SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 22, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3387 The People of the State of New York, Ind. 53096C/07
Appellant,

-against-

Marcoangel Vargas,
Defendant-Respondent.

____

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

DLA Piper LLP (US), New York (Peri A. Berger of counsel), for respondent.

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Order, Supreme Court, Bronx County (Richard Lee Price, J.), entered on or about October 30, 2008, which granted defendant's motion to suppress physical evidence and a statement, unanimously affirmed.

At a *Mapp/Dunaway* hearing on defendant's motion to suppress the introduction of a switchblade knife into evidence, a police officer testified that while driving in a police van, he made eye contact with defendant, who then turned around and walked in the opposite direction. The officer stated that he then observed,

protruding from the coin pocket of defendant's pants, a "brownish, reddish handle with silver around it," that he thought was a knife. He testified that when he subsequently exited the van and moved closer to defendant, he "thought it was a gravity knife." However, he did not explain why.

The officer conceded during testimony that defendant had not done anything suspicious and made no threatening gestures. The officer testified that nevertheless he approached defendant, and without saying anything to him, reached into defendant's pocket and took the knife "for [the officer's own] safety." The officer asked defendant why he had the knife and defendant responded that he "used it for protection." The officer identified the knife as a switchblade by the release button, handcuffed defendant, tested the knife to see if it functioned, and then arrested defendant for possession of an illegal weapon.

The motion court granted defendant's motion to suppress the knife and statement as "fruit[s] of an illegal search." The court reasoned that the officer had no reasonable suspicion of danger of physical injury warranting seizure of the knife.

We affirm, albeit on different grounds in light of recent Court of Appeals decisions. A police officer may stop and frisk an individual if he or she has "reasonable suspicion" that the

individual is committing, has committed or is about to commit a crime (*People v DeBour*, 40 NY2d 210 [1976]). In *People v Brannon* (16 NY3d 596 [2011]), the Court of Appeals addressed the level of knowledge a police officer must possess before he or she has reasonable suspicion to believe an individual possesses an illegal gravity knife, as opposed to a lawful knife, such as a pocketknife. The Court concluded that in order to stop and frisk an individual, the detaining officer must possess "specific and articulable facts from which he or she inferred that the defendant was carrying a gravity knife" (*id.* at 602).

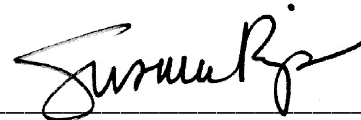
In *People v Fernandez*, decided with *Brannon*, the police officer testified that the clip and "head" of the knife were in plain view and that he knew from experience that gravity knives are typically clipped on the outside of the pocket with the "head" of the knife protruding out of the pocket for easy access (*id.* at 601). From this, the officer inferred that defendant was carrying a gravity knife. The Court found that the officer had reasonable suspicion (*id.* at 602; *see also People v Snovitch*, 56 AD3d 328 [2008], *lv denied* 11 NY3d 930 [2009]).

However, in this case, unlike *Fernandez*, the officer did not articulate any facts at all, much less specific facts from which he could have inferred that the knife was a gravity knife. His

sole testimony was that when he moved closer to defendant, he "thought" the object was a gravity knife. Hence, we find that the officer had no reasonable suspicion to stop and frisk defendant, or, as he did here, reach into his pocket and remove the knife. Accordingly, the knife and defendant's statement were properly suppressed (*see Wong Sun v U.S.*, 371 US 471, 485 [1963]).

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

ENTERED: NOVEMBER 22, 2011



CLERK

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

4850 Coretta Johnson, etc., et al., Index 105013/07
Plaintiffs-Appellants,

-against-

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

____

Burns & Harris, New York (Kenneth J. Gorman and Blake G. Goldfarb of counsel), for appellants.

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

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Order, Supreme Court, New York County (Karen Smith, J.), entered January 12, 2010, which, to the extent appealed from, granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny the motion insofar as plaintiffs claim a permanent limitation serious injury to the right knee, and otherwise affirmed, without costs.

In this personal injury action, plaintiff mother, Coretta Johnson, alleged that when she was 12 days pregnant, she was injured when a police vehicle backed up and hit her as she was crossing a street. She further alleged that she sustained a stress fracture of her right tibia as a result of the accident, and that the trauma and stress of the accident caused her to experience pregnancy complications resulting in an emergency

cesarean section at 27 weeks.

The City defendants' evidence, consisting of medical records, deposition testimony and expert medical affirmations, established prima facie entitlement to summary judgment dismissing plaintiffs' claims as to the pregnancy complications, but not as to Johnson's leg injury. The report from the pathologist who examined the postdelivery placenta and blood specimens indicated that an infection was the cause of the infant plaintiff's premature delivery. In addition, plaintiff mother's history of preexisting gynecological issues established prima facie that the infant's premature birth was not due to placental abruption because of trauma from the accident.

In opposition, plaintiffs failed to raise triable issues of fact. The evidence plaintiffs submitted consisted solely of a preliminary medical determination prior to the delivery and conclusory statements. This evidence neither substantiated the claim that there was a placental abruption nor refuted the evidence that an infection was the cause of the infant plaintiff's premature birth. While the medical records note that plaintiff mother experienced chronic vaginal bleeding during her pregnancy, the evidence establishes that preexisting gynecological issues were the cause of the bleeding. Further,

the conditions associated with a placental abruption, such as clotting and affected hemoglobin levels, were not present in the medical record (*see generally Moore v New York Med. Group, P.C.*, 44 AD3d 393, 395-397 [2007], *lv dismissed* 10 NY3d 740 [2008]).

The record does not support plaintiffs' argument that the medical records and their medical expert's affirmation raised triable issues as to whether stress from the accident induced a placental abruption. As noted, the medical evidence did not substantiate the claim of placental abruption. Further, the prenatal care reports plaintiff mother's physicians prepared did not note an accident, nor did they record any complaints from her regarding stress or anxiety arising from the accident. Indeed, the evidence demonstrated that plaintiff had preexisting high blood pressure, and that she took medication to control this condition before her infant's birth.

However, plaintiffs did raise a factual issue as to whether the accident caused the fracture of plaintiff's right tibia. The City relied on the absence in the ambulance and emergency reports of any mention of a stress fracture or complaints about plaintiff's leg. Given that plaintiff had recently become pregnant via in vitro methods, it is understandable that she may have focused on her pregnancy rather than on her leg. According

to plaintiffs' expert, it was also reasonable for plaintiff to wait to seek medical treatment for her leg in order to avoid an x-ray during her pregnancy. Moreover, documents from Lutheran Medical Center from as early as November 8, 2006, three weeks after the accident, indicate that plaintiff complained of pain in her right leg. At the time of her General Municipal Law § 50-h hearing, three months after the accident, plaintiff complained that since the accident she had constant, severe pain in her right leg.

In addition, records from Methodist Hospital dated April 28, 2007 indicate right lower extremity pain. X-rays from that date revealed what doctors thought was most likely "a healing stress fracture." On May 3, 2007, plaintiff visited Dr. Ki-No Moon, complaining of pain and swelling in her right leg that began two weeks after the accident. Dr. Moon sent plaintiff for an MRI and referred her to Memorial Sloan Kettering for further care. The MRI from Memorial Sloan Kettering Hospital revealed a lesion on plaintiff's right tibia that a biopsy ultimately revealed to be "in keeping with a previous stress fracture." On October 16, 2007, plaintiff went to the emergency room at Methodist Hospital complaining of swelling in her right leg, that had persisted for the past month. In December 2007, plaintiff underwent a surgical

procedure on her right tibia, as it had become infected.

According to plaintiffs' expert, orthopedic surgeon Dr. Jerry Lubliner M.D., plaintiff reports that she still has pain in her leg, cannot kneel or run, has difficulty walking and cannot work in her job as a security guard. Plaintiff claims she had no other injury to her right leg after the accident. Thus, the evidence more than amply raised an issue of fact as to whether plaintiff sustained a "serious injury" of a permanent nature to the right leg within the meaning of Insurance Law § 5102(d).

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

ENTERED: NOVEMBER 22, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5438 259 West 12th, LLC, Index 570300/09
Petitioner-Respondent,

-against-

Pearl Grossberg,
Respondent-Appellant.

____

Kellner Herlihy Getty & Friedman, LLP, New York (Carol Anne Herlihy of counsel), for appellant.

Steven Raison, New York, for respondent.

____

Order of the Appellate Term of the Supreme Court, First Department, entered July 29, 2010, which modified a judgment of Civil Court, New York County (Gerald Lebovits, J.), entered on or about February 20, 2007, after a nonjury trial, awarding possession of respondent tenant's apartment to petitioner landlord, to the extent of vacating so much of the judgment as afforded tenant a postjudgment opportunity to cure pursuant to RPAPL 753(4), and dismissed, as academic, landlord's appeal from an order, same court and Judge, entered on or about May 21, 2007, which granted tenant's motion for an extension of her time to cure until July 20, 2007, unanimously affirmed, without costs.

The Civil Court, in its judgment awarding possession of the subject apartment to the landlord, held that the tenant's

demolition and replacement of the bathroom walls caused a "lasting or permanent injury" to the apartment, and thus constituted a substantial violation of the lease. The court also held that the tenant substantially violated the lease by renovating the bathroom walls without first conducting an asbestos test before removing the walls; failing to insure that the new Sheetrock she installed had the proper fire rating; and failing to secure necessary permits or approval from the Department of Buildings and the Landmark Preservation Commission, all of which exposed the residents of the building to dangers like asbestos and fire, and the landlord to numerous violations, fines and lawsuits.

The Appellate Term correctly held that this lasting or permanent injury to the premises by demolition of the existing bathroom was not capable of any meaningful cure (*see 230 E. 14th St LLC v Klufas*, 11 Misc 3d 132[A], 2006 NY Slip Op 50368[U][2006]; *compare Stolz v 111 Tenants Corp*., 3 AD3d 421 [2004] [tenants could cure by removing greenhouse but could not do so within the 10-day period provided in RPAPL 753(4), thus entitling them to *Yellowstone* injunction]). While RPAPL 753(4) provides that a court "shall grant a ten day stay of issuance of the warrant, during which time the respondent may correct such

breach," implicit in that mandatory directive is that the breach may be cured. As we noted in *Wilen v Harridge House Assoc.* (94 AD2d 123 [1983]), the sponsor's memorandum in support of the amendment to the statute adding subdivision (4) states "that it was designed to cover breaches 'temporary in nature correctable within the ten day period'" (*id.* at 130, quoting NY Legis Ann, 1982, p 280). Because the tenant in this case caused a lasting or permanent injury to the premises, she was not entitled to any stay for the purpose of correcting an uncorrectable breach.

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

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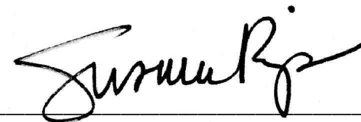


CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5798 Mervelyn White Craig, Index 307985/95
Plaintiff-Appellant,

-against-

Theophilus Craig,
Defendant-Respondent.

____

The Dominique Group, PLLC, New York (Joyce Elie of counsel), for appellant.

____

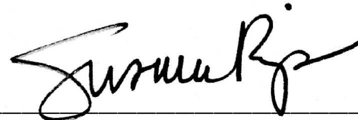
Order, Supreme Court, New York County (Saralee Evans, J.), entered January 26, 2010, which, inter alia, denied as time-barred plaintiff's motion to vacate a 1995 judgment of divorce, unanimously affirmed, without costs.

Plaintiff filed the instant action in 2009 seeking to vacate the judgment of divorce on the ground of fraud. She claims that she was unaware that papers she signed in 1995 pertained to a divorce action and that she did not learn of the divorce until 2008. In an affidavit filed in a related proceeding, plaintiff stated that she knew of the divorce proceedings before the 1995 judgment of divorce was entered. Therefore, plaintiff had until 2001 to assert her present claim (*see* CPLR 213[8]). Plaintiff's claim is time-barred even if she did not know of the divorce proceedings before the entry of the judgment. Plaintiff concedes

that she knew that defendant remarried in 2003. As she could with reasonable diligence have discovered in 2003 that defendant had divorced her some time before his remarriage, she had until 2005 to assert her claim (*see id.*).

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

ENTERED: NOVEMBER 22, 2011



CLERK

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

5816 Maria Acosta Robiou, Index 101129/02
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

____

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

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

____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered June 29, 2010, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion to strike the answer for failure to comply with discovery orders, unanimously affirmed, without costs.

Plaintiff, a superintendent of a multiple dwelling, was injured while firefighters were extinguishing a blaze in her building. At the request of a firefighter, plaintiff escorted him to the backyard where fire escapes were located. While in the backyard, plaintiff was struck by glass that had fallen as the firefighters were breaking windows on the upper floors.

The motion court properly granted summary judgment. A municipality bears no liability for its agent's negligent

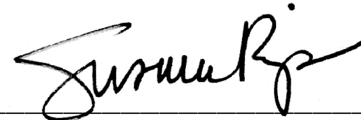
performance of a governmental function unless the agent assumed a special duty to an injured person in contrast to a general duty owed to the public (*McLean v City of New York,* 12 NY3d 194, 199 [2009]). Such a relationship did not exist here as there is no issue of fact as to whether the firefighter, through promise or actions, assumed a duty to protect plaintiff (*see Cuffy v City of New York,* 69 NY2d 255, 260 [1987]). Moreover, there is no evidence that plaintiff was given any assurance that was definite enough to justify any reliance on her part (*see Dinardo v City of New York,* 13 NY3d 872, 874 [2009]).

The motion court did not improvidently exercise its discretion in denying plaintiff's cross motion to strike defendant's answer (*see Talansky v Schulman*, 2 AD3d 355, 361-62 [2003]; *Gross v Edmer Sanitary Supply Co.*, 201 AD2d 390, 391 [1994]). Moreover, we agree with the motion court's conclusion that further discovery could not lead to "facts essential to

justify opposition" (CPLR 3212[f]), warranting a denial of defendant's summary judgment motion (*see Auerbach v Bennett*, 47 NY2d 619, 636 [1979]; *Banque Nationale de Paris v 1567 Broadway Ownership Assoc.*, 214 AD2d 359, 361 [1995]).

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

ENTERED: NOVEMBER 22, 2011



CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6106 The People of the State of New York, Ind. 474/08
Respondent,

-against-

Nelson Francois,
Defendant-Appellant.

Davis Polk & Wardwell LLP, New York (Thomas M. Noone of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Analisa Torres, J.), rendered February 23, 2009, as amended March 10, 2009, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

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]). Defendant only challenges the proof of the element of physical injury (*see* Penal Law §§ 10.00[9], 160.10[2][a]). To establish that element, the People were only required to prove that the victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]). The statutory threshold of

“substantial pain” may be satisfied by relatively minor injuries causing moderate, but “more than slight or trivial pain” (*see People v Chiddick*, 8 NY3d 445, 447 [2007], even where the injuries did not lead to any medical treatment (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

The evidence showed that defendant robbed the 85-year-old victim by knocking him down, causing the victim to hit his head and right shoulder on the ground. Defendant then jumped on the victim and took his bank deposit envelope.

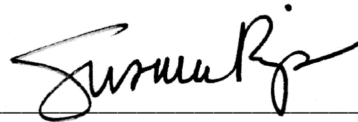
The victim testified that his injuries resulted in severe pain. Conflicts between the victim’s testimony and portions of medical records relating to, among other things, the victim’s reports of pain raised credibility issues which were resolved by the jury, and we find no reason to disturb its findings. Notwithstanding some contradictions in the medical records, there was ample evidence that the victim reported significant pain to ambulance and hospital personnel, and also reported to his primary care physician that the pain persisted two days after the robbery. Furthermore, for a period of three months after the robbery, the victim took over-the-counter pain medication and used heating pads for 30 to 60 minutes a day to relieve the pain in his shoulder. The victim testified that even nine months

after the incident, he still felt pain in his right arm whenever he used it to carry shopping bags. Finally, during the robbery defendant made threats to seriously injure the victim if he did not submit (*see Chiddick*, 8 NY3d at 448 [2007]).

Defendant did not preserve his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). The court's curative instructions were sufficient to prevent any inappropriate remarks from causing prejudice.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6107 In re Anizabel B.,

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

Howard M. Simms, New York, for appellant.

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

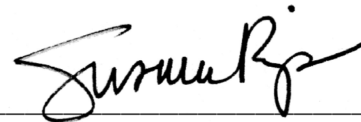
Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about March 18, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of assault in the third degree and menacing in the third degree, and placed her on probation for a period of nine months, unanimously affirmed, without costs.

Appellant’s challenges to the court’s suppression ruling are substantially similar to arguments this Court rejected on two

companion appeals (*Matter of Michael R.*, 87 AD3d 940 [2011]; *Matter of Daniel E.*, 82 AD3d 639 [2011], *lv denied* 17 NY3d 704 [2011]), and there is no reason to reach a different result here.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6108-6109 Joseph F. Beahn, Jr., Plaintiff-Appellant, Index 24247/06

-against-

New York Yankees Partnership,
Defendant-Respondent.

____

Ateshoglou & Aiello, P.C., New York (Steven D. Ateshoglou of counsel), for appellant.

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for respondent.

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Appeal from order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered July 19, 2010, which, in an action for personal injuries, granted defendant's motion for summary judgment dismissing the complaint, deemed appeal from judgment, same court and Justice, entered November 5, 2010, and so considered, said judgment unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about October 18, 2010, which granted plaintiff's motion for reargument, and, upon reargument, adhered to the prior determination, unanimously dismissed, without costs, as academic.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff was injured when, while attending a baseball game, he slipped and fell in the row

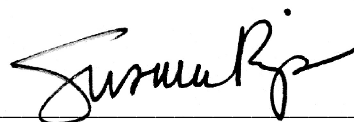
where his seat was located. Defendant submitted, inter alia, plaintiff's deposition testimony that while the walking surface of the steps, ramps and concourse area in the stadium was slick, he did not recall seeing any condition, namely liquid or food, in the row where he fell (*see Goldfischer v Great Atl. & Pac. Tea Co., Inc.*, 63 AD3d 575, 575 [2009] ["failure to identify the condition that caused plaintiff's fall is fatal to plaintiff's claim"]). Furthermore, plaintiff's sister stated that there was a puddle of liquid on the stairs at the entrance to the aisle where their seats were located and that the puddle had been there for at least 15 minutes. However, she also said that plaintiff fell at a spot that was three or four seats away from the puddle.

In opposition, plaintiff failed to raise a triable issue of fact. He submitted an affidavit, and the affidavits of his sister and his former girlfriend, who had accompanied him to the game. All three averred that plaintiff had stepped in the puddle observed by plaintiff's sister, and that the puddle caused plaintiff to fall. Affidavit testimony that is obviously prepared in support of litigation that directly contradicts deposition testimony previously given is insufficient to defeat the motion for summary judgment (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]). Here, plaintiff offers no

explanation as to his sudden change in testimony. Moreover, none of the affiants addressed the prior testimony or explained how the spill caused plaintiff to fall when, after he walked through the spill, he was able to continue to traverse the row of seats, and pass three or four seated fans, before falling.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6111 Lawrence A. Goldstein, et al., Index 650476/10
Plaintiffs-Respondents,

-against-

12 Broadway Realty LLC,
Defendant-Appellant.

____

Kramer Levin Naftalis & Frankel LLP, New York (Ronald S. Greenberg of counsel), for appellant.

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (David C. Burger of counsel), for respondents.

____

Amended order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered June 27, 2011, which, to the extent appealed from as limited by the briefs, resolved the lessor plaintiffs' first claim and defendant lessee's counterclaim, for declaratory relief as to the interpretation of the subject lease, in plaintiffs' favor, and declared that, among other things, the appraisers shall not consider the language of section 9.1 of the lease regarding the use of the land as a "modern apartment house with not less than nine stories," and that the Real Estate Board of New York (REBNY) shall be substituted for the Chamber of Commerce of the State of New York as the entity designated to appoint a third appraiser, in the event a third appraiser is necessary in accordance with section

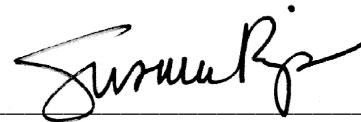
19.4 of the lease, unanimously affirmed, without costs.

The motion court properly interpreted the disputed sections of the lease as requiring the appraisers to value the land as vacant and unimproved, with no restrictions affecting its use (*see New York Overnight Partners v Gordon*, 88 NY2d 716, 721-722 [1996]). Reversal is not required on res judicata grounds. Indeed, neither the so-ordered stipulation in the first action nor the court's prior orders construed the disputed terms of the lease. Although the court had previously determined that the issue of the selection of a third appraiser was premature, it properly searched the record and resolved the issue sua sponte in this case in order to avoid further litigation and delay (*see* CPLR 3212[b]). Because the record shows that the designated entity under the lease no longer performs the service of

selecting neutral appraisers, the motion court providently exercised its discretion in declaring that REBNY should select a third appraiser, in the event one is necessary.

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

ENTERED: NOVEMBER 22, 2011



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Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6112 Joseph J. Cassidy, Index 13369/08
Plaintiff-Respondent,

-against-

DCFS Trust,
Defendant-Appellant,

Gilad Realty, Inc., et al.,
Defendants.

____

Arnold S. Kronick, White Plains, for appellant.

Scott Baron & Associates, P.C., Howard Beach (Michael Szechter of counsel), for respondent.

____

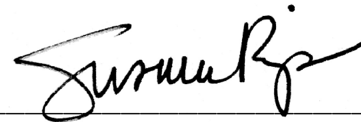
Order, Supreme Court, New York County (George J. Silver, J.), entered January 18, 2011, which, to the extent appealed from as limited by the briefs, denied that branch of defendants DCFS Trust and Gilad Realty, Inc.'s motion for summary judgment dismissing the complaint against DCFS Trust, unanimously affirmed, without costs.

DCFS Trust, as movant, failed to meet its initial burden to show prima facie entitlement to summary judgment (*see* CPLR 3212[b]; *Frees v Frank & Walter Eberhart L.P. No.1*, 71 AD3d 491 [2010]), inasmuch as it did not offer competent proof that it was engaged in the business or trade of leasing or renting motor vehicles (including the vehicle driven by the individual

defendant), as would entitle it to immunity from vicarious liability for injury caused by the individual defendant (*see* 49 USC § 30106 *[Graves Amendment]; cf. Ballatore v HUB Truck Rental Corp.*, 83 AD3d 978 [2011]). DCFS Trust also failed to present competent proof that the individual defendant was not its employee (*see generally Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 253 [2011]). The testimony of the president of defendant Gilad Realty, the company that rented the vehicle from DCFS Trust, is insufficient to establish DCFS Trust's business or trade or its employee roster.

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

ENTERED: NOVEMBER 22, 2011



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CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6113 The People of the State of New York, Ind. 4054/06
Respondent,

-against-

Andre Edmonds,
Defendant-Appellant.

____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Lewis Bart Stone, J. at plea; Charles H. Solomon, J. at sentencing), rendered on or about October 8, 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 22, 2011

____
CLERK

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

Tom, J.P., Saxe, Sweeney, Richter, Manzanet-Daniels, JJ.

6114 1840 Concourse Associates, LP, Index 602551/09
Plaintiff-Appellant,

-against-

Praetorian Insurance Company, etc.,
Defendant-Respondent.

____

Weg and Myers, P.C., New York (Joshua L. Mallin of counsel), for appellant.

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Michael E. Gorelick of counsel), for respondent.

____

Order, Supreme Court, New York County (James A. Yates, J.), entered December 7, 2010, which denied plaintiff’s motion for summary judgment and granted defendant’s cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

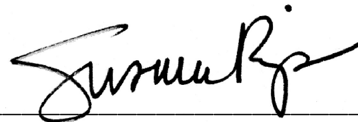
In this action for breach of contract based on a commercial property policy issued by defendant insurer to plaintiff property owner, defendant established its entitlement to judgment as a matter of law by showing that plaintiff commenced this action after expiration of the two-year limitations period contained in the policy (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967-968 [1988]). In opposition, plaintiff failed to raise a triable issue of fact as to whether the action was governed by

the six-year statute of limitations set forth in CPLR 213 (*id.*). Moreover, plaintiff failed to raise a triable issue of fact as to waiver or estoppel (*id.*).

Because plaintiff's claim is barred by the applicable two-year statute of limitations, we decline to consider any remaining arguments.

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

ENTERED: NOVEMBER 22, 2011



CLERK

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

6115 Hui Min Li, Index 105858/07
Plaintiff-Respondent,

-against-

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

Hong Kong Supermarket, Inc.,
Defendant-Appellant.

____

Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for appellant.

Law Office of Ryan S. Goldstein, P.L.L.C., Bronx (Ryan S. Goldstein of counsel), for respondent.

____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 31, 2011, which, insofar as appealed from, denied defendant Hong Kong Supermarket, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to grant the motion as to the cause of action for violation of civil rights pursuant to 42 USC § 1983, and otherwise affirmed, without costs.

Defendant failed to demonstrate conclusively that plaintiff's cause of action for false imprisonment as against it is without merit (*see Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]). The conflicting testimony presents issues of fact

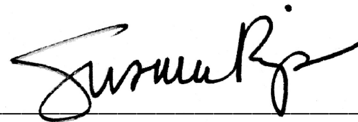
whether plaintiff was detained or remained voluntarily in the store after defendant accused her of stealing rice cakes and, if she was detained, whether the detention was conducted in a reasonable manner (*see* General Business Law § 218).

To the extent plaintiff's cause of action for violation of civil rights pursuant to 42 USC § 1983 is asserted against this defendant, it should be dismissed because the record is bereft of any indication that defendant was acting under color of state law (*see Rodriguez v City of New York*, 87 AD3d 867 [2011]).

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

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

ENTERED: NOVEMBER 22, 2011



CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6116 IMP Plumbing and Heating Corp., Index 115242/08
Plaintiff-Respondent,

-against-

317 East 34th Street, LLC., et al.,
Defendants,

NYU Hospital Centers,
Defendant-Appellant.

____

Holland & Knight LLP, New York (Deborah C. Roth of counsel), for appellant.

Sherwood Allen Salvan, New York, for respondent.

____

Appeal from order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 21, 2010, which granted plaintiff's motion for summary judgment on its first cause of action against defendant NYU Hospital Centers for an unpaid lien and for dismissal of NYU's cross claims against defendant general contractor, deemed appeal from judgment, same court and Justice, entered October 7, 2010 (CPLR 5520[c]), and so considered, said judgment unanimously reversed, on the law, without costs, the judgment vacated, and plaintiff's motion denied.

Plaintiff plumbing subcontractor failed to establish its entitlement to judgment as a matter of law. Plaintiff's rights under the Lien Law are wholly derivative of the general

contractor's right to payment, as a subcontractor's lien can only be satisfied out of funds "due and owing from the owner to the general contractor" (*Timothy Coffee Nursery/Landscape v Gatz*, 304 AD2d 652, 654 [2003] [internal quotation marks and citations omitted]). Plaintiff bore the initial burden of showing that funds were, in fact, due and owing to the general contractor (*see Penava Mech. Corp. v Afgo Mech. Servs. Inc.*, 71 AD3d 493, 495-496 [2010]). Although plaintiff's moving papers calculated the balance owed to the general contractor under the prime contract had it fully performed its contractual duties, it did not address the merits of NYU's position that the general contractor breached the contract.

Even assuming that plaintiff met its prima facie burden, NYU's opposition raised triable issues as to whether the general contractor was owed the unpaid balance of the contract price. The affidavit of NYU's Vice President for Facilities and the exhibits proffered in opposition directly challenged the adequacy of the general contractor's performance.

Dismissal of NYU's cross claims against the general contractor was also not warranted. NYU correctly asserts that, as in third-party actions, CPLR 3215(c)'s mandate that an action is deemed abandoned unless "proceedings" towards a default are

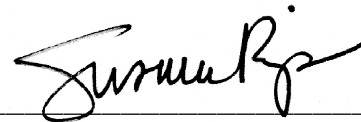
taken within one-year of the default, does not apply to indemnification claims until liability is established in the main action (*see Multari v Glalin Arms Corp.*, 28 AD2d 122, 124 [1967], *appeal dismissed* 23 NY2d 740 [1968]). Indeed, the motion court recognized such principle, but applied it only to the first cross claim. To the extent the second cross claim is one for contribution, the same principle applies, as the claim is asserted in the verified answer as specifically contingent upon a finding of liability against NYU in the main action.

Furthermore, with respect to all three cross claims, the standard employed by the motion court -- one year from service of the verified answer -- is not required by CPLR 3215(c), which mandates the one-year period as accruing from the default in answering the claim. Here, the moving papers do not indicate the

date of the general contractor’s alleged default, and only provide the date NYU’s pleading containing the cross claims was served.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6117 The People of the State of New York, Ind. 3952/03
Respondent,

-against-

David Maldonado,
Defendant-Appellant.

____

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

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

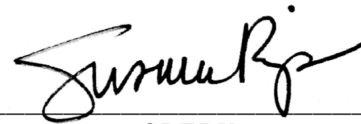
____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered December 10, 2009, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 15 years to life, unanimously modified, on the law, to the extent of vacating the imposition of a DNA databank fee, and otherwise affirmed.

As the People concede, the DNA databank fee should not have been imposed. The authorizing legislation became effective after the crime was committed.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6118 The People of the State of New York, Ind. 5559/09
Respondent,

-against-

Austin Cornelius,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered June 10, 2010, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second felony offender, to a term of 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 7 years, and otherwise affirmed.

The court's *Sandoval* ruling 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 convictions at issue were highly probative of credibility, and the court only permitted inquiry into a small

portion of defendant's extensive criminal record (*see People v Coleman*, 45 AD3d 432 [2007], *lv denied* 10 NY3d 763 [2008]).

The court's *Molineux* ruling (*People v Molineux*, 168 NY 264, [1901]) was also a proper exercise of discretion. The evidence of uncharged crimes was probative of defendant's knowledge and intent with regard to the burglary in this case, and helped establish that defendant knew that his entry into the store was unlawful. The probative value of this evidence outweighed any potential for prejudice, which was minimized by the court's suitable limiting instructions.

Defendant failed to preserve his argument that the court conflated its *Sandoval* and *Molineux* determinations, or his constitutional claims regarding either issue, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The trespass notices barring defendant from entering a chain of drugstores were properly admitted as business records and did not violate defendant's right of confrontation (*see People v Cox*, 63 AD3d 626, 627 [2009], *lv denied* 13 NY3d 859 [2009]; *People v Liner*, 33 AD3d 479 [2006], *affd* 9 NY3d 856 [2007]). These documents were "not created in order to memorialize witness

testimony," but for business purposes (*Liner v Artus*, 2008 WL 5114485, *3-4, 2008 US Dist LEXIS 98558, *7-11 [SD NY 2008]).

Since the court's reasonable doubt instruction cannot be viewed as expressly shifting the burden of proof, normal preservation requirements apply (*see People v Thomas*, 50 NY2d 467, 471-472 [1980]), and we decline to review defendant's unpreserved challenge to that instruction in the interest of justice. As an alternative holding, we also reject it on the merits. Although it would have been the better practice to use the standard CJI instruction, the court's charge, read as a whole, did not shift or misstate the burden of proof or expressly impose an affirmative obligation upon jurors to articulate a basis for harboring a reasonable doubt (*see People v Cubino*, 88 NY2d 998 [1996]; *People v Antommarchi*, 80 NY2d 247, 251-252 [1992]).

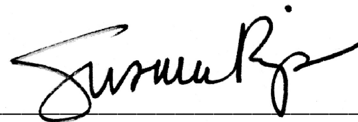
Defendant's challenge to the legal sufficiency of the evidence of physical injury is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence (*see People v Hodge*, 83 AD3d 594, 595 [2011]). We similarly find

that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 22, 2011



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CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6121 In re Jennifer Marrero,
Petitioner-Respondent,

-against-

Derek Johnson,
Respondent-Appellant.

____

Julian A. Hertz, Larchmont, for appellant.

Safe Horizon Domestic Violence Law Project, Brooklyn (Azaleea Carlea of counsel), for respondent.

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

____

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about May 24, 2010, which, inter alia, granted respondent father supervised visitation with the parties' child, and issued a five-year order of protection against him, unanimously affirmed, without costs.

Family Court found that respondent committed assault in the second and third degrees, harassment in the first and second degrees, menacing in the second degree, and disorderly conduct, offenses enumerated in Family Court Act § 812. Thus, the court had jurisdiction over this family offense proceeding and properly issued the order of protection.

Repeated acts of domestic violence by respondent toward

petitioner and the child were proved by a preponderance of the evidence and provide the requisite sound and substantial basis for the court's conclusion that supervised visitation with respondent would be in the best interests of the child (*see* Domestic Relations Law § 240[1][a]; *see Matter of Rodriguez v Guerra*, 28 AD3d 775 [2006]). We perceive no basis for disturbing the court's credibility determinations.

We have reviewed respondent's remaining contentions and find them without merit.

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

ENTERED: NOVEMBER 22, 2011

CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6122 & M-4993 The People of the State of New York, Respondent, Ind. 5450/03

-against-

Miguel Perez, Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about March 4, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated the denial of defendant's application for resentencing in light of his extensive criminal

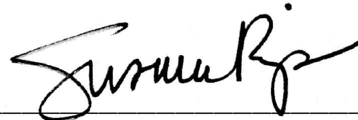
record and his pattern of misconduct while incarcerated (*see e.g.* *People v Marti*, 81 AD3d 418 [2011], *lv denied* 17 NY3d 798 [2011]).

M-4993 - People v Miguel Perez

Motion to dismiss appeal denied.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6123 Lijo Panghat, M.D., Claim 118300
Claimant-Appellant,

-against-

New York State Division of Human Rights,
Defendant-Respondent.

____

Lijo Panghat, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Ann P. Zybert of counsel), for respondent.

____

Order of the Court of Claims of the State of New York (Melvin L. Schweitzer, J.), entered November 12, 2010, which granted defendant’s motion to dismiss the claim, and denied claimant’s motion to strike defendant’s affirmative defenses and for leave to amend the claim, unanimously affirmed, without costs.

The Court of Claims properly granted the motion to dismiss the claim, which attempted to set forth a cause of action for defamation based on defendant’s publication of a judicial decision in a related matter on its website. Civil Rights Law § 74 prohibits a civil action that alleges injury from “the publication of a fair and true report of any judicial proceeding.” The privilege under that statute is absolute and

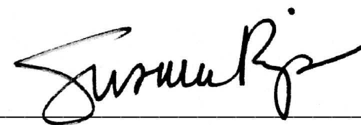
applies even in the face of allegations of malice or bad faith (*see Pelayo v Celle*, 270 AD2d 469 [2000]), and is not altered by subsequent appeals or dismissals of any action (*see Glendora v Gannett Suburban Newspapers*, 201 AD2d 620 [1994], *lv denied* 83 NY2d 757 [1994]).

The Court of Claims properly denied the motion for leave to amend the claim as the proposed amendments were not viable and could not overcome the privilege under Civil Rights Law § 74 (*see Sharon Ava & Co. v Olympic Tower Assoc.*, 259 AD2d 315 [1999]). The court also correctly declined to reach claimant's motion to strike the affirmative defenses, since it was unnecessary to do so.

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

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

ENTERED: NOVEMBER 22, 2011



CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6125 Felix Urbistondo, Plaintiff-Appellant, — Index 18541/07, 303670/07, 84109/09

-against-

The City of New York,
Defendant-Respondent.

- - - - -

Felix Urbistondo,
Plaintiff-Appellant,

-against-

Jose A. Pujols, et al.,
Defendants,

Welsbach Electric Corp.,
Defendant-Respondent.

- - - - -

[And a Third-Party Action]

____

Dinkes & Schwitzer, New York (Naomi J. Skura of counsel), for appellant.

London Fisher, LLP, New York (James Walsh of counsel), for respondents.

____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 29, 2010, which, insofar as appealed from as limited by the briefs, in these actions for personal injuries, granted the motion of defendants City of New York and Welsbach Electrical Corp. for summary judgment dismissing the complaints as against them, unanimously reversed, on the law, without costs,

and the motion denied.

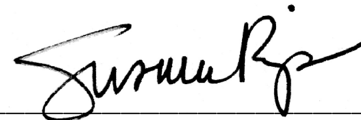
Dismissal of the complaint as against the City and Welsbach was not warranted in this action where plaintiff pedestrian alleges that he was injured when, while crossing an intersection where neither the pedestrian signal nor traffic light were functioning, he was struck by a motor vehicle driven by defendant Pujols. A City employee testified that on the morning of the accident, a complaint was lodged indicating that the traffic signals at the subject intersection were not working. A call type of "02" had been assigned to the complaint, meaning that Welsbach, the company charged with maintaining the traffic lights, had two hours to respond to the outage. However, the record shows that plaintiff was injured more than two hours after the complaint had been lodged.

"A municipality has a duty to maintain its streets in a reasonably safe condition" (*Kohn v City of New York*, 69 AD3d 463, 463 [2010]). Here, the record shows that the pedestrian signal and traffic light outages at issue were allowed to persist on a heavily traveled roadway, with nine traffic lanes, for more than

two hours and resulted in a dangerous condition on that roadway (*see Prager v Motor Veh. Acc. Indem. Corp.*, 74 AD2d 844 [1980], *affd* 53 NY2d 854 [1981]. Accordingly, triable issues exist as to whether the failure to timely respond to and remedy the signal outages was a proximate cause of plaintiff's accident (*see id.*).

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

ENTERED: NOVEMBER 22, 2011



CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6126N Joseph L. Newman, as Chapter 7 Trustee for the Estate of Victoria Lazorik, etc.,
Plaintiff-Appellant, Index 101745/08

-against-

The Old Glory Real Estate Corporation,
Defendant-Respondent,

Delidakis Construction Co. Inc.,
Defendant.

Michael A. Haskel, Mineola, for appellant.

Quirk and Bakalor, P.C., New York (Richard H. Bakalor of counsel), for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about April 21, 2010 which, insofar as appealed from, granted defendant The Old Glory Real Estate Corporation's motion to vacate a default judgment, unanimously affirmed, without costs.

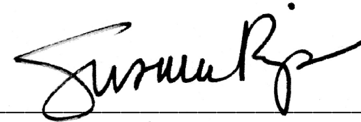
Defendant established that "[it] did not receive personal notice of the summons in time to defend and has a meritorious defense" (CPLR 317; *see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141-142 [1986]). The record shows that process was served on the Secretary of State and sent to the wrong address. However, there is no evidence that defendant

engaged in a deliberate attempt to avoid notice (*see id.* at 143; *Raiola v 1944 Holding*, 1 AD3d 296 [2003]). The record shows prima facie that defendant was the decedent's employer when she was injured, which, if proven, would limit plaintiff's recovery to

workers' compensation.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6127N Zoe Ferguson, Index 106855/09
Plaintiff-Respondent,

-against-

Hess Corporation,
Defendant,

ABRO Management Corp., et al.,
Defendants-Appellants.

Newman Myers Kreines Gross Harris, P.C., New York (Adrienne Yaron of counsel), for appellants.

The Perecman Firm, P.L.L.C., New York (Peter D. Rigelhaupt of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered March 29, 2011, which, in this personal injury action, granted plaintiff's motion to, among other things, vacate an order, same court and Justice, entered on default on August 17, 2010, granting the motion of defendants-appellants to strike plaintiff's complaint for failure to comply with discovery, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in vacating plaintiff's default and restoring the action to the calendar. The action has merit, plaintiff has substantially complied with discovery and retained new counsel, and there is a

strong public policy favoring resolution of cases on the merits (*Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413-414 [2011]). In view of the foregoing, we need not reach defendants' argument regarding plaintiff's motion to renew.

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

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

ENTERED: NOVEMBER 22, 2011

CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6128 The People of the State of New York, Ind. 3660/07
Respondent,

-against-

Andrew Moss,
Defendant-Appellant.

____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Justin M. Ross of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered February 9, 2009, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 10 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, including its evaluation of the arresting officer's use of documents to refresh his recollection.

Defendant claims that the arresting officer, who testified

to the detailed radioed description on which he relied, and then testified that defendant matched that description, was also required to testify as to defendant's actual appearance. Since defendant's arguments were insufficient to alert the court to that specific claim, it is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Lewis*, 37 AD3d 176, 177 [2007], *lv denied* 9 NY3d 846 [2007]). The officer described defendant's appearance at the time of his arrest by incorporating by reference the detailed description he had just given.

The evidence at a *Hinton* hearing established an overriding interest that warranted closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]). The undercover officer testified that he continued to work in, among other places, the area of the sale, that he had pending cases connected with that area, that he had been threatened while working in the area, and that he took precautions when entering the courthouse to protect his identity.

Instead of ordering a complete closure, the court permitted defendant's family to attend. In addition, it considered but rejected an alternative to closure proposed by defendant.

Accordingly, the court satisfied the *Waller* requirement of considering alternatives to full closure (*see Presley v Georgia*, 558 US __, __, 130 S Ct 721, 724 [2010]; *People Mickens*, 82 AD3d 430 [2011], *lv denied* 17 NY3d 798 [2011], *cert denied* __ US __, 2011 WL 4384159, 2011 US LEXIS 7608 [Oct 31, 2011]; *People v Manning*, 78 AD3d 585, 586 [2010], *lv denied* 16 NY3d 861 [2011]).

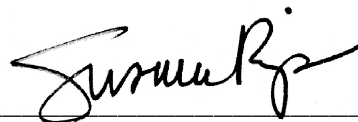
The court properly exercised its discretion in denying defendant’s midtrial motion for a severance. Defendant failed to demonstrate that, during trial, his defense and that of his codefendant had become so antagonistic as to require separate trials (*see People v Cardwell*, 78 NY2d 996 [1991]; *People v Mahboubian*, 74 NY2d 174, 183 [1989]). The codefendant’s testimony was favorable to defendant, and defendant’s argument that this testimony did more harm than good is speculative.

Defendant’s claims regarding the prosecutor’s summation and

the court’s interested witness charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: NOVEMBER 22, 2011



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CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6129 In re Miroslaw Haleniuk,
Petitioner-Appellant,

-against-

Bidywati Persaud,
Respondent-Respondent.

____

Michael J. Reilly, Kew Gardens, for appellant.

Schoeman, Updike & Kaufman, LLP, New York (Beth L. Kaufman of counsel), for respondent.

____

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about August 27, 2010, which granted respondent mother’s objections to the Support Magistrate’s April 19, 2010 order terminating petitioner father’s support obligation, vacated the order, dismissed the father’s petition for constructive emancipation, reinstated the order of support, and remanded the matter to the Support Magistrate to address the remaining petitions, unanimously affirmed, with costs.

The evidence in the record sufficiently supports Family Court’s finding that the father failed to meet his burden of showing that the child was constructively emancipated (*see O’Sullivan v Katz*, 81 AD3d 480 [2011]). Although the record reflects a strained relationship between the father and child, it

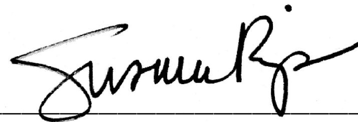
does not support a finding that the child completely refused to have a relationship with the father (*see id.*).

The father's failure to properly file a full record on appeal, despite his contrary statement made pursuant to CPLR 5531, warrants the imposition of costs incurred in preparing and filing a respondent's appendix (*see* CPLR 5528[e]; 22 NYCRR 600.10[c][1]).

We need not remand to the Support Magistrate to consider the father's arguments regarding a credit and his obligation to pay college expenses, as Family Court already provided for such relief in the order appealed from.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, JJ.

6130 In re Richard Logan, Index 105788/10
Petitioner,

-against-

Raymond Kelly, etc.,
Respondent.

____

Kevin P. Sheerin, Mineola, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Alyse Fiori of counsel), for respondent.

____

Determination of respondent, dated January 5, 2010, which revoked petitioner's Retired Law Enforcement Carry pistol license, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Michael D. Stallman, J.], entered July 8, 2010), dismissed, without costs.

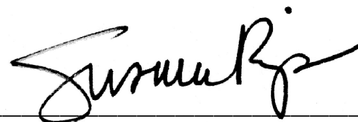
Respondent's determination was supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). Petitioner conceded at the administrative hearing that he failed to immediately notify the License Division upon becoming a party to a Child Protective Services investigation, a party to domestic incident reports, and

when an order of protection was issued against him (*see* 38 RCNY 5-22[c][8]; 38 RCNY 5-30[c][5], [d]; *Matter of Kozhar v Kelly*, 62 AD3d 540 [2009]). The revocation of petitioner's license was within respondent's broad discretion regardless of whether the allegations of petitioner's ex-wife, which led to the reportable incidents, were false. Petitioner's contention that his failure to report the incidents were "technical violations," is unavailing (*see Matter of Cohen v Kelly*, 30 AD3d 170 [2006]).

The penalty imposed does not shock our sense of fairness (*see Matter of Del Valle v Kelly*, 37 AD3d 311 [2007]). 38 RCNY 5-22(a)(1) explicitly states that pistol licenses are revocable at any time, and the record shows that petitioner violated the rules governing his pistol license on numerous occasions.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6131 Luis Arce, Index 300228/09
Plaintiff-Respondent,

-against-

1704 Seddon Realty Corp., et al.,
Defendants-Appellants.

____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellants.

Kerry B. Stevens, White Plains, for respondent.

____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered May 13, 2011, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor defendants dismissing the complaint.

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff alleges that he was injured when, while descending an interior staircase in defendants' building, he slipped on a pool of clear liquid and fell down the stairs. Defendants demonstrated that they neither created nor had notice of the allegedly defective condition of the stairs.

In opposition, plaintiff failed to raise a triable issue of fact. There was no evidence that defendants were notified of any clear liquid on the day of the accident or that the clear liquid was present for a sufficient period of time to allow defendants' employees an opportunity to discover and remedy the problem (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Wallace v Doral Tuscany Hotel*, 302 AD2d 255 [2003]). The clear liquid that caused plaintiff's fall could have been deposited there only minutes before the accident, particularly in light of plaintiff's testimony that the liquid was still dripping from the top step to the second step (*see Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 [2005]).

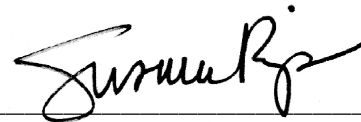
Furthermore, although plaintiff submitted affidavits from his girlfriend and another tenant of the building, who said that the subject stairs were often slippery and strewn with garbage, such prior observations are insufficient to defeat the motion (*see Melendez v New York City Hous. Auth.*, 23 AD3d 211 [2005]).

The report of plaintiff's expert was unsworn and therefore, did not constitute competent evidence sufficient to raise an issue of fact (*see Mazzola v City of New York*, 32 AD3d 906 [2006]). Even if we were to consider the report, his opinions regarding the dangerous and defective condition of the stairs due

to improper treads and differing heights were irrelevant since plaintiff’s claim was that he slipped because of the clear liquid that was present on the top step of the staircase.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6132- 6133 Yann Geron, as Chapter 7 Trustee of the Estate of Thelen LLP, Index 601253/09
Plaintiff-Respondent,

-against-

Steven DeSantis,
Defendant-Appellant.

____

Behrins & Behrins, P.C., Staten Island (Susan R. Schneider of counsel), for appellant.

Yudin & Yudin, PLLC, New York (Steven G. Yudin of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered January 7, 2011, awarding plaintiff the aggregate amount of $523,611.36, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 2, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on his claim for an account stated, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff established prima facie entitlement to judgment as a matter of law on his claim of account stated by establishing that the law firm generated detailed monthly invoices and mailed them to defendant on a regular basis in the course of its

business (*see Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539 [2009]; *American Express Centurion Bank v Williams*, 24 AD3d 577 [2005]).

Defendant's allegations of oral objections lack the specificity to raise issues of fact as to an account stated (*see Berkman*, 58 AD3d at 539; *Zanani v Schvimmer*, 50 AD3d 445, 446 [2008]). Defendant's reliance on his letter of September 2, 2008, in which he referred to "concerns" about the firm's bills, is misplaced, as the letter offers no detail as to the nature of those concerns. The letter also came long after defendant's receipt of the majority of the firm's bills, and postdated, by more than one year, an earlier letter written by defendant in June 2007, in which he acknowledged a large outstanding balance and confirmed that he would pay that sum "in full without defense of any kind" upon receipt of certain monies from his mother's estate.

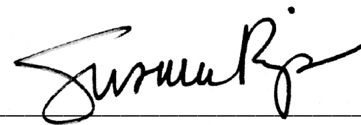
Defendant further expressed his desire for the firm to continue representing him, and acknowledged that fees for the firm's continuing services "may be substantial." Defendant's contention that this letter raises "unanswered questions of fact" as to whether it was drafted by the firm and signed by defendant "perhaps under duress or pressure of some sort" is unpreserved,

as he did not raise this argument below (*see Loguidice v Loguidice*, 67 AD3d 544, 545 [2009]). In any event, defendant's argument is speculative and lacks support in the record.

We have considered and rejected defendant's contention that there are inconsistencies in the sums sought by plaintiff in his account stated claim. We also reject defendant's claim that the summary judgment motion was premature in light of the fact that discovery had not yet been completed. We find that there is no need for further discovery as to whether defendant ever protested the firm's bills, since that is "a matter within [his] own knowledge" (*Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 419 [2009]).

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, JJ.

6134 In re Louis Inglese, Jr., Index 107806/10
Petitioner-Respondent,

-against-

Robert D. Limandri, as Commissioner of the
New York City Department of Buildings,
Respondent-Appellant.

____

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

Murray Richman, Bronx (Brian Alexander Jacobs of counsel), for respondent.

____

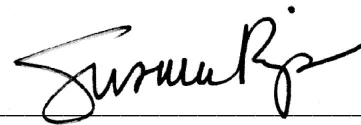
Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered November 12, 2010, annulling respondent's determination, dated April 23, 2010, which revoked petitioner's hoist machine operator license, and remanding the matter for a new determination, unanimously reversed, on the law, without costs, the petition denied, respondent's determination reinstated, and the proceeding brought pursuant to CPLR article 78 dismissed.

Petitioner's conviction of a crime directly related to the use of the subject license demonstrates poor moral character that adversely reflects on his fitness to hold a licensed position in

the construction industry (Administrative Code of City of NY §§ 28-401.6; 28-401.19[13]). The penalty imposed is not disproportionate to the offense (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). The Commissioner properly considered the factors set forth in Correction Law § 753.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6135 The People of the State of New York, Respondent, Ind. 638/06

-against-

George Rawls, Defendant-Appellant.

____

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

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

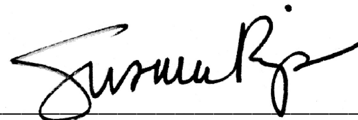
____

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, New York County (Ruth Pickholz, 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 22, 2011



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

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, JJ.

6136 Michael Furnari, et al., Index 7139/04
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

____

Belovin & Franzblau, LLP, Bronx (Jeffrey J. Belovin of counsel), for appellants.

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

____

Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered May 5, 2010, which, following the close of plaintiffs' case at trial and on defendant's motion, dismissing the complaint, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for a new, bifurcated trial.

Plaintiff was injured while playing softball on an asphalt multi-purpose play area at a City park located in the Bronx. After fielding a ball, plaintiff fell when he planted his foot to throw the ball. He claims that he fell as a result of an uneven playing surface caused by or concealed by a tar patch applied by defendant City.

At the close of plaintiffs' evidence, the trial court

granted the City’s motion to dismiss the complaint, finding that the plaintiffs had failed to show that City had received written notice of the defect under New York City Administrative Code § 7-201(c) and that the injured plaintiff had assumed a risk inherent in the sport of softball and the risk of playing despite an open and obvious defect. These conclusions were error.

The trial court was incorrect in finding that New York City Administrative Code § 7-201(c) required written notice of the defect in the asphalt softball field. The court gave § 7-201(c) an expansive reading, finding that the definition of street, which includes the terms “public way, public square, and public place” can be read to include the playing fields of a public park. This reading of § 7-201(c), however, places it in direct conflict with General Municipal Law 50-e(4), which limits the areas where written notice of a defect must be provided to a municipality to a street, highway, bridge, culvert, sidewalk or crosswalk (*Walker v Town of Hempstead*, 84 NY2d 360 [1994]). The City, in enacting the Code, cannot have intended to expand the definition of street in this way, which would conflict with state law.

The trial court’s presupposition that written notice was required also led to an improvident exercise of its discretion in

excluding evidence proffered by plaintiff. During the testimony of defendant's employee responsible for inspecting the park, the trial court excluded a work order request for the use of hot tar to repair the asphalt field on the ground that the witness could not state with certainty that it was for the exact area where plaintiff fell. However, it is where written notice is required that the City is not liable unless the written notice pinpoints the particular defect (*see e.g. Curci v City of New York*, 209 AD2d 574 [1994]). Here, the work order was relevant to show that the application of the hot tar obscured the cracks and depression in the surface, creating or adding to a defective condition.

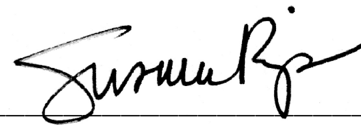
Finally, the trial court's determination that plaintiff assumed the risk of his injury because it was (a) inherent in the sport and (b) open and obvious, was in error. Plaintiff did not testify that he fell in pursuit of the ball, rather he stated that after moving to catch the hit ball on a bounce, he fell in the act of planting his foot to throw. He described it as his left foot getting "stuck" in something, he did not know what, causing him to fall. This accident was caused by an unevenness in the field or playing surface, which is not inherent in the sport when it is played on an asphalt surface, which is

presumably flat (*see Warren v Town of Hempstead*, 246 AD2d 536 [1998]).

Furthermore, under these circumstances, it cannot be said as a matter of law that this defect was open and obvious and not inherently dangerous, but rather, issues of fact are presented for determination by a jury (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [2004]).

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6137 Mody Diakite, Index 309254/09
Plaintiff-Respondent,

-against-

Mark A. Soderstrom, et al.,
Defendants-Appellants.

____

John C. Buratti & Associates, New York (John C. Buratti of counsel), for appellants.

Krentsel & Guzman, LLP, New York (Steven E. Krentsel of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 23, 2011, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing plaintiff's claims of serious injury of a permanent nature, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

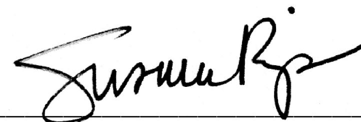
Defendants established prima facie that plaintiff did not sustain a serious injury of a permanent nature by submitting plaintiff's medical records and the affirmed reports of medical experts who, upon examination, found that plaintiff had active mobility of his left shoulder and had recovered from the 2009 vehicular accident without any disability. In opposition,

plaintiff failed to raise a triable issue of fact. The limitation in range of motion in his left shoulder found by his treating physician in November 2010 was insufficient to qualify as "significant," given the otherwise normal shoulder findings. Moreover, one year earlier the physician had found "active mobility of [plaintiff's] left shoulder with no significant pain," and yet no explanation was offered for the more recent finding of limitation (*see* Insurance Law § 5102[d]; *Jno-Baptiste v Buckley*, 82 AD3d 578 [2011]).

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

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6138 The People of the State of New York, Ind. 7462/02
Respondent,

-against-

Anthony Hemphill,
Defendant-Appellant.

____

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

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

____

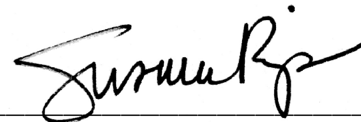
Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about May 28, 2010, which adjudicated defendant a level two sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant defendant a downward departure from his presumptive risk level (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). The underlying pattern of

criminal conduct, consisting of three separate predatory sexual attacks, was extremely serious. While defendant asserts he is unlikely to repeat such conduct, we find his contentions unpersuasive.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román JJ.

6139 In re Shemeek D.,
Petitioner-Respondent,

-against-

Teresa B.,
Respondent-Appellant,

Keith T., et al.,
Respondents,

____

John J. Marafino, Mount Vernon, for appellant.

Joseph V. Moliterno, Scarsdale, for respondent.

Aleza Ross, Central Islip, attorney for the child.

____

Order, Family Court, Bronx County (Peter Kuper, Referee), entered on or about February 22, 2010, which, following a fact-finding determination of extraordinary circumstances, awarded custody of the subject child to petitioner paternal aunt, unanimously affirmed, without costs.

Respondent mother argues that the court did not conduct a full evidentiary hearing on the custody petition because she did not testify in that proceeding. However, the record reflects that respondent's counsel consented to rest on the record after petitioner testified and the court conducted an in camera interview with the child. Thus, respondent failed to preserve

her objection (*see Matter of Jayden C. [Michelle R.]*, 82 AD3d 674, 675 [2011]).

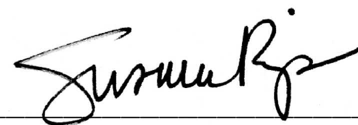
In any event, if the court erred in failing to permit respondent to present additional evidence, the error was harmless. Respondent conceded that she had not lived with the child since 1997 or 1998, having left him with his father and petitioner when he was two years old. During that period she admitted limited contact with him, including failing to visit at all in 2006 and 2007. Prolonged separation between a parent and child and lack of involvement in the child's life warranted a finding of extraordinary circumstances (*see Matter of Bennett v Jeffreys,* 40 NY2d 543, 546 [1976]; *Matter of Iris R. v Jose R.,* 74 AD3d 457 [2010]).

The court properly determined that it was in the best interests of the child to continue to reside with petitioner in

the stable and loving environment he had known most of his life (*see Bennett* 40 NY2d at 551-552).

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6140 Mintz & Gold, LLP, Index 102768/07
Plaintiff-Respondent,

-against-

Daniel Zimmerman, et al.,
Defendants-Appellants,

Dean Evan Hart,
Defendant.

Daniel A. Zimmerman, Westbury, appellant pro se.

Steven Cohn, Carle Place, appellant pro se.

Mintz & Gold LLP, New York (Paul Ostensen of counsel), for respondent.

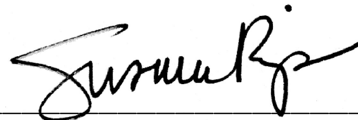
Order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 29, 2010, which, insofar as appealed from, denied defendants-appellants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

This was defendants' second motion for summary judgment. The motion court should have denied it on that basis, as defendants did not present sufficient cause for their successive

motions (*see NYP Holdings, Inc. v McClier Corp.*, 83 AD3d 426 [2011]). Even were we to reach the merits we would affirm because plaintiff was not required to plead special damages to set forth its claim under Civil Rights Law § 70, (*see* Civil Rights Law § 71).

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6141 Dale Jones, Index 102617/08
Plaintiff-Respondent,

-against-

550 Realty Heights, LLC, et al.,
Defendants-Appellants.

____

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for appellants.

Thomas Torto, New York (Jason R. Levine of counsel), for respondent.

____

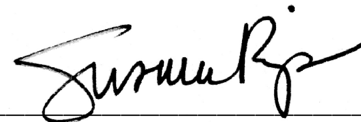
Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered September 23, 2010, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants' failed to meet their initial burden of demonstrating entitlement to judgment as a matter of law on the issue of whether they lacked constructive notice that the subject step was worn, because they failed to address the allegation in their moving papers (*see Sanchez v Irun*, 83 AD3d 611, 611-612 [2011]; *James v Loran Realty V Corp.*, 61 AD3d 561, 562 [2009]). Defendants rely on the portion of plaintiff's deposition in which he testified that a puddle caused him to fall, however, he also

testified that the worn condition of the step could have contributed to his accident (*see Ruffin v Chase Manhattan Bank, N.A.*, 66 AD3d 549, 549-550 [2009]; *Garcia v New York City Tr. Auth.*, 269 AD2d 142 [2000]).

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6142 Matthew Koziarz, Index 108637/03
Plaintiff-Respondent,

-against-

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

Manhattan and Bronx Surface
Transit Operating Authority,
Defendant.

____

Steve S. Efron, New York, for appellants.

Shestack & Young, LLP, New York (Hayes Young of counsel), for respondent.

____

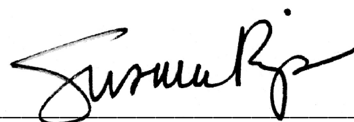
Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 18, 2010, which granted plaintiff's motion to set aside a jury verdict in defendants' favor, unanimously reversed, on the facts, without costs, and the motion denied. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff was crossing Madison Avenue at 34th Street when he was struck by a Transit Authority bus turning left onto the avenue. The traffic light was in plaintiff's favor at the time of the accident. Nevertheless, viewed in the light most favorable to defendants, the evidence supports the jury's finding

that defendants were not liable for plaintiff's injuries (*see Kaminsky v M.T.A. N.Y. City Tr. Auth.*, 79 AD3d 411 [2010]; *Mazariegos v New York City Tr. Auth.*, 230 AD2d 608, 609-610 [1996]). Defendant bus driver testified that before making his turn he scanned the intersection, checked his mirrors, and observed no pedestrians crossing the street; a witness on the bus testified that he observed plaintiff on the sidewalk about 10 feet from the curb when the bus began its turn; and the physical evidence showed that the point of collision was near the rear tires of the bus.

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

ENTERED: NOVEMBER 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6143 The People of the State of New York, Respondent, Ind. 3149/04
6143A SCI. 6165/04

-against-

Zhaundu Bradley,
Defendant-Appellant.

____

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

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

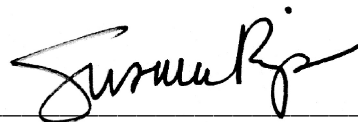
____

Judgments of resentence, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered November 3, 2010, resentencing defendant to an aggregate term of 8 years, with 2½ 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 22, 2011



CLERK

Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román, JJ.

6145 The People of the State of New York, Respondent, Ind. 877/10

-against-

Herberto Zayas, Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered July 22, 2010, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him to a term of 3½ to 7 years, unanimously affirmed.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). The undisputed facts, established by eyewitness testimony and a surveillance tape, were that defendant entered a coffee shop, jumped over a counter into a nonpublic area, tried unsuccessfully to open a cash register, and was promptly arrested.

Defendant faults his trial counsel for not arguing to the

jury that the People failed to prove defendant formed his larcenous intent at the time he entered the store. However, there was no such requirement in this case.

Defendant was guilty of burglary because, with intent to steal, he knowingly and unlawfully entered the nonpublic area of a public building (*see* Penal Law §§ 140.00[5]; 140.20; *People v Quinones*, 18 AD3d 330 [2005], *lv denied* 5 NY3d 809 [2005]). The element of "intent to commit a crime therein" is assessed at the moment of unlawful entry into the particular area. Where a crime requires a particular intent, that intent need only exist at the moment of the prohibited conduct (*People v Muhammad*, __ NY3d __ , 2011 NY Slip Op 07302, *8 [October 20, 2011]). Here, the entry into the building only became unlawful at the moment when defendant crossed from the public area to the nonpublic area. Therefore, only his intent at the time he entered the nonpublic area was relevant.

Accordingly, it was objectively reasonable (*see Strickland*, 466 US at 688) for counsel to forgo any challenge to the proof that defendant entered the store itself with larcenous intent. In any event, we also conclude that such a strategy had no reasonable probability of affecting the outcome (*id.* at 694). There was ample evidence to support the inference that defendant

formed the intent to steal before he entered the store (*see e.g. People v Zokari*, 68 AD3d 578 [2009], *lv denied* 15 NY3d 758 [2010]).

In addition, the strategy that counsel did pursue was objectively reasonable under the circumstances of the case. Faced with virtually conclusive evidence of defendant's guilt, counsel reasonably employed a jury nullification strategy (*see Anderson v Calderon*, 232 F3d 1053, 1087, 1089 [9th Cir 2000], *cert denied* 502 US 847 [2001]). Counsel sought to persuade the jury that defendant's conduct was so removed from the conventional notion of a burglary that it would be unfair to treat it as such.

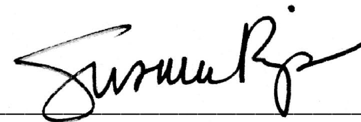
Defendant failed to preserve, and affirmatively waived, his claim that the court should have made an individual inquiry of a juror who might have overheard remarks critical of defense counsel, and we decline to review it in the interest of justice. The court offered to conduct an individual inquiry, but suggested an alternative approach where it would initially question the jurors as a group. Defense counsel expressly agreed to the latter proposal, and made no further requests or objections after

none of the jurors indicated that they had been exposed to information that might affect their ability to be impartial.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 22, 2011



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Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, JJ.

6146 Adam Miller, Index 112216/09
Plaintiff-Respondent,

-against-

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

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for appellants.

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for respondent.

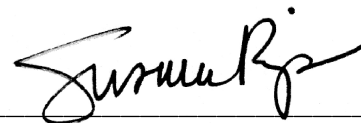
Order, Supreme Court, New York County (Jane S. Solomon, J.), entered March 17, 2011, which, to the extent appealed from, as limited by the briefs, denied defendants’ motion to dismiss the tortious interference with contractual rights claim asserted against defendant Olga Livanis, unanimously affirmed, without costs.

A notice of claim is required as a condition precedent to commencing an action against an employee of the New York City Department of Education (Education Law § 3813[2]; General Municipal Law § 50-i), when, as in this case, the conduct complained of was engaged in as part of defendant's employment or

in the scope of her employment (*Radvany v Jones*, 184 AD2d 349 [1992]; *see also Hale v Scopac*, 74 AD3d 1906 [2010]; *DeRise v Kreinik*, 10 AD3d 381, 382 [2004]). Here, plaintiff did file a notice of claim which described in detail the time, place and manner of the conduct by Livanis that allegedly interfered with his tenure rights and continued employment with the DOE, as well as his ability to enter into employment with other schools. Although he did not use the words "tortious interference with contract," a notice of claim does not have to set forth a precise legal theory of recovery (*DeLeonibus v Scognamillo*, 183 AD2d 697, 698 [1992]; *see also Simons v City of New York*, 252 AD2d 451, 453 [1998]). "[T]he notice of claim described in sufficient detail the time, place and manner of the occurrence and plaintiff's damages to advise the City of the basis for the claim so as to have an opportunity to investigate" (*id.; see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 547 [1983]).

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

ENTERED: NOVEMBER 22, 2011



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Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, JJ.

6147N Sidikie Kamara, Index 121883/07
Plaintiff-Appellant,

-against-

Raphael Ambert, etc., et al.,
Defendants-Respondents.

____

Alexander J. Wulwick, New York, for appellant.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for Raphael Ambert, Dan McCaffery, RY Management, and Rupert Towers Housing Company, respondents.

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for City of New York, respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 2, 2009, which denied plaintiff's motion to restore the action to the court's trial calendar, unanimously affirmed, without costs.

A party seeking to have a case restored to the trial calendar must demonstrate a meritorious cause of action, a reasonable excuse for the delay, a lack of intent to abandon the action and the absence of prejudice to the opposing party (*see e.g. Benjamin v Teixeira*, 78 AD3d 434 [2010]). Here, although the record demonstrates that plaintiff had communicated with his attorney in the one year and nine months after the action had

been struck from the trial calendar, he failed to offer a reasonable excuse for the delay in seeking to restore the action and failed to demonstrate that restoration of the case, fifteen years after the underlying events took place, would not prejudice defendants (*see Almanzar v Rye Ridge Realty Co.*, 249 AD2d 128 [1998]).

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

ENTERED: NOVEMBER 22, 2011

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

5756 135 East 57th Street LLC, Index 101857/10
Plaintiff-Appellant,

-against-

Daffy's Inc.,
Defendant-Respondent.

____

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for appellant.

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of counsel), for respondent.

____

Judgment, Supreme Court, New York County (James A. Yates, J.), entered October 13, 2010, affirmed, with costs.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
David Friedman
Karla Moskowitz
Helen E. Freedman
Rosalyn H. Richter, JJ.

5756
Index 101857/10

____x

135 East 57th Street LLC,
Plaintiff-Appellant,

-against-

Daffy's Inc.,
Defendant-Respondent.

____x

Plaintiff appeals from a judgment of the Supreme Court, New York County (James A. Yates, J.), entered October 13, 2010, after a nonjury trial, declaring defendant's late notice of lease renewal excused on equitable grounds.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel, Warren A. Estis and Lori A. Nott of counsel), for appellant.

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg and Rachelle Rosenberg of counsel), for respondent.

SAXE, J.P.

The law generally exacts a high price for failure to comply with the precise language of a contract (*see e.g. Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470 [2004]). But, in some situations, principles of equity have softened the often harsh results of common-law rules of strict contract construction. These equitable principles, such as the doctrine of substantial performance, import the concept of fundamental fairness to the context of contract-dispute litigation. One equitable construct that has been used to protect parties from the harsh results of strict contract construction is the principle underlying this appeal, that equity will intervene to avoid a forfeiture.

The trial court exercised its equitable power in this case to excuse the lateness of a commercial tenant's notice to the landlord of its intent to renew a lease. The main issue presented is whether this exercise of equitable authority was proper, given that the tenant did not prove that it made substantial improvements in anticipation of continued occupancy.

Daffy's Inc., a popular discount clothing retailer that operates 7 stores in Manhattan and 18 retail stores in all, has operated its store at 135 East 57th Street in Manhattan since the lease term began on November 7, 1994. While the term of the

lease expired on January 31, 2011, the lease gave Daffy's the option of two five-year renewal terms, the first of which was to be exercised no later than January 31, 2010. However, due to the failure of its controller to calendar this particular option date, Daffy's did not give written notice of its intention to renew until February 4, 2010, when it e-mailed and sent by fax a letter incorrectly dated January 30, 2010. The landlord rejected this late attempt to exercise the renewal option in a letter dated February 5, 2010 and sent by overnight mail, in which it commented that the purported renewal letter had been fraudulently backdated and in any event was not delivered in the manner prescribed by the lease. Daffy's responded by sending its renewal letter in the manner prescribed by the lease on February 9, 2010.

Two days later, by summons and complaint dated February 11, 2010, the landlord commenced this action, seeking a declaration that Daffy's had failed to timely renew the lease, that the renewal option was terminated, and that the lease would expire on January 31, 2011. In its answer, Daffy's sought a declaration that it had effectively exercised its renewal option for the store's premises. After a nonjury trial, the court found that Daffy's was entitled to equitable relief under *J.N.A. Realty Corp. v Cross Bay Chelsea* (42 NY2d 392 [1977]), and issued a

declaration excusing the lateness of Daffy's exercise of its renewal option. The landlord now appeals, contending that Daffy's did not establish the requisites for a grant of such equitable relief.

As the landlord points out, as a rule, when a contract requires written notice to be given within a specified time, the notice is ineffective unless it is received within that time (*see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 693 [1995]; *Maxton Bldrs. v Lo Galbo*, 68 NY2d 373, 378 [1986]). However, an exception to the rule may be applied on equitable grounds where a forfeiture would result from the tenant's neglect or inadvertence (*J.N.A. Realty*, 42 NY2d at 398).

The requirements for granting such equitable relief have been articulated as follows:

> "Equity will relieve a tenant from a failure to timely exercise an option in a lease to renew or purchase if (1) the tenant in good faith made substantial improvements to the premises and would otherwise suffer a forfeiture, (2) the tenant's delay was the result of an excusable default, and (3) the landlord was not prejudiced by the delay" (*Vitarelli v Excel Automotive Tech. Ctr., Inc.*, 25 AD3d 691 [2006]).

We note initially that the four-day delay in providing the one-year's notice required by the lease did not prejudice the landlord. On the question of whether Daffy's delay should be treated as excusable, while the landlord characterizes the

backdating of the renewal letter as fraudulent conduct, the record supports the trial court's rejection of that assessment. Although Daffy's renewal letter, prepared on February 4, 2010, was incorrectly dated January 30, 2010, it is noteworthy that Daffy's never claimed that its exercise of its renewal option was timely, based on the date of the letter; indeed, the option renewal letter was e-mailed with a cover page dated February 4, 2010, and the fax cover sheet was time-stamped February 4, 2010. Moreover, the corporate controller who prepared the letter provided a credible explanation for the error. We accept the trial court's conclusion that the misdating was not prompted by either bad faith or an intent to defraud, and that the four-day delay was an honest mistake.

The more difficult issue is whether Daffy's evidence established the type of forfeiture for which equitable relief is appropriate under the rule articulated in *J.N.A. Realty*.

As *J.N.A. Realty* explains, equity does not generally intervene when a party fails to timely exercise a contractual option, because "the loss of the option does not ordinarily result in the forfeiture of any vested rights" (42 NY2d at 397). "The reason is that the option itself does not create any interest in the property, and no rights accrue until the condition precedent has been met by giving notice within the time

specified" (*id.*). However, while options such as stock options or options to buy goods do not create a vested interest in the property so that the loss of the property may be treated as a forfeiture, lease renewal options are different. Equity may intervene where a tenant in possession of premises under an existing lease neglects to timely exercise a renewal option, because "he might suffer a forfeiture if he has made valuable improvements on the property" (*id.*).

Although the trial court concluded that Daffy's made alterations to the space, including tearing down walls that had divided the space into separate antique stores, and customizing the space to its needs, we find no support for these findings in the record. Rather, Daffy's CEO testified only to the painting of the 57th Street store, and to Daffy's inability to undertake flooring work due to leaking at the premises. In fact, there was testimony that the premises were "highly improved when Daffy's took it."

Even if it could be inferred from the testimony that Daffy's removed walls at the start of the lease term in 1994, that improvement was made too long ago to justify equitable relief under *J.N.A. Realty*. In a case where the improvements relied on by the tenant had been made during the first two years of the lease, this Court observed that they had already been amortized

and depreciated by the time of the attempted renewal, so that the tenant had "reaped the benefit of any initial expenditure," and concluded that there was insufficient evidence that the tenant would suffer a forfeiture (*see Soho Dev. Corp. v Dean & DeLuca*, 131 AD2d 385, 386 [1987], quoting *Wayside Homes v Purcelli*, 104 AD2d 650, 651 [1984], *lv denied* 64 NY2d 602 [1984]; *Trieste Group, LLC v Ark Fifth Ave. Corp.*, 13 AD3d 207 [2004]).

Nevertheless, the Court of Appeals has authorized equitable relief against untimely renewal where there was no indication that substantial improvements had been made. Indeed, in *J.N.A. Realty* the Court cited *Sy Jack Realty Co. v Pergament Syosset Corp.* (27 NY2d 449 [1971]), in which it had affirmed the grant of equitable relief to the commercial tenant, not because substantial improvements to the premises would otherwise be forfeited, but "to preserve the tenant's interest in a 'long-standing location for a retail business' because this is 'an important part of the good will of that enterprise, [and thus] the tenant stands to lose a substantial and valuable asset'" (*J.N.A. Realty* at 398, quoting *Sy Jack Realty* at 453). The equivalent circumstance is presented here.

Daffy's introduced evidence that the 57th Street store in particular had become highly successful and popular, that the company had searched for alternative space into which to relocate

that store and had not identified any prospects, and that even if it found a viable site, it would require the better part of a year to open the new store. So, although there was evidence that Daffy's, like Dean & DeLuca in *Soho Dev. Corp. v Dean & DeLuca* (131 AD2d 385 [1987], *supra*), had widespread name recognition unrelated to any particular store location, the evidence was sufficient to support a finding that Daffy's 57th Street store in particular had garnered substantial goodwill in its approximately 15 years at the location, which goodwill was a valuable asset that would be damaged by its ouster from the premises.

We recognize that there is a distinction between *Sy Jack Realty* and the present case, in that the tenant in *Sy Jack* was found to have timely mailed its notice, although the notice was never delivered. Nevertheless, *Sy Jack* illustrates that the possible forfeiture against which equity protects need not be based solely on substantial improvements; equity may intervene to protect against the forfeiture of the substantial and valuable asset of the business's goodwill.

Thus, given the loss of goodwill that would accompany the loss of the store, enforcing the lease's time restraint for renewal would result in a forfeiture that warranted the court's consideration of whether equity ought to intervene. In this context, the court properly considered the testimony that most of

the store’s 114 employees would lose their jobs and benefits if the store were to close and no alternate location was available, as well as the evidence of the mistake made by the corporation’s controller in failing to calendar the renewal deadline. Moreover, there is no credible evidence that Daffy’s had unclean hands (*see Madison/Fifth Assoc., LLC v 1841-1843 Ocean Parkway LLC*, 75 AD3d 403 [2010]). Finally, the location was shown to be “one of [Daffy’s] top producing retail locations, and [the landlord] failed to establish that any prejudice resulted from the breach” (*see Cellular Tel. Co. v 210 E. 86th St. Corp.*, 14 AD3d 305, 306 [2005]).

“By its nature, equitable relief must always depend on the facts of the particular case and not on hypotheticals” (*J.N.A. Realty*, 42 NY2d at 400). The facts here justify the relief awarded to Daffy’s.

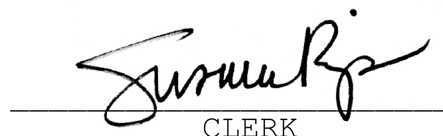
Accordingly, the judgment of the Supreme Court, New York County (James A. Yates, J.), entered October 13, 2010, after a

nonjury trial, declaring defendant's late notice of lease renewal excused on equitable grounds, should be affirmed, with costs.

All concur.

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

ENTERED: NOVEMBER 22, 2011



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