SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 17, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6056 Andrew Johnson, Index 16727/06
Plaintiff-Appellant,

-against-

301 Holdings, LLC, et al.,
Defendants-Respondents.

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Wingate, Russotti & Shapiro, LLP, New York (Florina Altshiler of counsel), for appellant.

Gallo Vitucci & Klar LLP, New York (Kimberly A. Ricciardi of counsel), for respondents.

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Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered August 30, 2010, which, in this action for personal injuries sustained when plaintiff tripped and fell on the bottom step of an interior staircase in the lobby of defendants' building, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by presenting evidence showing that the stairs were

not inherently dangerous and did not constitute a hidden trap. The evidence showed that the lobby and stairs were well lit; that there were no physical defects in the structure of the steps; that plaintiff was well aware of the steps since he had been a tenant in the building for several years and had traversed the lobby hundreds of times; and that no one had ever complained about the stairs (*see e.g. Broodie v Gibco Enters. Ltd.*, 67 AD3d 418 [2009]; *Burke v Canyon Rd. Rest.*, 60 AD3d 558 [2009]; *see also Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665 [2010]).

Plaintiff failed to raise a triable issue of fact in opposition to the motion. His reliance on the expert's affidavit is misplaced since the sections of the New York City Building Code cited by the expert were not applicable to the stairs (*see DeRosa v City of New York*, 30 AD3d 323, 326 [2006]]).

We have considered plaintiff's remaining contentions,

including that he momentarily forgot about the presence of the staircase, and find them unavailing.

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

6058 The People of the State of New York, Ind. 2750/08
Respondent,

-against-

Jonathan Ryer,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered March 19, 2010, convicting defendant, after a nonjury trial, of manslaughter in the first degree, and sentencing him to a term of 10 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's intent to cause, at least, serious physical injury could be readily inferred from his actions (*see People v Getch*, 50 NY2d 456, 465 [1980]). Defendant inflicted a deep stab wound that

perforated the victim's kidney. The evidence does not support his assertion that he acted recklessly, or that he was attempting to defend himself.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

6066 George Heath, Index 40555/78
Plaintiff-Appellant,

-against-

John S. Wojtowicz, et al.,
Defendants.

Warner Bros. Inc.,
Defendant-Respondent.

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George Heath, appellant pro se.

Margolin & Pierce, LLP, New York (Philip Pierce of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about July 19, 2011, which denied plaintiff's motion seeking reimbursement from defendant Warner Bros., Inc. pursuant to a settlement agreement with plaintiff's predecessor in interest, unanimously modified, on the law and the facts, to issue an order barring plaintiff from commencing any further actions or proceedings seeking to obtain royalties from the film "Dog Day Afternoon," and otherwise affirmed, without costs.

The motion court properly denied plaintiff's motion seeking additional royalties from Warner Bros. Plaintiff's claim was previously litigated, it was determined that he is due 16 2/3% of the 1% of royalties owed to his predecessor, the late John S.

Wojtowicz, and that determination was affirmed by this Court (72 AD3d 402 [2010], *lv dismissed* 15 NY3d 768 [2010]). Accordingly, plaintiff is barred by the doctrine of res judicata from relitigating this claim (*see Marinelli Assoc. v Helmsley-Noyes Co.*, 265 AD2d 1, 5 [2000]).

Furthermore, given plaintiff's pattern of continuous and vexatious litigation concerning this subject matter for the past few decades (*see e.g. New York State Crime Victims Bd. v Abbott*, 212 AD2d 22 [1995]), an injunction barring him from commencing new actions or proceedings seeking royalties from the film is warranted.

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 17, 2011

CLERK

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

6068-
6069 The People of the State of New York, Respondent,

-against-

Randall John,
Defendant-Appellant.

Ind. 3829/08

– – – – –

The People of the State of New York,
Respondent,

-against-

Levon Pratt,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), for Randall John, appellant.

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

Levon Pratt, appellant pro se.

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

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Judgments, Supreme Court, New York County (John Cataldo, J.), rendered July 9, 2009, convicting defendants, after a jury trial, of robbery in the first and robbery second degrees, criminal possession of a weapon in the second degree (two counts) and criminal possession of a marijuana in the fifth degree, and sentencing defendant John to an aggregate term of 15 years, and

sentencing defendant Pratt, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court properly declined to suppress identification testimony. The prompt showup was part of an unbroken chain of exigent events (*see People v Serrano*, 219 AD2d 508 [1995]). Immediately after the robbery, the identifying witness pointed out the car in which his assailants were fleeing. The police pursued the car, stopped it, arrested defendants, and conducted a showup.

The overall effect of the allegedly suggestive circumstances was not significantly greater than what is inherent in any showup (*see People v Gatling*, 38 AD3d 239, 240 [2007], *lv denied* 9 NY3d 865 [2007]). Even assuming that the facts relating to the showup were as the officer testified on cross-examination rather than as he testified on direct and redirect examination, the showup was not unduly suggestive. "[T]he witness, using his common sense, could have discerned that the likely reason for the prompt arrest was that the police had located the getaway car" (*People v Stewart*, 257 AD2d 442, 443 [1999], *lv denied* 93 NY2d 902 [1999]), and arrested the men whom the witness had described. Accordingly, even if the officer gave the witness unnecessary information about the circumstances of the arrest, it was

information the witness would have expected.

The court's *Sandoval* ruling regarding defendant Pratt balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). The court minimized any potential prejudice when it precluded almost all inquiry into the underlying facts of Pratt's prior convictions.

The other evidentiary rulings challenged by defendants were proper exercises of discretion. In any event, any error regarding either or both rulings was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentences.

We have considered and rejected defendant Pratt's pro se claims.

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

6070 In re Dandre H.,

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

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

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

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about December 16, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree, sexual abuse in the first degree, and sexual misconduct, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

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]). There is no basis for disturbing the court's credibility determinations.

The court properly permitted the five-year-old victim to

give sworn testimony. The victim's voir dire responses established that he sufficiently understood the difference between truth and falsity, that lying was wrong, and that lying could bring adverse consequences (*see People v Nisoff*, 36 NY2d 560, 565-566 [1975]; *People v Cordero*, 257 AD2d 372 [1999], *lv denied 93* NY2d 968 [1999]). Furthermore, there was significant corroborating testimony provided by an adult family member. This witness entered the bedroom occupied by appellant and the victim, and saw indications that a sex act had just occurred.

To the extent certain testimony exceeded the bounds of the prompt outcry exception to the hearsay rule (*see People v McDaniel*, 81 NY2d 10, 16-17 [1993]), the error was harmless. In this nonjury trial, the court is presumed to have considered only proper evidence in reaching its verdict (*see People v Moreno*, 70 NY2d 403, 406 [1987]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

6071 Gerhard Wetzel, et al., Index 13468/06
Plaintiffs-Appellants,

-against-

Juan Santana, et al.,
Defendants-Respondents.

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Law Offices of Andrew J. Spinnell, LLC, New York (Andrew J. Spinnell of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered March 23, 2010, which, insofar as appealed from as limited by the briefs, in this action for personal injuries sustained when plaintiff pedestrian Gerhard Wetzel was struck by defendants' vehicle as he crossed the street, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by presenting evidence showing that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d). Defendants submitted the affirmed report of an orthopedist who examined plaintiff and found that he had normal ranges of motion in his cervical spine and that the limited

ranges of motions in his lumbar spine were related to his age (*see Torres v Triboro Servs., Inc.*, 83 AD3d 563 [2011]).

In opposition, plaintiff did not raise a triable issue of fact. Plaintiff failed to submit competent medical evidence showing either recent or contemporaneous range of motion testing. Accordingly, he failed to demonstrate a causal connection between his injuries and the accident (*see Pou v E & S Wholesale Meats, Inc.*, 68 AD3d 446 [2009]). Although the unaffirmed report of the MRI performed upon plaintiff in November 2006 revealed the presence of herniated discs in the cervical spine, the mere existence of "bulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury" (*DeJesus v Paulino*, 61 AD3d 605, 608 [2009]). The MRI also fails to support plaintiff's claims since it was taken more than two years after the accident.

Furthermore, plaintiffs' bill of particulars, wherein he alleged that he was confined to bed for two to three days after the accident, is fatal to the claim under the 90/180-day category of Insurance Law § 5102(d) (*see Lopez v Eades*, 84 AD3d 523 [2011]).

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

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

6072 Richard T. Fitzsimmons, et al., Index 651360/10
Plaintiffs-Respondents,

-against-

Pryor Cashman LLP, et al.,
Defendants-Appellants.

_____

Pryor Cashman LLP, New York (Gideon Cashman of counsel), for appellants.

Schulte Roth & Zabel LLP, New York (Ronald E. Richman and Max Garfield of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 10, 2011, which, in a legal malpractice action alleging, among other things, that defendants failed to notify plaintiffs of information indicating that money may have been misappropriated from the benefit funds of which plaintiffs were trustees, denied defendants' motion to dismiss the complaint based on documentary evidence and for failure to state a cause of action, unanimously affirmed, without costs.

The court applied the correct standard and properly held that the complaint states a cause of action for legal malpractice. Plaintiff put forth sufficient detail to establish the negligence of the attorneys, that the negligence was the proximate cause of the losses sustained by the benefits funds,

and actual damages to those funds (*see Leder v Spiegel*, 9 NY3d 836, 837 [2007], *cert denied* 552 US 1257 [2008]; *O'Callaghan v Brunelle*, 84 AD3d 581, 582 [2011]). Plaintiffs were not required to allege the specific scope of defendants' duties, given the absence of a governing retainer agreement (*see Greenwich v Markhoff*, 234 AD2d 112, 114 [1996]). Moreover, the documentary evidence — including Form 5500s, minutes of a 1997 Board meeting, and Department of Labor letters — does not conclusively disprove plaintiffs' allegations (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Plaintiffs' expert affidavit was properly considered to remedy any defects in the complaint (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

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

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

6074-
6075 Rita DiCarlo, Index 114153/07
Plaintiff-Appellant,

-against-

Beacway Operating, LLC,
Defendant-Respondent.

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Law Offices of Peter L. Quan, PLLC, New York (Leslie Sultan of counsel), for appellant.

Gartner & Bloom, P.C., New York (Arthur P. Xanthos of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered December 7, 2009, which, in an action for personal injuries allegedly sustained by plaintiff tenant as a result of exposure to mold in defendant landlord's building, granted defendant's motion for summary judgment dismissing the complaint, and order, same court and Justice, entered January 31, 2011, which, upon renewal, adhered to the prior order dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was warranted. The plain terms of a prior stipulation of settlement in defendant's nonpayment profeeding resolved all grievances between the parties, including plaintiff's counterclaim of harmful mold exposure while she was a tenant in defendant's apartment (*see Matter of Matinzi v Joy*, 96

AD2d 780, 781 [1983], *affd* 60 NY2d 835 [1983]).

The evidence presented by plaintiff on the motion to renew did not warrant a different result.

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 17, 2011

CLERK

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

6077 Evelyn Britton, Index 303660/08
Plaintiff-Respondent,

-against-

Villa Auto Corp., et al.,
Defendants-Appellants,

Nicolette Evanson,
Defendant.

_____

Marjorie E. Bornes, New York, for appellants.

Patrick J. Hackett, Garden City, for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered April 15, 2010, which, to the extent appealed from, denied defendants Villa Auto Corp. and Thami Boulabut's motion for summary judgment dismissing the complaint as against them on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted, and, upon a search of the record, defendant Evanson's motion granted as well. The Clerk is directed to enter judgment dismissing the complaint against all defendants.

Defendants moved for summary judgment and made out a prima facie showing that plaintiff did not suffer a serious injury. In

opposition to that motion, plaintiff offered no explanation for her failure to pursue any treatment for almost three years after the initial period of treatment that encompassed less than two months (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Agramonte v Marvin*, 22 AD3d 322 [2005]). In addition, although plaintiff testified that she underwent physical therapy for six months beginning a week after the accident and that she stopped going because no-fault would no longer pay her bills, there is no evidence of this treatment in the record. To the contrary, the records of Dr. Rose, plaintiff's expert, suggest that if plaintiff went to physical therapy, she stopped going less than six weeks after the accident.

Plaintiff failed to submit any competent objective medical or other evidence in support of her 90/180-day claim. Her deposition testimony established that she was confined to bed and home for less than one month after the accident (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660, 663 [2010]; *Hospedales v "John Doe,"* 79 AD3d 536 [2010]).

Defendant Evanson did not appeal from the denial of her motion for summary judgment. Nonetheless, she is entitled to summary dismissal of the complaint as against her, since "if

plaintiff cannot meet the threshold for serious injury against one defendant, she cannot meet it against the other" (*Lopez v Simpson*, 39 AD3d 420 [2007]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

6078 In re Aaliyah H.,

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

_____

Richard L. Herzfeld, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondent.

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about October 4, 2010, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of robbery in the second degree, and placed her 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, and it 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]). Appellant had already been on probation for a

prior delinquency adjudication, but her pattern of unlawful behavior continued to escalate. In addition, she had a very poor academic and attendance record at school, along with behavior problems and inadequate supervision at home. For the same reasons, the length of the placement was not excessive.

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

6079N Yousef Yahudaii, Index 103449/08
Plaintiff,

-against-

Nourallah Baroukhian, etc.,
Defendant-Appellant,

Manouchehr Malekan, et al.,
Defendants.

– – – – –

Reisman, Peirez & Reisman, L.L.P.,
Nonparty Respondent.

_____

Nourallah Baroukhian, appellant pro se.

Reisman Peirez Reisman & Capobianco LLP, Garden City (Jerome Reisman of counsel), for respondent pro se.

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Appeal from order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 5, 2010, which, inter alia, granted nonparty respondent's motion to confirm the judicial hearing officer's report, following an inquest, determining the reasonable value of the legal services rendered and disbursements paid by respondent on behalf of defendant Nourallah Baroukhian in the underlying commercial foreclosure action, deemed appeal from judgment, same court and Justice, entered September 14, 2010 (CPLR 5520[c]), against said defendant in favor of respondent in the total amount of $72,572.25, and, so considered, said judgment

unanimously affirmed, without costs.

The JHO's findings are supported by the record (*see Barrett v Toroyan*, 45 AD3d 301 [2007]). To the extent defendant challenges the quality of the legal services provided, his contentions are unavailing, because he failed to raise them before the JHO (*see Marcano v U-Haul Co. of Va.*, 82 AD3d 479 [2011]; *DiIorio v Gibson & Cushman of N.Y.*, 204 AD2d 167 [1994]). Similarly, at the inquest, defendant failed to raise the claim that he was misled as to what was scheduled to take place on the day of the inquest itself.

We find that the fee dispute is not subject to arbitration. While the retainer agreement properly references Part 137 of the Rules of the Chief Administrator, the fee dispute resolution program established by part 137 does not apply to fee disputes involving sums of more than $50,000, absent the consent of the parties (*see* 22 NYCRR 137.1[b][2]).

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

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

6080N Laurie Alvarez, Index 300298/10
Plaintiff-Respondent,

-against-

Metropolitan Transportation Company, etc.,
Defendant,

Liberty Lines Transit, Inc., et al.,
Defendants-Appellants.

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

Law Offices of Ryan S. Goldstein, PLLC, Bronx (Ryan S. Goldstein of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered November 12, 2010, which, in an action for personal injuries, denied the motion of defendants-appellants to change venue from Bronx County to Westchester County, unanimously affirmed, without costs.

CPLR 504(1) would ordinarily place venue in Westchester County (*see Powers v East Hudson Parkway Auth.*, 75 AD2d 776 [1980]; *see also Chitayat v Princeton Restoration Corp.*, 289 AD2d 102 [2001]). However, when plaintiff named the Metropolitan Transportation Company as a defendant, a conflict arose between CPLR 504(1) and CPLR 505(a). Thus, the court had the discretion

to choose a venue proper for at least one of the parties or claims (CPLR 502). The court did not abuse its discretion when it left venue in Bronx County, where the motor vehicle accident occurred and where defendant bus driver resides. We note that should the record develop sufficiently to establish that the Metropolitan Transportation Company was improperly named as a defendant, the remaining defendants may still move under CPLR 504(1) for a change of venue.

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

ENTERED: NOVEMBER 17, 2011

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4870 The People of the State of New York, Ind. 1438/07
Appellant,

-against-

Devon Wallace,
Defendant-Respondent.

_____

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Sheilah Fernandez of counsel), for respondent.

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Order, Supreme Court, New York County (Thomas Farber, J.), entered on or about September 15, 2009, which granted defendant's motion to suppress physical evidence, unanimously reversed, on the law, and the motion denied.

On the morning of March 18, 2007, the operator of a stopped J train in the Gates Avenue station in Brooklyn was approached by a man on the platform he described as of "Indian" appearance. The man, who spoke quickly and appeared to be nervous, told the operator, who had almost 20 years of experience, that a black man in the first car of the train had a gun in a brown bag and was displaying it to people. The operator, while continuing the train run, used his radio to contact the police, but did not know whether his report had been heard.

Moments later, the man approached the station agent working in the toll booth at the Gates Avenue station and advised her that there was a man on the train wearing a brown shearling jacket who had a brown bag with a gun in it. The agent immediately hit the button on the Emergency Booth Communication System, causing a report to be sent to the police. Police Officer Isaac Garcia received a radio run about a "male black with a brown jacket, brown bag, with a firearm" located on the J train approaching the Essex Street station in Manhattan.

As the J train entered the Essex Street station, the operator stopped it and told a police officer that this was the train on which the armed man was riding. The officer, one of six present at the time, told the operator to pull up to the end of the station. Once the train stopped, the police, knowing that the man with a gun was in the first car, proceeded to remove two black males with brown jackets and put them against the wall. Officer Garcia then walked back into the train with his weapon drawn and, as he entered, he saw defendant standing in front of a group of mostly Asian females trying to get into the crowd. Garcia and defendant made eye contact and Garcia raised and pointed his weapon at defendant. Garcia told defendant to get off the train, and a supervisor grabbed defendant and put him

against the wall. Defendant did not obey the instructions, and Garcia unclipped a bag hanging from defendant's chest. The police found a loaded firearm in the bag.

After hearing testimony to the foregoing effect, Supreme Court granted defendant's motion to suppress the gun based on a finding that the police lacked reasonable suspicion to stop defendant. We reverse.

Upon receiving a report of a man with a gun in the first car of the J train, the police were duty-bound to take action (*People v Benjamin*, 51 NY2d 267, 270 [1980]). Even an anonymous telephone tip giving only a general description and the location of an individual with a gun permits a common-law inquiry by the police (*see People v Bora*, 191 AD2d 384, 385 [1993], *affd* 83 NY2d 531 [1994]; *People v Gaines*, 159 AD2d 175, 177 [1990]). However, "when the information provided by the tip is considered in conjunction with the attendant circumstances and exigencies . . . , more intrusive police action may be justified" (*Bora*, 191 AD2d at 385).

We agree with Supreme Court and defendant that the information furnished to the station agent did not, by itself, create reasonable suspicion. Nonetheless, and contrary to defendant's contention, *Florida v J.L.* (529 US 266 [2000]) is

distinguishable in that, here, the informant imparted the information in a face-to-face encounter, thereby enhancing his reliability (*see People v Appice*, 1 AD3d 244 [2003], *lv denied* 1 NY3d 595 [2004]).

Nor does the fact that the information was imparted to a station agent or conductor mean that the informant should be regarded as anonymous within the meaning of *Florida v J.L.* As Supreme Court observed:

> "Station agents and train conductors are the natural point of contact for someone reporting an emergency situation in a subway car. And it seems likely that both train conductors and station agents are as able as police officers to make the kind of reliability assessment necessary to transmit this type of information to command central. Moreover, while it is possible to imagine any number of reasons why someone might make a false report to 911 or to a police officer to get someone in trouble, it is less likely that a live civilian -- even if unidentified -- would make this type of [false] report to a subway motorman or station agent."

In any event, the circumstances supported police action more intrusive than a mere common-law inquiry. The encounter occurred, not on the street, but within the confines of a subway car, where defendant was trying to push his way into a group of people. This attempt, akin to an attempt to flee, by a person who met the description given to the police, elevated the situation to one of reasonable suspicion (*see People v Brown*, 216

AD2d 3 [1995]). Moreover, the potential danger to both the innocent bystanders and the police officer in the confined subway car was obvious.

Accordingly, we conclude that the police did not act unreasonably in removing defendant from the train for a pat down, considering the information imparted by the informant in a face-to-face meeting, the obvious concern the officer had for his own safety and that of the surrounding passengers, and defendant's attempt to push into the surrounding passengers after he made eye contact with the officer. It follows that the motion to suppress should have been denied.

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

4969 Sumitomo Mitsui Banking Corporation., Index 600898/10
Plaintiff-Appellant-Respondent,

-against-

Credit Suisse, et al.,
Defendants-Respondents-Appellants.

_____

Miller & Wrubel, P.C., New York (Martin D. Edel of counsel), for appellant-respondent.

Lankler Siffert & Wohl, LLP, New York (Charles T. Spada of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered October 15, 2010, which denied plaintiff's motion for summary judgment and to dismiss defendants' counterclaim and affirmative defenses, and denied defendants' cross motion for summary judgment, affirmed, without costs.

In 2006, Credit Suisse and other lenders, including plaintiff, entered into a $5.5 billion unsecured credit agreement (the 2006 Credit Agreement) with nonparty Capmark Financial Group, Inc. (Capmark). Credit Suisse and other lenders also entered a $5.25 billion unsecured bridge loan agreement (the Bridge Loan) with Capmark. Plaintiff was not a Bridge Loan lender, but purchased a $200 million participation interest therein from Credit Suisse.

The participation agreement provides that upon receipt by Credit Suisse of any "cash Distribution," Credit Suisse shall pay plaintiff its pro rata share, and that upon receipt of a "non-cash Distribution," Credit Suisse shall transfer to plaintiff, at plaintiff's expense, its share of "the beneficial and record ownership of such . . . non-cash Distribution." The participation agreement defines "Distribution" as "any payment or other distribution (whether received by set-off or otherwise) of cash (including interest), notes, securities or other property (including collateral) or proceeds under or in respect of the Seller's Interest."

In 2009, facing an increasingly challenging financial situation, Capmark commenced negotiations to restructure its debt, including the $833 million principal balance of the Bridge Loan, which was due March 23, 2009. Towards this end, in May 2009, Capmark and the 2006 Credit Agreement lenders, the Bridge Loan lenders and several new lenders executed a secured $1.5 billion Term Facility Credit and Guaranty Agreement (the 2009 Credit Agreement), the proceeds of which were be used "solely to make an Existing Bridge Loan Agreement Repayment and an Existing [2006] Credit Agreement Repayment." Existing Bridge Loan Agreement Repayment" was defined as "any ratable repayment or

prepayment in cash of outstanding Existing Bridge Loans." Existing Credit Agreement Repayment was defined as "any ratable repayment or prepayment of outstanding 'loans' under and as defined in the [2006 Credit Agreement] in cash (accompanied, in the case of any repaid Revolving Credit Loans, with a permanent reduction in the corresponding Revolving Credit Commitments)." Capmark and the lenders also executed "Amendment No. 3 and Waiver to the [2006] Credit Agreement" and "Amendment No. 9 and Waiver to the Bridge Loan Agreement" which provided that Capmark would make repayments "in cash."

As a condition precedent to the closing, the 2009 Credit Agreement provided that "substantially contemporaneously" with the borrowing under the 2009 Credit Agreement, not less than $984,375,000 of an Existing Credit Agreement Repayment and $590,625,000 of an Existing Bridge Loan Repayment "shall occur." The $984,375,000 was comprised of $937,500,000 in loan proceeds and $46,875,000 of Capmark's own funds. The $590,625,000 was comprised of $562,500,000 in loan proceeds and $28,125,000 of Capmark's own funds. The payments did not extinguish the Bridge Loan; rather, the loan's maturity date was extended to March 23, 2011 and the 2009 Credit Agreement provided that the outstanding balance was "to be updated after finalization of funds flow."

When Credit Suisse received its share of the $28,125,000 payment that Capmark made towards the Bridge Loan from its own funds, it gave plaintiff its pro rata share in cash. However, characterizing the $562,500,000 in loan proceeds applied to the Bridge Loan from the 2009 Credit Agreement as a reallocation of debt, Credit Suisse took the position that it was a non-cash distribution under the participation agreement and offered to transfer to plaintiff its share of Capmark's new secured debt.

Plaintiff rejected the offer, taking the position that the $562,500,000 was a cash distribution under the participation agreement, entitling plaintiff to $21,640,589.14 in cash. Plaintiff maintains that because the participation agreement defines "Distribution" to include amounts received "by setoff or otherwise," physical movement of the 2009 loan proceeds back and forth between plaintiff and Credit Suisse was not required, the salient point being that Capmark used the loan proceeds to pay down the Bridge Loan and Credit Suisse did not have the right to convert plaintiff's participation in the Bridge Loan into participation in the 2009 Credit Agreement.

To mitigate damages, the parties sold $21,640,589.14 of Capmark's secured debt to a third party, of which plaintiff received $14,356,171.32. In this action, plaintiff seeks to

recover the $7,284,687.82 balance, plus interest, based on defendants' alleged breach of the participation agreement. Defendants counterclaim for a declaratory judgment that plaintiff is not entitled to its pro rata share in cash because defendants received secured debt, not cash, from Capmark.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Plaintiff satisfied this burden by submitting the 2009 Credit Agreement and amendment to the Bridge Loan Agreement, which stated that Capmark would make repayments in cash, and Capmark's quarterly financial statement for June 30, 2009 to September 2009, which reflected that the balance of the Bridge Loan had been reduced from $833,000,000 as of December 31, 2008 to $234,204,000 as of June 30, 2009.[1] This shifted the burden to

[1] We note that in *In re Capmark Fin. Group Inc.* (438 BR 471, 491-492 [Bankr D Del 2010]), the United States Bankruptcy Court for the District of Delaware, stated, ""62. Use of Proceeds. The proceeds from the Secured Credit Facility, together with $75 million from CFGI, were used to pay antecedent debt of CFGI and the subsidiary Guarantors, as follows: (i) approximately $984.4 million was used to pay a portion of the amounts owed under the Credit Facility, see Debtors' Ex. 4(d); and (ii) the balance, approximately $590.6 million, was used to pay a portion of the amounts owed under the Bridge Loan. See Debtors' Ex. 2(j);

defendants to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In opposition to plaintiff's motion, defendants submitted an affidavit from Didier Siffer, who had overseen Credit Suisse's relationship with Capmark since February 2009. Siffer stated that the 2009 transaction restructured the Bridge Loan and 2006 Credit Agreement, extending the maturity of the loans in exchange for receiving a security interest and small cash payment from Capmark. Siffer further stated that defendants "did not receive a cash payment for the $562,500,000 principal portion of the Bridge Loan that was restructured." In support, Siffer annexed a May 28, 2009 letter from Capmark to Citibank, the administrative agent for the Bridge Loan, concerning the "Repayment of USD Bridge Loan Agreement Dated As Of March 23, 2006 (As Amended Supplemented Or Otherwise Modified, The 'Loan Agreement'). . .," which states,

> "The undersigned hereby requests the following Loan continuation:
>
> 1. Repayment will occur on: May 29, 2009 (a business day)
> 2. Repayment amount: USD $28,125,000.00
> 3. Reallocation amount: USD $562,500,000.00

Hr'g Tr. 132:13-24 (Fairfield)."

4. Under the: USD Bridge Loan Agreement
5. Loans denominated in USD: Eurocurrency Loans
6. Borrower: Capmark Financial Group Inc.”

Siffer’s affidavit and the Capmark letter raise an issue of fact as to whether there was a cash payment to satisfy the Bridge Loan or a reallocation of debt. Although the documents in connection with the 2009 transaction brand the $562,500,000 as a cash repayment, it is the economic substance of a transaction that should determine the rights and obligations of interested parties (*see 801 Fulton Ave. Corp. v Burton Radin*, 138 AD2d 561 [1988]; *see also International Trade Admin. v Rensselaer Polytechnic Inst.*, 936 F2d 744, 748 [2d Cir. 1991] [courts look to "the economic substance of the transaction and not its form”] [internal quotation marks and citations omitted]).

Although the Capmark letter is hearsay (*see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 18 AD3d 286 [2005]), it may be considered in opposition to plaintiff’s motion because it is not the only proof submitted *(see Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 100 [1999]; *Koren v Weihs*, 201 AD2d 268 [1994]). However, the letter cannot support defendants’ cross motion for summary judgment.

Federal cases holding that a taxpayer is not entitled to a deduction for paying interest in cash if he borrows funds from a

lender to pay interest to the same lender *(see e.g. Davison v Commissioner of Internal Revenue*, 141 F3d 403 [2d Cir 1998]) are not dispositive. In any event, the lenders who lent Capmark money in 2009 were identical to the Bridge Loan lenders. Although defendants contend that the lenders on the 2009 credit facility were the same as, or the successors to, the Bridge Loan lenders and the lenders on the 2006 credit facility, plaintiff disputes this.

Defendants are not entitled to summary judgment based on section 3.1 of the participation agreement, as it is far from clear whether the 2009 Credit Agreement is a "Credit Document" under the participation agreement. Plaintiff's interpretation that "in connection therewith" means "in connection with the Bridge Loan agreement" is reasonable, but defendants' interpretation that the phrase includes "in connection with waivers and amendments to the bridge loan agreement" is also reasonable. Moreover, the meaning cannot be determined solely from the participation agreement. Therefore, the court properly denied both sides' motions for summary judgment *(see e.g. Kohman v Rochambeau Realty & Dev. Corp.*, 17 AD3d 151, 152 [2005]).

Defendants' argument that, even if the 2009 Credit Agreement is not a Credit Document, they are still entitled to summary

judgment because the 2009 credit facility restructured the Bridge Loan, is unavailing. If the 2009 Credit Agreement is not a Credit Document, the exclusion clause in the definition of "Obligations" ("excluding . . . any obligations and liabilities of Seller which . . . are attributable to Seller's actions or obligations in any capacity other than as a Lender under the Credit Documents") would apply.

All concur except Catterson, J., who dissents in a memorandum as follows.

CATTERSON, J. (dissenting)

In my view, the undisputed facts in the record demonstrate that Capmark did nothing more in the transaction at issue than restructure the bridge loan to extend the maturity date. This restructuring, rather than repayment, granted various lenders a secured position in exchange for the bulk of the unsecured bridge loan. Therefore, I am compelled to dissent and would grant summary judgment to Credit Suisse.

The record sets out what the majority and the court below overlooked in denying summary judgment, the context of the transaction documents. Plaintiff and the majority rely on the expressions "cash" and "repayment" in the 2009 bridge loan agreement and amendment no. 9 to find an issue of fact. However, as set out below, it is plain that there was no payment in cash to Credit Suisse and the purpose of the transaction was simply an exchange of debt.

Initially, I note that all of the restructuring documents relied on by plaintiff and referenced by the majority only describe obligations of the parties going forward. None of the documents reflect actual events that occurred in the performance of the restructuring. Credit Suisse's obligation to make a cash distribution to Sumitomo would only be triggered by the threshold

events. Capmark must necessarily have made a cash payment of $562,500,000 to Citibank, and Citibank actually made a corresponding cash payment to Credit Suisse. The record contains no evidence whatsoever that any cash payment migrated from Capmark to Citibank and then on to Credit Suisse.

I agree with the majority that we must consider "the substance of the entire transaction, rather than its form." Chemical Bank v. Meltzer, 93 N.Y.2d 296, 302, 690 N.Y.S.2d 489, 492, 712 N.E.2d 656, 660 (1999). In Chemical Bank, the Court further cautioned that we must not "focus on a few words of a single instrument, [the] transaction must be analyzed as an integrated whole." 93 N.Y.2d at 304, 690 N.Y.S.2d at 493, 712 N.E.2d at 661. We must not "elevate form over substance, obfuscate the nature of [the parties'] legal obligations and gloss over the essential character of th[e] transaction." Id. In this case, the "essential character" of the transaction was to substitute secured debt for unsecured debt. This is made clear by repeated references in the 2009 agreement to refinancing the bridge loan. Furthermore, the notices from Capmark to Citibank and from Citibank to Credit Suisse document the "reallocation" and/or "roll up" of the bridge loan in secured debt. The notices do not refer to a repayment to Credit Suisse of the bridge loan

debt.

The participation agreement is clear at § 1.1 and § 5 that Credit Suisse is only obligated to deliver to Sumitomo its share of any distribution "[u]pon receipt" by Credit Suisse. Thus, Sumitomo was only entitled to its ratable share of any cash actually received by Credit Suisse.

In my view, Sumitomo has presented no evidence whatsoever that refutes the notifications from Capmark to Citibank and from Citibank to Credit Suisse that show that the bridge loan debt was not repaid but rather "reallocat[ed]" or "roll[ed] up" into secured debt. Mere allegations that Credit Suisse received a cash distribution via setoff are insufficient to defeat Credit Suisse's motion for summary judgment.

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

5668 In re Samuel V. S.,

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

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Shamea L., etc.,
Respondent-Appellant.

Administration for Children Services,
Petitioner-Respondent,

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John J. Marafino, Mount Vernon, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondent.

Cozen O'Connor, New York (Kenneth G. Roberts of counsel), attorney for the child.

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Order, Family Court, New York County (Jody Adams, J.), entered on or about November 5, 2009, which denied respondent mother's motion to vacate an order, same court and judge, entered December 5, 2008, which, upon her default in appearing at the fact-finding hearing, found that she had neglected the subject child, unanimously affirmed, without costs.

A party seeking to vacate an order must establish that there was a reasonable excuse for the default and a meritorious defense to the petition (*see* CPLR 5015[a][1]; *Matter of Atkin v Atkin*, 55 AD3d 905 [2008]). Without reaching the question of whether or

not the mother had a reasonable excuse for default, we find that the court properly denied the mother's motion because she failed to set forth a meritorious defense. The record demonstrates that the mother suffers from either borderline personality disorder or NOS personality disorder, that she committed multiple acts of domestic violence upon the father in the child's presence and threatened to kill the child, thereby impairing or creating an imminent danger of impairing the child's physical, emotional or mental well-being (*see Matter of Davion A.*, 68 AD3d 406 [2009]). The mother's submission, consisting solely of an affirmation from her counsel, was insufficient because it contained conclusory assertions and was not from an individual who had personal knowledge of the facts. No basis exists for disturbing the court's credibility determinations, which are entitled to great deference (*see Matter of Daquan D.*, 18 AD3d 363, 364 [2005]).

We have considered the appellant's additional arguments and find them unpersuasive or unpreserved.

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

ENTERED: NOVEMBER 17, 2011

CLERK

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

5710-
5711 The People of the State of New York, Respondent,

-against-

Joel Murray,
Defendant-Appellant.

Ind. 3248/99

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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Order, Supreme Court, New York County (Michael R. Sonberg, J.), entered on or about June 29, 2010, which denied defendant's CPL 440.46 motion for resentencing, and order, same court and Justice, entered on or about September 15, 2010, which, upon renewal, adhered to the original determination, unanimously affirmed.

On March 15, 2000 defendant was convicted, after a jury trial, of criminal sale of a controlled substance in the third degree, a class B felony, and was sentenced to an indeterminate term of 5 to 10 years. Defendant was found to have sold cocaine to an undercover police officer on April 27, 1999 in New York County. On May 27, 2003 this Court unanimously affirmed defendant's conviction and sentence (305 AD2d 301 [2003], *lv*

denied 100 NY2d 623 [2003]).

In February 2010 defendant moved, pursuant to CPL 440.46, to be resentenced to a determinate term under the 2009 Drug Law Reform Act (L 2009, ch 56) (DLRA). In a written decision dated June 25, 2010 and handed to counsel at a scheduled court appearance on June 29, the court denied defendant's motion.

In July 2010 defendant moved to renew his application, claiming that his medical records showed mental and emotional problems, which stemmed from an organic brain injury he suffered as a child. He argued his medical condition should be considered as a significant mitigating factor that contributed to his prison disciplinary record. Upon renewal, the lower court adhered to its original decision denying resentencing.

The DLRA provides that "[t]he court shall offer an opportunity for a hearing and bring the applicant before it. The court may also conduct a hearing, if necessary, to determine whether such person qualifies to be resentenced or to determine any controverted issue of fact relevant to the issue of sentencing" (L 2004, ch 738, § 23). Here, defendant did not preserve his argument that he was denied a proper hearing on his resentencing motion (*see People v Alaouie*, 86 AD3d 462 [2011]; *People v Soler*, 45 AD3d 499 [2007], *lv dismissed* 9 NY3d 1009

[2007]), and we decline to review it in the interest of justice. When the court handed down its decision on June 29, 2010 defendant neither asked for a hearing, nor objected on the ground that he had not been given an opportunity to be heard prior to the denial of the motion. Defendant also did not raise these specific objections in his renewal motion.

In any event, review of the renewal motion and the supporting medical records does not provide a basis for DLRA resentencing. Defendant has a criminal history spanning approximately 25 years, with a total of 31 convictions, 5 of which are felony convictions, and 1 of which is a violent felony conviction. During his time in prison, defendant compiled a record of 29 disciplinary infractions, including 7 tier III infractions and 22 tier II infractions. These infractions involved verbally and physically abusive conduct toward prison staff, threats and harassment, use of obscene language, and, on one occasion, threatening to kill a correction officer. The most significant of defendant's infractions was his conviction of attempted first-degree promoting prison contraband for possession of a three-inch sharpened metal blade, concealed in his right-leg pants cuff. Defendant was sentenced to an indeterminate prison term of 1 ½ to 3 years, to run consecutively with his prison

sentence for the underlying drug conviction.

In addition to a poor disciplinary history, defendant also exhibited an inability to complete various substance abuse and behavior programs. Defendant was removed from several programs for disciplinary reasons, and failed to complete alcohol and substance abuse programs due to poor participation or progress. Further, defendant's medical records do not raise any controverted issues of fact relevant to his resentencing. The factual content of the records was not in dispute; rather, the only issue presented was the inference to be drawn from the medical records.

Finally, although the issue was not properly preserved in this case, we remind trial courts that the statute mandates that the court offer an opportunity for a hearing and that the applicant be brought before it prior to a decision being issued

on the motion (*People v Figueroa*, 21 AD3d 337, 339 [2005], *lv denied* 6 NY3d 753 [2005]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5826 Allan B. Mendelsohn, etc., Index 602869/99
Plaintiff-Appellant,

-against-

City of New York (19th Precinct),
Defendant-Respondent.

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The McDonough Law Firm, LLP, New Rochelle (Howard S. Jacobowitz of counsel), for appellant.

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

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about February 9, 2011, which, to the extent appealed from, granted defendant City of New York's cross motion for summary judgment dismissing the complaint as time-barred, unanimously affirmed, without costs.

The court correctly determined that, pursuant to CPLR 213(2), this action for breach of a construction contract had to be commenced within six years of substantial completion of the work and was time-barred (*see Phillips Constr. Co. v City of New York*, 61 NY2d 949, 951 [1984]; *645 First Ave. Manhattan Co. v Silhouette Drywall Sys.*, 212 AD2d 394 [1995]). The City submitted a letter dated May 21, 1992 showing that the work was substantially complete on April 9, 1992, more than six years

before plaintiff commenced this action.

Plaintiff failed to raise an issue of fact as to when the work was substantially complete. To the contrary, plaintiff's own document, a contractor's certificate seeking partial payment dated May 7, 1992, indicates that 98% of the work was complete as of that date. The June 29, 1992 and August 5, 1992 memoranda, and the October 1, 1993 and November 22, 1993 letters, merely show that work incidental to the electrical work on the building, namely a fire alarm system and items on a punch list, was incomplete (*see Phillips Constr.*, 61 NY2d at 951).

Additionally, plaintiff's purported claim to recover its guarantee monies pursuant to Article 24 of the contract has not been considered here, as it was not raised below, either in the pleadings or the motion papers and thus, was not preserved for appellate review.

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

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

ENTERED: NOVEMBER 17, 2001

CLERK

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

5889 In re Kennya S.,

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

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Kensader S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

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Dora M. Lassinger, East Rockaway, for appellant.

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

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

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Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about May 28, 2010, which, insofar as appealed from as limited by the briefs, bringing up for review a fact-finding determination that respondent father neglected the subject child, unanimously reversed, on the law, without costs, the finding of neglect vacated and the petition dismissed as against him.

Under the circumstances of this case, notwithstanding the findings of the Family Court, the isolated instance of excessive

corporal punishment resulting in relatively mild physical injuries (depicted in photographs in the record) does not support a finding of neglect (*see In re Chanika B.*, 60 AD3d 671 [2009]; *Matter of Christian O.*, 51 AD3d 402 [2008]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6081 The People of the State of New York, Ind. 30129/10
Respondent,

-against-

Jeffrey E. Epstein,
Defendant-Appellant.

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Kirkland & Ellis LLP, New York (Jay P. Lefkowitz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

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Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about January 18, 2011, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence, including reliable hearsay (*see People v Mingo*, 12 NY3d 563, 571 [2009]) supported the assessment of points for risk factors sufficient for a level three sex offender adjudication (Correction Law § 168-n[3]). In the circumstances of this case, the court properly relied on highly reliable proof of criminal conduct for which defendant was neither indicted nor convicted.

The sex offender adjudication arises out of defendant's sex

offenses in Florida. The evidence before the SORA hearing court established that defendant committed multiple offenses against a series of underage girls. The girls were brought to defendant's home to provide "massages" that led to very serious sex crimes.

These facts were established by reliable hearsay, including the probable cause affidavit prepared by Florida law enforcement authorities after their investigation, and the Board of Examiners of Sex Offenders' case summary (*see Mingo*, 12 NY3d at 572-573, 577). The probable cause affidavit was extremely detailed. It set forth the sworn, tape-recorded statements of the victims. The victims' detailed accounts of defendant's crimes corroborated each other, and were also corroborated by other evidence, including declarations against penal interest made by defendant's accomplice.

In 2006, the Florida prosecutor obtained an indictment charging defendant with solicitation of prostitution. In 2008, the Florida prosecutor filed an information, this time charging procuring a person under 18 for prostitution. A few days after the information, defendant pleaded guilty to both accusatory instruments. Both instruments involved the same victim, who was only one of defendant's many victims.

The Board and the hearing court are not limited to the

underlying crime in determining an offender's risk level (*see People v Johnson*, 77 AD3d 548, 549-550 [2010], *lv denied* 16 NY3d 705 [2011]). "[T]he fact that an offender was not indicted for an offense may be strong evidence that the offense did not occur" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, General Principles ¶ 7, at 5 [2006]). However, here the strong evidence that the offenses against the other victims *did* occur outweighs any inferences to be drawn from the manner in which this case was prosecuted in Florida.

The reasons for the actions taken by the Florida authorities remain unclear on this record. The record before us is insufficient to establish that those authorities reasonably believed the charges involving the other victims were unprovable. The record permits competing inferences. In any event, the hearing court was entitled to rely on the reliably proven facts themselves, and was not necessarily bound by any exercises of prosecutorial discretion.

We reject defendant's argument that the People should be estopped from taking a different position on appeal from the position they took before the hearing court. At the hearing, the People mistakenly conceded that the conduct for which defendant was not indicted should not be considered, and that defendant

should be adjudicated a level one offender. These were legal arguments that the court rejected, and it is the court's determination that we review on this appeal. Furthermore, when the court announced that it was rejecting the People's position and would consider the offenses against additional victims, defendant did not request any opportunity to challenge the reliability of the additional charges. Accordingly, defendant was not deprived of a fair opportunity to litigate the issue (*see e.g. People v Strong*, 276 AD2d 271 [2000], *lv denied* 96 NY2d 807 [2001]).

Defendant's remaining claims are improperly raised for the first time on appeal (*see People v Windham*, 10 NY3d 801 [2008]), and are unavailing in any event.

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6082 In re Richard Cowan, Index 106108/09
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

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Jeffrey L. Goldberg, Lake Success, for appellant.

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

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered December 23, 2009, denying the petition and dismissing this article 78 proceeding seeking to annul the determination of respondents to remove petitioner's firearms and not issue him a Certificate of Service, unanimously affirmed, without costs.

Pursuant to CPLR 217(1), any proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner. The determination becomes final and binding when the petitioner has received notice of the determination and has been aggrieved thereby (*see Matter of Yarbough v Franco*, 95 NY2d 342 [2000]).

The decision to place petitioner on "No Firearms" status was final on December 2, 2008. Petitioner was forced to check his firearms on that date and to surrender his identification card. Since the ultimate relief petitioner seeks is review and modification of his status, he became aggrieved by and received notice of the respondents' determination on that date (*see Matter of Rocco v Kelly*, 20 AD3d 364 [2005]). The commencement of this article 78 proceeding on or about April 30, 2009, was beyond the four-month period of limitations, and the proceeding was properly dismissed as time-barred.

Petitioner's claim that he was not aggrieved until he received no response from respondents to his memorandum of February 20, 2009, requesting the removal of the "No Firearms" designation from his retiree identification card, is unavailing. Petitioner's memorandum constituted nothing more than a request for reconsideration of the respondents' determination of his status, and therefore, did not toll or revive the statute of

limitations (*see Matter of Moskowitz v New York City Police Pension Fund*, 82 AD3d 473 [2011]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6083 In re Steven O.,

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

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

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about April 23, 2010, 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 sexual misconduct, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to adjudicate appellant a person in need of supervision, and instead adjudicated him a juvenile delinquent and placed him on probation. This was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947

[1984]), in light of the underlying incident, which was a serious sex offense against a considerably younger child, as well as a clinical psychologist's recommendation. Accordingly, the court properly concluded that appellant was in need an 18-month period of probation.

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6084 43rd Street Deli, Index 110073/06
Plaintiff-Appellant,

-against-

Paramount Leasehold, L.P.,
Defendant-Respondent.

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Cornicello, Tendler & Baumel-Cornicello, LLP, New York (Susan Baumel-Cornicello of counsel), for appellant.

Law Offices of M. Teresa Daley, P.C., New York (M. Teresa Daley of counsel), for respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered April 5, 2011, which, insofar as appealed from, in this action seeking, inter alia, a declaration that plaintiff tenant is not in default of the parties' lease and that plaintiff properly exercised its option to renew the lease, denied plaintiff's motion to remove a pending holdover proceeding in the Housing Part of Civil Court and to consolidate it with this action, unanimously reversed, on the law, without costs, and the motion granted.

The motion should have been granted in the interests of judicial economy (*see e.g. Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337, 339 [2006]; *Moretti v 860 W. Tower, Inc.*, 221 AD2d 191 [1995]). The record shows that the Supreme Court action and the

Civil Court proceeding involve the same parties, and essentially the same questions of law and fact. Defendant has failed to demonstrate that any of its substantial rights would be prejudiced (*see Fisher 40th & 3rd Co. v Welsbach Elec. Corp.*, 266 AD2d 169, 170 [1999]; *Amtorg Trading Corp. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213 [1993]), and the Civil Court cannot accord the complete relief sought by plaintiff in the Supreme Court action (*see DeCastro v Bhokari*, 201 AD2d 382, 382-83 [1994]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6085 John Rustum, et al., Index 113020/10
Plaintiffs-Respondents,

-against-

Camila A. Pinto,
Defendant-Appellant,

Jerry Dickstein, etc.,
Defendant.

_____

Agovino & Asselta, LLP, Mineola (Robert C. Buff of counsel), for appellant.

Baker, Leshko, Saline & Blosser, LLP, White Plains (Mitchell J. Baker of counsel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 3, 2011, which, in this action for breach of contract arising out of the sale of a cooperative apartment unit, granted plaintiffs' motion for summary judgment directing defendant escrow agent to return their $290,000 down payment, and denied the cross motion of defendant apartment owner Camila Pinto for summary judgment seeking to retain the contract deposit, unanimously affirmed, with costs.

The court properly granted plaintiffs' motion, because, in giving effect to the plain meaning of the unambiguous contract language (*see Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]), it

found that plaintiffs were unsuccessful in obtaining a "Loan Commitment Letter," within the meaning of the parties' contract of sale. Plaintiffs properly cancelled the contract, since paragraph 18.3.1.3 authorized them to cancel the contract if a Loan Commitment Letter contained unmet conditions not concerning plaintiffs. Here, the commitment letter was conditional upon two requirements that were within the control of the lender (*see Zellner v Tarnell*, 65 AD3d 1335 [2009]; *Kapur v Stiefel*, 264 AD2d 602, 603 [1999]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6086-
6087 Jane Lavali, Index 302623/09
Plaintiff-Respondent,

-against-

Janet A. Lavali, et al.,
Defendants-Appellants.

_____

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Janet A. Lavali, appellant.

Majorie E. Bornes, New York, for Roman Car Service, Inc., and Francisco R. Perez, appellants.

Raphaelson & Levine Law Firm, P.C., New York (Jason Krakower of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered November 5, 2010, insofar as it denied the branches of defendants' motion and cross motion for summary judgment dismissing plaintiff's claim that she sustained serious injuries under the "significant limitation of use" category of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain a serious injury as a result of the subject accident by submitting the affirmed reports of their orthopedist and neurologist, who both examined plaintiff over three years after the accident, and noted full range of motion in the cervical

spine, lumbar spine, and right shoulder (*see Thompson v Abbasi*, 15 AD3d 95, 96 [2005]). The affirmed MRI reports of the two radiologists who found mild degenerative changes and absence of disc herniations or bulges establishes prima facie lack of causation (*see Depena v Sylla*, 63 AD3d 504 [2009], *lv denied* 13 NY3d 706 [2009]).

In opposition, plaintiff's chiropractor's affidavit, together with the affirmed reports of her neurologist and physiatrists, was sufficient to raise a triable issue of fact as to injury to the cervical and lumbar spine. Plaintiff's chiropractor relied, inter alia, on contemporaneous and current range of motion tests, positive results on straight leg and other objective tests, and observation of spasms, as well as affirmed and unaffirmed medical reports (see *Rubencamp v Arrow Exterminating Co., Inc.*, 79 AD3d 509 [2010]; *Adetunji v U-Haul Co. of Wisconsin, Inc.*, 250 AD2d 483, 483-484 [1998]). On the issue of causation, plaintiff's expert's conclusion that plaintiff sustained serious injuries as a result of the accident is based on a physical examination of the previously asymptomatic plaintiff just days after the accident and a review of her medical records which acknowledged mild disc degeneration, and

thus is sufficient to raise an issue of fact (*Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [2011]; *see also Peluso v Janice Taxi Co., Inc.*, 77 AD3d 491, 493 [2010]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6088 In re Delilah E. H., and Others,

Children Under the Age
of Eighteen Years, etc.,

Wilson H.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

Elisa Barnes, New York, attorney for the children.

_____

Order, Family Court, New York County (Jeanette Ruiz, J.), on or about September 2, 2010, which, after a hearing, found that respondent stepfather Wilson H. abused and neglected his stepson (Isaiah L.A.), with whom he resided, and derivatively abused and neglected his children Delilah E. H. and Elijah W. H., unanimously affirmed, without costs.

Although respondent argues there was no direct evidence of abuse to support the court's abuse findings, the credited testimony given by petitioner agency's expert witnesses regarding their interviews with the child sufficiently corroborated the child's consistent, out-of-court statements that his stepfather

had intentionally placed his hand on the stove burner because he was playing with matches. Such evidence, together with a sketch the child made of the stove burner, upon which the child placed his hand to show the agency's expert witness how his stepfather burned his hand, established, by a preponderance of the evidence, that the stepfather abused his stepson by intentionally burning his hand (*see* Family Court Act §§ 1012[e][I], 1046[b][I]; *Matter of Nicole V.*, 71 NY2d 112 [1987]). The child suffered second degree burns and blisters, but was not taken to a hospital for medical treatment for nearly 24 hours. At the hospital, the child was diagnosed as having suffered epidermal loss on two digits of his left hand, and was prescribed morphine, Motrin and Tylenol for his pain. On such a record, the finding of neglect as to the stepson was supported by a preponderance of the evidence (*see* Family Court Act § 1012[f][I]). The derivative findings of abuse and neglect as to the child's two siblings were supported by the record, given the nature of the harm inflicted upon, and the substantial risk of protracted impairment of physical and mental health suffered by, the stepson (*see Matter of Dutchess County Dept. Of Social Servs.*

[Noreen K.], 242 AD2d 533, 534 [1997]; *cf. Matter of Joshua R.*, 47 AD3d 465 [2008], *lv denied* 11 NY3d 703 [2008]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6089 The People of the State of New York, Ind. 664/08
Respondent,

-against-

Miguel Matias,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Hannah E.C. Moore of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett J.), rendered on or about November 4, 2009,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: NOVEMBER 17, 2001

CLERK

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

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6090-
6091 Sherry Gong, et al., Index 601889/09
Plaintiffs-Appellants-Respondents,

-against-

Genghmun Eng, etc.,
Defendant-Respondent-Appellant,

Toy-Fung Tung, etc.,
Defendant.

Hofheimer Gartlir & Gross, LLP, etc.,
Defendant-Respondent.

_____

Randall T. Sims, New York, for appellants-respondents.

Hofheimer Gartlir & Gross, LLP, New York (David L. Birch of counsel), for respondent-appellant/respondent.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered December 29, 2010, which denied plaintiffs' and defendants' motions for summary judgment, unanimously affirmed, with costs.

Plaintiffs seek return of a down payment, as well as the recovery of expenses and attorneys' fees, with respect to a failed real estate transaction. There are triable issues of

fact, including whether the fence and air conditioner support beams were minor encroachments that did not render title uninsurable and whether they were curable within a reasonable time.

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6097 The People of the State of New York, Ind. 2432/01
Respondent, 4365/01

-against-

Darryl West,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

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

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Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered November 17, 2009, resentencing defendant to an aggregate term of 10 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6098 The People of the State of New York, Ind. 4735/08
Respondent,

-against-

Shakeya Stevens,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Weil Gotshal & Manges LLP, New York (Lucy Muzzy of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered December 15, 2009, as amended December 18, 2009, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree, and sentencing her to a term of nine months, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of alleged conflicts in testimony. The

evidence established the requisite intent to defraud (*see e.g. People v Rodriguez*, 71 AD3d 450 [2010], *affd* __NY3d__, 2011 NY Slip Op 07257 [Oct 18, 2011]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6099 In re Breeana R.W., etc.,

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

– – – – –

Antigone W.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

_____

Richard L. Herzfeld, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

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Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about August 25, 2010, which upon a fact-finding determination of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child to petitioner and the Administration for Children's Services (ACS) for the purpose of adoption, unanimously affirmed, without costs.

The finding is supported by clear and convincing evidence (Social Services Law § 384-b [7][a]). The record shows the agency made diligent efforts to strengthen and encourage

respondent's relationship with the child by referring her to services and scheduling regular visitation. Respondent refused to consistently attend therapy and take her medication, visited sporadically and failed consistently to remain in contact with the agency. The agency records were admissible as an exception to the hearsay rule because the agency demonstrated that it was within the scope of the entrant's business duty to contemporaneously record the acts, transactions or occurrences sought to be admitted, and each participant in the chain producing the record, from the initial declarant to the final entrant, was acting within the course of regular business conduct (CPLR 4518[a]; *Matter of Leon RR.*, 48 NY2d 117, 122 [1979]). Unlike *Matter of Leon RR.*, here, appellant received the record in advance of trial and had the opportunity to object to specific entries, which she failed to do (*see Matter of Baby Girl Q.*, 14 AD3d 392, 393 [2005], *lv denied* 5 NY3d 704 [2005]; *Matter of Jaquone Emiel B.*, 288 AD2d 57, 58 [2001], *lv denied* 97 NY2d 608 [2002]).

A suspended judgment was not warranted since the mother did not demonstrate that she had made significant progress in

overcoming her problems and the best interests of the child favor stability (*see Matter of Tony H.*, 28 AD3d 379 [2006]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6100 Hector Luciano, Index 21067/03
Plaintiff,

-against-

H.R.H. Construction, LLC, et al.,
Defendants.

[And Third Party Actions]

– – – – –

Mometal Inc., et al.,
Third Third-Party Plaintiffs-Respondents,

-against-

Admiral Insurance Company,
Third Third-Party Defendant-Appellant.

_____

Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP, Melville (Michael G. Walker of counsel), for appellant.

Haworth Coleman & Gerstman, LLC, New York (Nora Coleman of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered June 14, 2010, which, in this personal injury action arising from a construction accident, to the extent appealed from as limited by the briefs, denied appellant insurer's motion for summary judgment dismissing the third third-party complaint, unanimously affirmed, without costs.

Supreme Court properly denied the motion as untimely.

Absent other directive from the court, summary judgment motions should be made no later than 120 days "after the *filing* of the note of issue" (CPLR 3212[a] [emphasis added]). It is undisputed that the insurer did not move for summary judgment until two years after plaintiff filed the note of issue. Although the insurer was not served with the note of issue, it does not deny that it knew about its filing (*cf. McFadden v 530 Fifth Ave.* RPS III *Assoc., LP*, 28 AD3d 202, 202-203 [2006]). Accordingly, the motion court correctly required "a satisfactory explanation for the untimeliness" and properly determined that no such explanation was given (*Brill v City of New York*, 2 NY3d 648, 652 [2004]).

We reject the insurer's argument, raised for the first time on appeal, that it did not believe that the 120-day period had begun to run, because a note of issue had been filed only in the main action, not in the "severed" third third-party action. By order entered January 17, 2007, the court (Lucindo Suarez, J.) granted the insurer's motion to sever the third third-party claims only to the extent of severing the claims for trial on the condition that they were not "disposed of prior thereto." Accordingly, as the court explicitly stated in its order, the actions remained consolidated through discovery. Thus,

plaintiff's filing of the note of issue started the running of the 120-day period, and the insurer's "failure to appreciate that its motion was due . . . is no more satisfactory than a perfunctory claim of law office failure" (*Giudice v Green 292 Madison, LLC*, 50 AD3d 506, 506 [2008][internal quotation marks omitted]).

Given the foregoing, we need not reach the merits of the motion.

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6102-
6102A Adam Belok, Index 106944/09
Petitioner-Appellant,

-against-

New York City Department of
Housing Preservation and Development, et al.,
Defendants-Respondents.

_____

Lewis & Greer, P.C., Poughkeepsie, (Veronica A. McMillan of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alyse Fiori of counsel), for New York City Department of Housing Preservation and Development, respondent.

Barry Mallin & Associates, P.C., New York (Michael Schwartz of counsel), for Mutual Redevelopment Houses, Inc., respondent.

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Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered December 29, 2009, which denied petitioner's application to annul a determination of respondent New York City Department of Housing Preservation and Development (HPD), dated March 16, 2009, denying petitioner succession rights to the subject cooperative apartment and issuing a certificate of eviction against petitioner, and dismissed this proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Order, same court (Saliann Scarpulla, J.), entered November 15, 2010, which, to the extent appealed from as

limited by the briefs, denied plaintiff's motion to renew and reargue, deemed to be an order denying a motion only to reargue, and, so considered, the appeal therefrom unanimously dismissed, without costs, as taken from a nonappealable order.

The determination that petitioner did not sustain his burden of establishing his entitlement to succession rights to his deceased parents' apartment had a rational basis in the record (*see Matter of Quan v New York City Dept. of Hous. Preserv. & Dev.*, 70 AD3d 528 [2010], *lv denied* 17 NY3d 703 [2011]; *Matter of Hochhauser v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288 [2008]). The governing regulatory agreement required that persons seeking succession rights be listed on annual income affidavits for the two years prior to the departure of the cooperator of record. Petitioner's mother died in August 2007, and he concedes that he did not provide the Hearing Officer with a copy of an income affidavit for calendar year 2006. Petitioner's submission of a copy of the affidavit with his article 78 petition is unavailing, since review of an agency determination is limited to the "facts and record adduced before the agency" (*Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000] [internal quotation marks and citation omitted]). In any event, even apart from the missing income affidavit, the documentary

evidence reviewed by the Hearing Officer contained numerous inconsistencies relating to petitioner's address, including inconsistencies in the addresses given in tax returns filed by petitioner during the relevant time period (*see Hochhauser*, 48 AD3d at 289).

Petitioner was not entitled to an evidentiary hearing. The regulatory agreement under which he sought succession rights does not provide for a hearing, and the procedures adhered to by HPD afforded petitioner due process (*see Quan*, 70 AD3d at 528). The evidence petitioner claims he would have provided at an evidentiary hearing could have been provided as documentary evidence, and petitioner does not assert that he was denied an opportunity to submit such evidence (*see Matter of Mayfield v Esplanade Gardens, Inc.*, 30 AD3d 296 [2006], *appeal dismissed* 7 NY3d 864 [2006]).

The record does not support petitioner's claim that HPD or Supreme Court discriminated against him because he lived in the subject apartment while his wife and children lived in Dutchess County. HPD and the court merely found that petitioner had not proven that he engaged in that living arrangement for the relevant time period.

Petitioner's motion to renew and reargue raised no new facts

and is therefore properly viewed as one for reargument only, the denial of which is not appealable (*Pizarro v Evergreen Estates Hous.*, 5 AD3d 143, 143-144 [2004]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6104N Sotirios Tsioumas, Index 26811/04
Plaintiff-Appellant,

-against-

Time Out Health & Fitness, et al.,
Defendants-Respondents.

_____

Sacco & Fillas LLP, Whitestone (Kenneth G. Esehak of counsel), for appellant.

Callan, Koster, Brady & Brennan, LLP, New York (Janine L. Peress of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered August 25, 2010, which denied plaintiff's motion to modify an order, same court and Justice, entered July 24, 2009, and deem a copy of said prior order, with notice of entry, to have been served timely nunc pro tunc, unanimously affirmed, without costs.

The July 2009 order, which was affirmed on a prior appeal (78 AD3d 619 [2011]), vacated an order dismissing the action for plaintiff's failure to restore it to the calendar within one year of it being marked off. Contrary to plaintiff's position, our order of affirmance in no way altered or modified the terms of the July 2009 order, which directed plaintiff to serve a copy of the order with notice of entry upon defendant within 20 days of

the date the order was issued and stated that "plaintiff may move . . . to restore this action to the trial calendar" upon compliance with the court's directive. Plaintiff did not serve a copy of that order with notice of entry until December 22, 2009, more than four months after the expiration of the 20-day deadline.

Plaintiff moved to modify the portion of the July 2009 order relating to service of the order. The motion was properly denied in light of plaintiff's conclusory assertion of an unspecified "clerical error" as an excuse for the delay and failure to address the subsequent delay in moving for modification. In any event, the delays are part of a pattern of neglect (*see Gavillan v City of New York*, 11 AD3d 217 [2004]).

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

ENTERED: NOVEMBER 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6105N New Line Stone Co., Inc., Index 112963/08
Plaintiff-Respondent,

-against-

BCRE Services LLC, et al.,
Defendants-Appellants.

_____

Tarter Krinsky & Drogin LLP, New York (Michael R. Wood of counsel), for appellants.

Wilkofsky, Friedman, Karel & Cummins, New York (David B. Karel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lancelot B. Hewitt, Special Referee), entered April 14, 2011, which, among other things, granted plaintiff's motion to compel defendants to provide detailed responses to plaintiff's interrogatories numbered 4 through 13, unanimously modified, on the facts, to deny the motion only with respect to interrogatory number 13, and otherwise affirmed, without costs.

The motion court providently exercised its discretion in requiring defendants to provide more detailed responses to plaintiff's interrogatories 4 through 12, which sought the facts underlying defendants' seven affirmative defenses and three counterclaims. Most of defendants' responses provided general statement of facts, and some responses provided no facts at all.

Moreover, defendants failed to meet their burden to establish that the information sought was privileged (*see JP Foodservice Distribs. v Sorrento, Inc.*, 305 AD2d 266 [2003]). However, defendants are not required to respond to interrogatory number 13, since it is repetitive.

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

ENTERED: NOVEMBER 17, 2011

CLERK