved (*see People v Romero*, 7 NY3d 911, 912 [2006]). In any event, the challenged remarks were generally permissible (*see Portuondo v Agard*, 529 US 61 [2000]; *People v Savage*, 50 NY2d 673 [1980], *cert denied* 449 US 1016

[1980]; *People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]); *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]), and nothing in the summation was so egregious as to require a new trial. Moreover, any improprieties could have been rectified by curative instructions, but defendant never requested any (*see People v Young*, 48 NY2d 995 [1980]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, JJ.

5977 Leslie Goldstein, Index 106808/10
Petitioner-Appellant,

-against-

The Teachers' Retirement System
of the City of New York,
Respondent-Respondent.

_____

Law Offices of Lloyd Somer, New York (Lloyd Somer of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Katrina E. McCann of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen A. Rackower, J.), entered December 20, 2010, denying the petition to annul respondent's determination that petitioner was not entitled to credit for 20 years of service, and dismissing the proceeding brought pursuant to CPLR article 78 as time-barred, unanimously affirmed, without costs.

Petitioner was informed by letter dated August 22, 2006, that respondent had improperly included prior employment in calculating his service credit with the New York City Department of Education. Although he was offered an administrative remedy that would have enabled him to obtain the service credit he desired, petitioner declined that remedy on September 24, 2007,

at which point the four-month limitations period began to run (CPLR 217[1]; *see Matter of Best Payphones, Inc. v Dept. of Info. Tech. & Telecom. of City of New York*, 5 NY3d 30, 35 [2005]).

Upon ascertaining that petitioner had less service credit than its preliminary evaluation had indicated, respondent was required by Education Law § 525 to correct the error (*Matter of Galanthay v New York State Teachers' Retirement Sys.*, 50 NY2d 984 [1980]). The doctrine of estoppel may not be applied to prevent respondent from doing so (*see Matter of E.F.S. Ventures Corp. v Foster*, 71 NY2d 359, 369 [1988]; *Matter of Scheurer v New York City Employees' Retirement Sys.*, 223 AD2d 379 [1996]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5978 In re William Jamal W. Jr.,

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

Marjorie C.,
Respondent-Appellant,

Edwin Gould Services for
Children and Families,
Petitioner-Respondent.

_____

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

John R. Eyerman, New York, for respondent.

_____

Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about April 22, 2010, which, to the extent appealable, upon a fact-finding of permanent neglect, terminated respondent's parental rights to the subject child, on respondent's default, and committed the custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for purposes of adoption, unanimously affirmed, without costs.

The court acquired jurisdiction over respondent when respondent appeared in court on January 28, 2010, and neither she nor her counsel objected to the manner of the service of the summons, despite the omission of the return date therefrom (*see*

Family Court Act § 167).

No appeal lies from an order entered on default (*see* CPLR 5511; *Matter of Jessenia Shanelle R. [Wanda Y.A.]*, 68 AD3d 558 [2009]). However, the denial of respondent's counsel's request to adjourn the inquest and dispositional hearing is appealable because that request was "the subject of contest below" (*see James v Powell*, 19 NY2d 249, 256 n 3 [1967]). We find that the court properly declined to grant the adjournment, having warned respondent on the preceding court date that it would proceed to inquest if she failed to appear (*see Matter of Cain Keel L. [Derzerina L.]*, 78 AD3d 541 [2010], *lv dismissed* 16 NY3d 818 [2011]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5980 Nelida A. Valentin, Index 400055/07
Plaintiff-Appellant,

-against-

Columbia University,
Defendant-Respondent.

_____

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Harris J. Zakarin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 20, 2010, which, in this action for personal injuries, granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment on the issue of liability, unanimously modified, on the law, defendant's motion denied, and otherwise affirmed, without costs.

Dismissal of the complaint was not warranted in this action where plaintiff alleges that she was injured when, while walking on defendant's property, she stepped on a loose hexagonal paver, causing her foot to get caught in the space between pavers and her to fall to the ground. The statement from plaintiff's witness that "for many years prior to the date of the accident

. . . the hexagon tiles in the specific area of [plaintiff's] fall were loose and uneven and presented a hazardous condition" created a triable issue of fact as to whether defendant had constructive notice of the loose condition of the subject paver (*see Colbourn v ISS Intl. Serv. Sys.*, 304 AD2d 369, 370 [2003]; *compare Lance v Den-Lyn Realty Corp.*, 84 AD3d 470 [2011]).

Contrary to defendant's contention, it failed to establish that the defect was trivial as a matter of law, since there is a lack of evidence demonstrating the size of the gap between the pavers (*see Rivas v Crotona Estates Hous. Dev. Fund Co., Inc.*, 74 AD3d 541 [2010]). Furthermore, because the loose condition of a paver is difficult to detect, such a condition, combined with a gap between pavers, creates a triable issue as to whether the condition of the walkway, regardless of any triviality, had the characteristics of a trap or snare (*see Glickman v City of New York*, 297 AD2d 220 [2002]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Román, JJ.

5981 Gopal Agrawal, et al., Index 114736/05
Plaintiffs-Appellants,

-against-

Metropolitan Life Insurance Company,
Defendant-Respondent.

_____

Trief & Olk, New York (Barbara E. Olk of counsel), for appellants.

D'Arcambal, Levine & Ousley, LLP, New York (Aimee P. Levine of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered July 15, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and, upon a search of the record, summary judgment awarded to plaintiffs on their claims.

The decedent, plaintiffs' mother, represented in her application to obtain life insurance from defendant that she did not have diabetes or any in-force insurance other than a policy issued previously by defendant. She also made representations as to her net worth. After a lengthy investigation, defendant determined that the decedent had misrepresented her medical history, her in-force insurance and her net worth. However, in

its repudiation letters, sent after the completion of its investigation, defendant based its denial of payment on the sole ground of the decedent's misrepresentation of her net worth.

To the extent defendant relies on the figure of $5-6 million in support of its assertion that the decedent misrepresented her net worth, its reliance is misplaced. The figure of $5-6 million was not included in the insurance application and therefore cannot be considered (*see* Insurance Law § 3204[a]; *Tannenbaum v Provident Mut. Life Ins. Co. of Phila.*, 53 AD2d 86, 104-105 [1976], *affd* 41 NY2d 1087 [1977]). There is no dispute that the decedent satisfied the $500,000 net worth valuation asserted in her application.

Defendant's failure to assert the other defenses in its initial repudiation constitutes a waiver of those defenses for purposes of denying liability under the policies (*Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 AD3d 33, 35 [2009]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5982-
5982A-
5982B In re Arnel Ashley B., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Cynthia T., etc.,
Respondent-Appellant,

Edwin Gould Services For Children
And Families, et al.,
Petitioners-Respondents.

_____

Lisa H. Blitman, New York, for appellant.

John R. Eyerman, New York, for respondents.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the children.

_____

Orders, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about November 4, 2009, which, upon a 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 Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7][a],[f];

[3][g][i]). The record shows that the agency exercised diligent efforts to encourage and strengthen respondent's relationship with the children by, among other things, creating a regular visitation schedule and service plan, inviting respondent to service plan review meetings, and referring her to parenting skills class and a drug treatment program (*see Matter of Adante A.*, 38 AD3d 243 [2007]). The record also shows that despite the agency's efforts, the mother failed for the relevant time period to plan for the children's future and ameliorate the behavioral problems that resulted in their placement (*Matter of Khalil A. [Sabree A.]*, 84 AD3d 632, 633 [2011]).

A preponderance of the evidence supports the determination that it is in the best interests of the children to terminate respondent's parental rights (*see* Family Ct Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that respondent has not addressed her behavioral problems, and that the children wish to be adopted by the foster mother, with whom they have lived for over 10 years (*see Matter of Alyssa M.*, 55 AD3d 505, 506 [2008]). The children have thrived in the foster mother's care, and the foster mother testified that she would continue to facilitate the children's visits with their

siblings after their adoption (*Matter of Victoria Marie P.*, 57 AD3d 282, 283 [2008], *lv denied* 12 NY3d 706 [2009]). An alternative disposition is not warranted by respondent's testimony that she wanted to participate in family therapy or that the children wished to maintain contact with her (*see Matter of Mykle Andrew P.*, 55 AD3d 305, 306 [2008]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5983 The People of the State of New York, Ind. 752/09
Respondent,

-against-

Kenneth Padilla,
Defendant-Appellant.

_____

Randall D. Unger, Bayside, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew T. Murphy of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel Conviser, J. at hearing; Wayne M. Ozzi, J. at jury trial and sentencing), rendered September 8, 2010, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

The court properly denied defendant's motion to suppress a revolver recovered from his impounded car. The police conducted a proper inventory search, which was supported by sufficient documentation. The search produced a "meaningful inventory list" (*People v Johnson*, 1 NY3d 252, 256 [2003]), even though the

searching officer did not record every item he released to defendant's sister (*see People v Black*, 250 AD2d 494 [1998], *lv denied* 92 NY2d 922 [1998]), and we do not find there were any deficiencies of any kind that would warrant suppression of the revolver. Regardless of whether the officer suspected that contraband might be present, there was no evidence that the search was conducted as a ruse to discover incriminating evidence (*see Johnson*, 1 NY3d at 256). Defendant did not preserve his argument that the police improperly impounded his car, and we decline to review it in the interest of justice. As an alternate holding, we reject it on the merits.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), particularly when viewed in light of the statutory presumption of possession by all occupants of a vehicle (*see* Penal Law § 265.15[3]). Moreover, defendant was the owner, driver, and sole occupant, and the evidence, even without the automobile presumption, warrants the inference that he knew

there was a firearm in his car (*see People v Reisman*, 29 NY2d 278, 285-286 [1971], *cert denied* 405 US 1041 [1972]).

Defendant's remaining claims do not warrant reversal.

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5984 ING Real Estate Finance (USA) LLC, et al., Plaintiffs-Respondents, Index 601860/09

-against-

Park Avenue Hotel Acquisition, LLC, Defendant-Appellant,

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

_____

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Gregg L. Weiner of counsel), for appellant.

Morrison & Foerster LLP, New York (Rachel M. Wertheimer of counsel), for respondents.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered November 22, 2010, which, in a mortgage foreclosure action, to the extent appealed from as limited by the briefs, granted plaintiffs-lenders' motion for summary judgment as against defendant-appellant borrower, unanimously affirmed, with costs.

Plaintiffs established prima facie their right to foreclosure with undisputed evidence that defendant failed to pay the outstanding principal due under the parties' loan agreements (*see JPMCC 2007-CIBC19 Bronx Apts., LLC v Fordham Fulton LLC*, 84

AD3d 613 [2011]). In opposition, defendant failed to raise an issue of fact as to its unclean hands and bad faith affirmative defenses (*id.*). Indeed, defendant did not provide any evidentiary proof that plaintiffs' alleged conflict of interest caused or contributed to the failed negotiations of a prenegotiation agreement (*see Marine Midland Bank v Cafferty*, 174 AD2d 932, 934-935 [1991]). Under the circumstances, the court properly determined that discovery on the issue is unwarranted. In view of the foregoing, we need not address defendant's argument regarding the waiver provision in the parties' master credit agreement.

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 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5985 Serena Eteng, et al., Index 304049/08
Plaintiffs-Appellants,

-against-

Dajos Transportation, et al.,
Defendants-Respondents.

_____

Law Offices of Stuart M. Kerner, P.C., Bronx (Stuart M. Kerner of counsel), for Serena Eteng, appellant.

O'Connor, Redd, LLP, White Plains (John P. Gray of counsel), for Andre Allen, appellant.

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

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 26, 2010, which, to the extent appealed as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied as to plaintiff Serena Eteng's claims of significant limitation of use of her cervical and lumbar spine and plaintiff Andre Allen's claims of significant limitation of use of his lumbar spine and right knee, and otherwise affirmed, without costs.

Defendants made a prima facie showing of entitlement to

summary judgment as to plaintiff Eteng's claims of "significant limitation of use" of her cervical and lumbar spine, right shoulder and right knee (Insurance Law § 5102[d]). They submitted expert medical reports finding normal ranges of motion, as well as the report of a radiologist who opined that changes shown in an MRI of the then 25-year-old plaintiff's cervical spine were degenerative. In opposition, plaintiff submitted competent medical evidence raising an issue of fact as to her cervical and lumbar spine injuries, including the report of a radiologist who found disc herniations, and of her treating physician who opined after full examination within a week of the accident that her injuries were causally related to the accident (see *Linton v Nawaz*, 62 AD3d 434, 439 [2009], *affd on other grounds* 14 NY3d 821 [2010]; *see also June v Akhtar*, 62 AD3d 427 [2009]).

Defendants also met their initial burden as to plaintiff Allen's claims of "significant limitation of use" of his shoulders, right knee and cervical spine. They submitted expert medical reports finding normal ranges of motion, as well as the report of a radiologist who opined that changes shown in an MRI of the then 27-year-old plaintiff's knee were degenerative. However, defendants' experts' conflicting reports concerning

their examinations of Allen's lumbar spine failed to establish the absence of limitations in range of motion, and their radiologist's report concerning the lumbar MRI is not in the record. In opposition, Allen submitted evidence sufficient to raise an issue of fact as to the injury to his right knee, since his treating physician found causation and limitations in range of motion, and his radiologist confirmed that an MRI revealed a tear of the medial meniscus, without noting any degeneration (*see Jacobs v Rolon*, 76 AD3d 905 [2010]). In addition, assuming defendants met their burden as to the lumbar spine injury, Allen submitted objective medical evidence of contemporaneous and continuing limitations, as well as the affirmed report of a radiologist finding disc herniations and his physician's opinion that his injury was causally related to the accident, which was sufficient to raise an issue of fact. Nevertheless, we note that if plaintiffs prevail at trial on their serious injury claims, they will be entitled to recovery also on their non-serious injuries caused by the accident (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [2010]).

Plaintiffs adequately explained the gap in treatment by asserting in their affidavits that they stopped receiving treatment for their injuries when their no-fault insurance

benefits were cut off (*see Browne v Covington*, 82 AD3d 406 [2011]).

Plaintiffs' bill of particulars refuted their 90/180-day claim, since both alleged that they were confined to bed for two weeks and to home for one month (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522 [2010]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5986 The People of the State of New York, Ind. 5626/07
Respondent,

-against-

Dan Holmes,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about August 5, 2009,

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

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

ENTERED: NOVEMBER 10, 2011

CLERK

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

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5987 Raisa Rozina, et al., Index 100617/09
Plaintiffs-Appellants,

-against-

Casa 74th Development LLC, et al.,
Defendants-Respondents.

_____

Tsyngauz & Associates, P.C., New York (Michael Treybich of counsel), for appellants.

Starr Associates LLP, New York (Evan R. Schieber of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered September 7, 2010, which, to the extent appealed from as limited by the briefs, granted defendant sellers' motion for summary judgment dismissing the first through fourth causes of action, for a declaration that the parties' option agreement is void pursuant to EPTL 9-1.1(b) and the return of plaintiff purchasers' deposit, and the ninth cause of action, alleging that the subject unit materially deviated from the specifications contained in the offering plan and option agreement, and for summary judgment on their counterclaims for attorney's fees and declaratory relief, and declared, among other things, that the option agreement is enforceable and that defendant Casa is entitled to retain the deposit, unanimously

modified, on the law, to deny the part of the motion seeking summary judgment dismissing the ninth cause of action, and to reinstate the complaint, as so limited, and otherwise affirmed, without costs.

The option agreement did not violate the rule against remote vesting (EPTL 9-1.1[b]). Although a closing date was not specified in either the option agreement or the offering plan, which was incorporated by reference and made part of the option agreement, the closing was to occur with or after the completion of several contingencies, all of which were to occur by January 2010. Nothing in the option agreement or the offering plan demonstrated an intention that the option be held open beyond the 21-year period in EPTL 9-1.1(b). It must, therefore, be presumed that the parties intended that the option would be executed within that time (*see* EPTL 9-1.3; *see also Kaiser-Haidri v Battery Place Green, LLC*, 85 AD3d 730, 733 [2011]). Accordingly, the court properly granted that branch of defendants' motion for summary judgment dismissing plaintiffs' first through fourth causes of action.

Defendants, however, failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the ninth cause of action, since they never addressed in their moving

papers whether there was any deviation in the unit. Accordingly, the motion should have been denied with respect to this claim, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Defendants could not cure the defect in their moving papers by submitting their architect's affidavit with their reply (*see Ford v Weishaus*, 86 AD3d 421, 422 [2011]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5991 The People of the State of New York, Ind. 5583/07
Respondent,

-against-

Daniel Viera,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Matthew T. Murphy of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered September 22, 2009, as amended November 23, 2009, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 8 years, unanimously affirmed.

Defendant did not preserve his claim that his sentence violated his plea agreement (*see e.g. People v Taylor*, 5 AD3d 333 [2004], *lv denied* 3 NY3d 648 [2004]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

At the time of the plea, the court warned defendant that he was subject to a sentence of eight years if he "absconded" or

"ran away" from a drug treatment program, but only five years if he merely failed to complete the program. It is undisputed that defendant left a program without permission. Although defendant was not discharged from this program for absconding, but rather for using and selling drugs at the facility, the fact that the program elected to discharge defendant for even more serious misconduct does not negate the fact that he also absconded. Accordingly, the court properly exercised its discretion in imposing the agreed-upon sentence.

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5992-
5993 Index 103678/08

Robert Sands Cassidy,
Plaintiff-Respondent-Appellant,

-against-

Highrise Hoisting &
Scaffolding, Inc.,
Defendant,

Rockrose GC MWA L.L.C., et al.,
Defendants-Appellants-Respondents.

_____

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollack of counsel), for appellants-respondents.

O'Dwyer & Bernstien, LLP, New York (Steven Aripotch of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered August 5, 2010, which granted plaintiff's motion for summary judgment on his claim pursuant to Labor Law § 240(1), and granted defendants-appellants' cross motion for summary judgment as to plaintiff's Labor Law §§ 241(6) and 200, and common law causes of action, unanimously affirmed, without costs.

At the time of plaintiff's accident, Midtown West A.L.L.C. owned a building under construction, for which Rockrose GC MWA L.L.C. was the general contractor. Defendant Highrise Hoisting and Scaffolding, Inc. had installed a sidewalk bridge, hoistway

and temporary loading dock. The temporary loading dock constructed by Highrise was a wooden platform measuring 20 feet by 40 feet and was, depending upon the witness, approximately 48 to 60 inches above the ground, about the height of a trailer truck. At the section of the loading dock where trucks load and unload, there was a removable horizontal pipe railing that was approximately 8 feet long and 2 inches in diameter. The horizontal pipe railing was secured to vertical posts with clamps at each end, and tightened into place with a nut and bolt. In order to allow for a delivery, the horizontal pipe railing would be unbolted from the clamps and removed.

Plaintiff, a laborer employed by the non-party concrete sub-contractor, was waiting for the hoist to come to the loading dock level, when he leaned against the dock railing, which fell, causing him to fall as well. He suffered personal injuries to his neck and back.

The motion court properly granted plaintiff summary judgment on his Labor Law § 240(1) claims. Plaintiff was performing work protected by Labor Law § 240(1), his injuries were gravity-related, and the elevated platform served as a device designed to protect a worker from gravity-related hazards (*see Brennan v RCP Assoc.*, 257 AD2d 389, 391 [1999], *lv dismissed* 93 NY2d 889

[1999]; *see also Cordeiro v TS Midtown Holdings, LLC*, 2011 NY Slip Op 06457 [2011]). Since the safety rail which was intended to protect the plaintiff from falling off the elevated platform failed, the owner and the general contractor were in violation of § 240(1).

However, defendants established that plaintiff could not recover under Labor Law § 241(6). Since the temporary loading dock was a platform under Industrial Code § 23-1.22(c)(2), and not a scaffold, plaintiff failed to plead any applicable Industrial Code violations to support his claim (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-504 [1993]).

Plaintiff's common law and Labor Law § 200 claims were also properly dismissed. There is no evidence that defendants were on notice that the rail, which had been detached for a delivery made within ½ hour prior to plaintiff's fall, was improperly re-attached. The affidavit of plaintiffs' site safety expert failed to create questions of fact warranting denial of summary judgment. An expert's opinion should be disregarded where no authority, treatise, standard, building code, article or other corroborating evidence is cited to support the assertion concerning an alleged deviation from good and accepted industry custom and practice (*Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d

1, 2 [2005]). "Before a claimed industry standard is accepted by a court as applicable to the facts of a case, the expert must do more than merely assert a personal belief that the claimed industry-wide standard existed at the time the design was put in place" (*Hotaling v City of New York*, 55 AD3d 396, 398 [2008], *affd* 12 NY3d 862 [2009]).

We decline to reach defendants' argument concerning Labor Law § 240(3), raised for the first time in their appellate reply brief.

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5994 In re Jean T.,

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

_____

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

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

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about April 5, 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 criminal possession of a controlled substance in the fifth degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The placement was a proper exercise of the court's discretion that constituted the least restrictive alternative consistent with appellant's needs and best interests and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Soon after he had been discharged from a prior

placement that had resulted from a drug sale, appellant took part in a sale of cocaine and, while that case was pending, repeated the same criminal behavior (*see e.g. Matter of Jancarlos S.*, 55 AD3d 370, [2008]). Furthermore, appellant did not attend school and had serious behavioral problems at home.

The court accepted the recommendations of the Department of Probation and Mental Health Services, and rejected that of a representative of an intensive community-based program. There is no basis for disturbing that determination. The court reasonably concluded that appellant's behavior could not be controlled without a residential placement.

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5997 The People of the State of New York, Ind. 3564/08
Respondent,

-against-

Richard Bahamonte,
Defendant-Appellant.

_____

Curtis J. Farber, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered July 2, 2010, convicting defendant, after a jury trial, of attempted assault in the first degree, assault in the second degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 10 years, unanimously affirmed.

Defendant was not deprived of a fair trial by the People's questioning of their civilian witnesses about their reluctance to testify. Under the circumstances of the case, including defendant's attacks on the witnesses' credibility, it was appropriate for the prosecutor to elicit brief, nonprejudicial testimony that the witnesses did not wish to testify (*see People*

v Howard, 7 AD3d 314, 314 [2004], *lv denied*, 3 NY3d 675 [2004]; *People v Wortherly*, 68 AD2d 158, 163-164 [1979]). Furthermore, the prosecutor had a good faith basis for believing that defendant had tampered with witnesses. Accordingly, the prosecutor appropriately made limited attempts to elicit defendant's acts of witness-tampering. Had any of these witnesses revealed such acts, that testimony would have been admissible as consciousness-of-guilt evidence. In any event, the prosecutor's attempts were unsuccessful, and they did not cause defendant any prejudice.

The prosecutor's summation remarks about the witnesses' fear of defendant were made in response to defense counsel's attack on the witnesses' credibility, and were a fair comment based upon the evidence (*see Howard*, 7 AD3d at 314). The prosecutor's comments on defendant's gang membership were based on the evidence, and that evidence was relevant to the issue of motive.

In addition, defendant challenges the portions of the prosecutor's summation and the court's charge that dealt with defendant's alleged disappearance for several weeks after the crime, and the consciousness-of-guilt inference that could be drawn therefrom. These arguments are unpreserved and we decline to review them in the interest of justice. As an alternative

holding, we also reject them on the merits. There was a sufficient evidentiary basis for the summation remarks and the corresponding jury instruction.

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5998-
5999N Esteevered Djeddah,
Plaintiff-Respondent,

-against-

Daniel Turk Williams, M.D.,
Defendant-Appellant.

Index 111626/02

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

Kramer & Dunleavy, LLP, New York (Lenore Kramer of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered September 2, 2010, which denied defendant's motion for summary judgment dismissing the complaint, and order, same court and Justice, entered October 5, 2010, which, to the extent appealed from, denied his motion to quash plaintiff's subpoena for the medical records of his treatment of her father, unanimously affirmed, without costs.

Plaintiff's submissions in opposition to defendant's motion for summary judgment, i.e., her own affidavit, her undisclosed expert's affidavit, and her father's medical records (which had already been disclosed in a separate action), raise triable issues of fact whether there existed a doctor-patient

relationship between herself and defendant, whether defendant departed from accepted medical practice by failing to treat her properly in connection with her claims of physical and mental abuse by her father, and whether defendant violated Social Services Law § 413 by failing to report her allegations of abuse to the appropriate authorities. As the motion court found, plaintiff's affidavit does not directly contradict the deposition testimony she gave in the earlier action about whether she believed, at ages 10 to 12, that she was receiving treatment from defendant when she met with him during a time when he was treating her father for manic depression and issues arising from marital conflict. Excerpts from the father's medical records, which were prepared by defendant and disclosed to plaintiff and her mother in an action in which the father was a party, tend to substantiate plaintiff's allegations that she reported the abuse to defendant. By disclosing his medical records, the father waived his privilege as to the information therein (*see Matter of Farrow v Allen*, 194 AD2d 40, 44 [1993]; *People v Martinez*, 22 AD3d 318 [2005], *lv denied* 6 NY3d 756 [2005]). Notwithstanding their lack of certification, the records were properly considered since they were not the sole basis for the court's determination (*see e.g. Clemmer v Drah Cab Corp.*, 74 AD3d 660, 661 [2010];

Hammett v Diaz-Frias, 49 AD3d 285 [2008]).

Plaintiff's submissions also raise a triable issue of fact whether she suffered physical and psychological injury proximately caused by defendant's failure to adequately treat her and to timely report her allegations of physical and sexual abuse by her father. Based on his interview of her and his review of her medical records, plaintiff's expert opined that she suffered physical and psychological harm as a direct consequence of these failures on defendant's part. The letter to the father informing him that the Department of Social Services determined, a year after defendant referred plaintiff to a child psychiatrist, that plaintiff's complaints of abuse were "unfounded," does not dispose of her claims, since it does not set forth the nature and extent of the investigation conducted by the Department of Social Services.

The court did not err in denying defendant's motion to quash plaintiff's subpoena for the medical records of his treatment of her father on the ground that it was not accompanied by the father's authorization (*see* CPLR 3122[a][2]). The court only ordered an in camera review of the medical records, and instructed counsel for both parties to be prepared to notify the father of his right to object to plaintiff's perusal of the

records, stating that it would rule upon any objections raised by the father. In any event, as indicated, the father waived any privilege as to the medical records that were previously disclosed. Moreover, he lacked grounds for objecting to the disclosure of information contained in the medical records that was not necessary to his treatment, which defendant acknowledged had no connection to the alleged abuse of plaintiff (*see* CPLR 4504[a]; *Holiday v Harrows, Inc.*, 91 AD2d 1062 [1983]).

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

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

ENTERED: NOVEMBER 10, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

6000N Ramon Mejia-Ortiz, Index 6049/07
Plaintiff-Appellant,

-against-

Gavin R. Inoa, et al.,
Defendants-Respondents.

_____

Calcagno & Associates, Staten Island (Craig A. Borgen of counsel), for appellant.

Law Offices of Michael A. Barnett, Garden City (Jay M. Weinstein of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered April 23, 2010, which, to the extent appealable, denied plaintiff's motion to, among other things, renew a prior motion for a default judgment against defendant Brown-Grey, and dismissed the action as abandoned, unanimously affirmed, without costs.

No appeal lies from the denial of a motion to reargue (*DiPasquale v Gutfleish,* 74 AD3d 471 [2010]). Supreme Court properly denied the motion to renew. The only new facts submitted in support of the motion relate to plaintiff's counsel's attempts to serve defendant Inoa after commencement of the action. Even if counsel provided a reasonable explanation for failing to include those facts in the prior motion, they do

not warrant a change in the prior determination (*see* CPLR 2221[e][2],[3]). Indeed, plaintiff still failed to provide an affidavit of merit or a reasonable excuse for the 2½-year delay in moving for a default judgment against defendant Brown-Grey (*see Mejia-Ortiz v Inoa*, 71 AD3d 517 [2010]). The medical records submitted in reply were not properly before the motion court and, in any event, were not affirmed (*see Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1992]).

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

ENTERED: NOVEMBER 10, 2011

CLERK

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

5486- Index 602303/09
5487-
5488-
5489-
5490-
5491 RSB Bedford Associates, LLC,
Plaintiff-Respondent,

-against-

Ricky's Williamsburg,
Inc., etc., et al.,
Defendants-Appellants.

_____

Santamarina & Associates, New York (Gil Santamarina of counsel), for appellants.

Gallagher, Harnett & Lagalante LLP, New York (Brian K. Gallagher of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Bernard J. Fried, J.), entered April 14, 2010, June 17, 2010, June 23, 2010 and November 4, 2010, affirmed, with costs. Appeal from order, same court and Justice, entered August 12, 2010, dismissed, without costs, as taken from a non-appealable order.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
James M. Catterson
Karla Moskowitz, JJ.

5486-5487-5488-
5489-5490-5491
Index 602303/09

_____x

RSB Bedford Associates, LLC,
Plaintiff-Respondent,

-against-

Ricky's Williamsburg,
Inc., etc., et al.,
Defendants-Appellants.
_____x

Defendants appeal from an order of the Supreme Court, New York County (Bernard J. Fried, J.), entered April 14, 2010, which, inter alia, granted plaintiff's motion for partial summary judgment as to liability, from an order, same court and Justice, entered June 23, 2010, which, inter alia, granted plaintiff's cross motion to reargue, and found that defendant Ricky's Williamsburg, Inc., d/b/a Ricky's NYC was also liable for attorney's fees, from an order, same court and Justice, entered on or about June 17, 2010, which denied defendants' motion to stay or cancel the damages trial, from an order, same court and Justice, entered August 12, 2010, which, inter alia, ordered certain discovery and ordered discovery completed by August 31, 2010; and from an order, same

court and Justice, entered November 4, 2010, which, inter alia, denied defendants' motion to compel compliance with a subpoena served on a nonparty and granted plaintiff's cross motion to quash.

Santamarina & Associates, New York (Gil Santamarina of counsel), for appellants.

Gallagher, Harnett & Lagalante LLP, New York (Brian K. Gallagher of counsel), for respondent.

MOSKOWITZ, J.

A commercial tenant and its guarantor parent corporation appeal from five orders: three substantive determinations and two discovery rulings. Because plaintiff's willingness and ability to close on the property associated with the lease at issue is irrelevant, we affirm.

Plaintiff RSB Bedford planned to buy a building on Bedford Avenue in Brooklyn (the property). However, plaintiff was unwilling to acquire the property without a committed commercial tenant. Accordingly, in anticipation of entering into a commercial lease, plaintiff entered into a letter agreement (the side letter) on August 12, 2008 with defendant Ricky's Williamsburg (Ricky's or defendant). In the side letter, Ricky's specifically acknowledged that:

> "Landlord does neither currently own the Property nor have the Property under contract. Landlord intends to execute a contract (the "Contract") concurrently with or shortly after executing the Lease. Landlord is unwilling to execute the Contract for the acquisition of the Property until the Lease has been fully signed" (emphasis added).

Thus, defendant understood that plaintiff did not currently own the property and would not acquire the property until plaintiff had obtained a tenant for it.

In the side letter, defendant also acknowledged that

plaintiff had until September 14, 2009 to close on the property. If title did not close by that date, defendant would have the right to terminate the lease unilaterally (the walkaway clause). Defendant also had the right to terminate if plaintiff did not sign an agreement to acquire the property by September 15, 2008 or if, after acquiring title, plaintiff failed to deliver the property in the condition the lease required.

As the side letter had contemplated, on August 18, 2008, the parties entered into a lease for space at the property. Among other things, the lease provided that defendant promised to take possession of a particular retail storefront on the "Commencement Date." The commencement date remained open in the lease for the obvious reason that plaintiff had not yet purchased the property. The lease specifically provided that if delivery of possession had not occurred by March 1, 2010, defendant had the right to cancel the lease with no further obligation to plaintiff. The lease also contained a standard merger clause prohibiting changes that were not in writing.

On August 18, 2008, plaintiff also entered into a guaranty agreement with defendant's parent company, defendant Ricky's Holdings, Inc. (Holdings). Under the guaranty, Holdings

guaranteed all aspects of defendant's performance and obligations under the lease and side letter.

On August 27, 2008, plaintiff signed an agreement to purchase the property (the acquisition agreement).

On June 15, 2009, counsel for defendant sent a letter "to formally notify [plaintiff] that Ricky's will not take possession of the premises" (the rejection letter). Although defendant had acknowledged in the side letter that plaintiff had not yet acquired the property and that plaintiff wanted a signed lease before entering into the acquisition agreement, defendant nevertheless accused plaintiff of material misrepresentation because "this firm has learned that you do not own the Premises in fee simple as you represented in the purported lease." Ignoring the merger clause in the lease, the rejection letter also accused plaintiff of having failed "to deliver the Premises in accordance with your subsequent oral modifications to the alleged lease." Even though the dates whereby defendant could walk away from the deal had not occurred, the rejection letter stated, "[A]s a result of your repeated delays and general inability to meet with the terms of the alleged lease, my client has suffered material damages." The rejection letter continued that "[a]s a result of your seemingly incompetent and unethical

behavior, my client has no desire to enter into any business arrangement with you or your corporate vehicles." The rejection letter included a release in favor of defendants and stated that plaintiff should agree to rescind the agreements. The rejection letter threatened legal action if plaintiff did not comply.

In July 2009, plaintiff commenced this action that included a claim for anticipatory breach of the lease and side letter. Plaintiff sought, inter alia, damages arising from its inability to purchase the building, as well as lost rent and other unspecified damages totaling $20 million.

Defendants filed their answer and counterclaim on August 13, 2009. Accompanying the answer was a request for production of documents. On August 28, 2009, plaintiff moved for partial summary judgment as to defendant Rickys' liability and to dismiss the counterclaims. Ricky's opposed and cross-moved to dismiss the complaint.

Supreme Court heard oral argument on March 11, 2010. Defendants did not, either in their brief or during oral argument, argue that plaintiff had to show it was ready, willing and able to perform in order to recover.

On April 12, 2010, the motion court granted partial summary judgment as to liability against both defendants. The court

found the rejection letter to be an unequivocal statement of intent to breach the agreement. The court also granted plaintiff's request for attorney's fees and costs against Holdings only and referred the issues of the amount of damages, attorneys fees and costs to a special referee to hear and report with recommendations. Defendants have appealed from this order to the extent it granted plaintiff's motion for partial summary judgment.

Defendants moved to reargue. Plaintiff cross-moved to reargue that part of the decision that denied plaintiff's motions for attorney's fees and costs against Ricky's. On June 6, 2010, the court denied defendants' motion for reargument, but granted plaintiff's, and accordingly also sent the issues of attorney's fees and costs relating to Ricky's to a special referee. Defendants also appeal from this order.

The hearing before the special referee was to take place on June 17, 2010. However, defendants moved by order to show cause to vacate or stay that hearing. Defendants argued that the lease, the letter agreement and the guaranty expressly precluded recovery for compensatory or consequential damages and these were what plaintiff was seeking. Supreme Court denied this motion on June 17, 2010 without explanation. Defendants appealed.

Defendants served discovery demands on plaintiff and the nonparty seller of the property at issue, and asked the court for leave to conduct discovery and to set a discovery schedule. On August 5, 2010, the court provided for limited discovery, including that: (1) the parties must provide all documents they were to use at the hearing, (2) "plaintiff must provide all documents concerning the $400,000 deposit and return of that deposit" and (3) plaintiff had to provide all documents that defendants had requested a year earlier that related to damages. The court did not provide for any nonparty discovery. The court then restored the case to the Special Referee Calendar. Defendants have taken an appeal from this order as well. However, as this order is apparently not from a motion on notice, it is not appealable. The proper course would have been for defendants to move to vacate and appeal from the denial of vacatur.

Undeterred, defendants moved to compel discovery from plaintiff and the nonparty seller, seeking documents related to the sale of the property. Plaintiff moved to quash and for a protective order. In a separate motion, defendants moved for penalties and, in yet another motion, plaintiff moved for sanctions. On November 1, 2010, Supreme Court consolidated all

of these motions for disposition and (1) denied defendants' motion to compel discovery from the nonparty seller because, inter alia, the information defendants sought was relevant to the issue of liability rather than damages; (2) granted that part of plaintiff's motion for a protective order preventing Ricky's from issuing any additional discovery notices or requests of any kind without leave of court; (3) granted that part of plaintiff's motion for sanctions prohibiting defendants from presenting any further arguments or evidence on the issue of liability and (4) denied the remainder of plaintiff's motion seeking other sanctions.

As part of their motion to compel, defendants sought an order to strike portions of plaintiff's complaint and resolve certain issues in defendants' favor. The basis for seeking this relief was an argument that defendants made for the first time, namely that plaintiff had failed to produce documents "evidencing its being ready, willing and able to purchase the Property on the date of Ricky's breach in June of 2009." Defendants argued that a party seeking damages for anticipatory breach of contract must show that it was in a position to perform at the time of the repudiation in order to recover damages. In the November 1, 2010 order, the motion court held that "the information sought goes

not to the question of damages, but rather, to liability." As the court had already determined the issue of liability, the court denied defendants' motion to compel or strike portions of plaintiff's complaint. The court also prohibited defendants from "making additional arguments, or presenting any additional evidence, that is offered for the purpose of refuting the determination of their liability on the Complaint." Defendants appeal from this order as well.

Discussion:

Defendants maintain that the motion court erred because it did not allow an inquiry into plaintiff's being "ready willing and able" to close on the property. Defendants argue that this inquiry is relevant to the damages that plaintiff could recover for anticipatory breach. As discussed, the motion court denied defendants' motion to compel certain discovery on the grounds that the "ready, willing and able standard" was relevant only to liability. Plaintiff, relying on *American List Corp. v U.S. News and World Report*, Inc. (75 NY2d 38 [1989]), argues that the "ready, willing and able" standard is not material to either liability or damages for anticipatory breach.

However, we do not need to reach the issue of when and whether the court should have allowed an inquiry into plaintiff's

ability to close because, under the contracts, plaintiff's ability to close is irrelevant. The parties planned in the contracts for the contingency that plaintiff might not be ready, willing and able to acquire the property. Under the side letter, Ricky's expressly agreed that plaintiff could have until September 14, 2009 to close on the property. The side letter states defendant could unilaterally terminate the lease on that date if the closing had not taken place. Instead of waiting until September 14, 2009, Rickys' counsel sent a letter in June 2009 that was unequivocal in its expression that Ricky's was terminating the agreement to lease the premises. Thus, Ricky's breached the schedule to which the parties had agreed (*see 131 Heartland Blvd. Corp. v C.J. Jon Corp.*, 82 AD3d 1188, 1189-1190 [2011] ["defendant's cancellation of the contract when the deadline for obtaining the lease modification agreement had not yet passed, constituted a wrongful repudiation of the contract"]).

Nor is the issue of plaintiff being ready, willing and able to close relevant to damages. Ricky's signed an agreement with a walkaway clause providing that the termination date was September 14, 2009. It could have negotiated for an earlier date. It did not do so. Accordingly, by walking away prior to

September 14, 2009, Ricky's breached the contractual arrangement it made with plaintiff and is liable for damages circumscribed by whatever contractual limits may apply. However, the propriety of the damages Supreme Court might award, if any, is not before us at this time.

There is another reason the ready, willing and able requirement is irrelevant. A party cannot prevent the fulfillment of a contractual condition and then argue failure of that condition as a defense to a claim that it breached the contract (*see Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262 [1995] ["failure of the condition cannot be utilized as a defense where, as here, the party resisting the contractual obligation has affirmatively acted to obviate its fulfillment"]; *Sunshine Steak, Salad & Seafood, Inc. v W.I.M. Realty, Inc.*, 135 AD2d 891, 892 [1987]). Here, the side letter that defendant signed made clear that plaintiff could not close without the lease. By pulling out of the lease, Ricky's frustrated the ability of plaintiff to close.

Finally, there is nothing in the lease creating an obligation running from plaintiff to Ricky's that required plaintiff to close. Any obligation plaintiff had to be ready, willing and able to close would run to the seller under the

acquisition agreement. Defendant is presumably not a party to that agreement (*cf. In re Bankers Trust Co.*, 450 F3d 121, 128 [2d Cir 2006], citing *Amies v Wesnofske*, 255 NY 156, 163 [1931]).[1] Defendants also argue that Ricky's is not liable for attorney's fees under the lease because the lease never went into effect. This argument suffers from the same infirmity as defendants' argument concerning their general liability. Namely, Ricky's breached the agreement by failing to wait until September 14, 2009 to terminate the lease, and plaintiff is entitled to the attorneys' fees as the contract provides.

Defendants claim they cannot be liable for consequential damages in the form of lost profits or an acceleration of rent under the lease (compensatory damages) because the lease and the side letter bar this sort of liability. However, the limitation on damages these documents may contain is not an issue relating to liability, but rather goes to the proper calculation of damages. As noted, this issue is not before us.

Defendants also claim that it was error for the motion court to find that Ricky's breach triggered Holdings' obligations under the guaranty. Holdings guaranteed

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[1] Even if plaintiff's being "ready willing and able" were relevant to liability, defendants waived the argument by failing to raise it in opposition to the summary judgment motion.

> "prompt payment when due . . . [and] all *reasonable attorneys' fees*, costs, and expenses of collection incurred by Landlord in enforcing its rights and remedies under the Lease, and together with the full and complete discharge and performance of each and every. . . term, covenant, obligation or warranty contained in the Lease *or any other document executed in connection with the Lease by the Tenant*" (emphasis added).

Because the guaranty covers obligations in "any other document executed in connection with the Lease," it covers the side letter. Defendants breached the lease and the side letter with their June 2009 letter. Thus, the guaranty clearly applies. Defendants also challenge the court's ruling that Holdings is liable for attorney's fees under the guaranty. However, Holdings also guaranteed "reasonable attorney's fees" that plaintiff incurred in "enforcing its rights." Thus, the argument that Holdings is not liable for attorney fees lacks any basis.

In a similar vein, defendants challenge the motion court's ruling on reargument that awarded plaintiff its costs and attorney's fees against Ricky's. However, rider 16.01(iii) of the lease provides for defendants to pay plaintiff's attorney's fees in connection with, inter alia, "any breach by Tenant of any of the terms and/or provisions of this Lease." Thus, the plain language of this subsection imposes liability on both defendants

for legal fees should Ricky's breach the lease. As noted, Ricky's did breach the lease, albeit anticipatorily. Accordingly, Ricky's is liable for attorney's fees.

Finally, defendants appeal from the denial of their motion to stay or cancel the damages hearing. However, this motion really was a thinly-veiled attempt to once again reargue the summary judgment motion. This time, defendants argued that plaintiff lacks standing to sue for lost rent because plaintiff never became the landlord of the property. However, this argument and the authority defendants cite are completely inapposite to this claim for breach of contract. We find the remainder of defendants' arguments unavailing.

Accordingly, the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered April 14, 2010, that, inter alia, granted plaintiff's motion for partial summary judgment as to liability, should be affirmed, with costs; the order of the same court and Justice, entered June 23, 2010, that, inter alia, granted plaintiff's cross motion to reargue and found that defendant Ricky's Williamsburg, Inc. d/b/a Ricky's NYC was also liable for attorney's fees, should be affirmed, with costs; the order of the same court and Justice, entered on or about June 17, 2010, that denied defendants' motion to stay or cancel the damages trial, should be affirmed, with costs; and the order of

the same court and Justice, entered November 4, 2010, that, inter alia, denied defendants' motion to compel compliance with a subpoena served on a nonparty and granted plaintiff's cross motion to quash, should be affirmed, with costs. The appeal from the order, same court and Justice, entered August 12, 2010, that, inter alia, ordered certain discovery and ordered discovery completed by August 31, 2010, should be dismissed, without costs, as taken from a non-appealable order.

All concur.

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

ENTERED: NOVEMBER 10, 2011

CLERK