SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 29, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4915 In re Christopher Hazeltine, Index 115412/09
Petitioner-Appellant,

-against-

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

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

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered March 2, 2010, which granted respondents' cross motion to dismiss the petition seeking, inter alia, to annul respondents' determination terminating petitioner's probationary employment and the underlying 2006-07 "unsatisfactory" rating (U-rating) and to direct respondents to reinstate him to his former teaching position with back pay, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously modified, on the law, to

the extent of granting the petition with respect to petitioner's 2006-07 U-rating, and otherwise affirmed, without costs.

Petitioner's probationary employment was terminated based on an "unsatisfactory" rating on his year-end performance review of his third year of probationary teaching. To the extent that petitioner challenges the termination, this claim is time-barred. A petition to challenge the termination of probationary employment must be brought within four months of the effective date of termination. Further, the time to commence a proceeding challenging the termination of probationary employment is not extended by the petitioner's pursuit of administrative remedies (*see* CPLR 217[1]; *Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 767 [1988]; *Matter of Strong v New York City Dept. of Educ.*, 62 AD3d 592 [2009], *lv denied* 14 NY3d 704 [2010]). Here, the effective date of petitioner's termination was August 24, 2007, the date his name was placed on the invalid/inquiry list, and his petition was not filed until November 2, 2009, more than two years after his termination.

However, and as conceded by respondents, the petition is not time-barred to the extent that it seeks review of petitioner's U-rating. The determination that petitioner's teaching performance

was unsatisfactory did not become final and binding until the Chancellor denied his appeal sustaining the rating (see *Matter of Johnson v Board of Educ. of City of N.Y.*, 291 AD2d 450 [2002]).

We hold that the determination of the Chancellor that petitioner merited a U-rating, based on two incidents taking place in March and May 2007,[1] lacked a rational basis and was arbitrary and capricious. During the March 2007 incident, petitioner allegedly verbally berated a student and pulled her chair while she was seated in it. However, the school's parent advocate, who witnessed the incident, testified at the hearing that the student was pushing her chair towards the door when petitioner asked her to leave the classroom. When the student reached the doorway, it appeared that she would tip over the door saddle, whereupon petitioner grabbed the chair. The parent advocate further described the student and her mother as "confrontational." The parent advocate testified that the principal never asked her account of what transpired. The

[1]The U-rating was also allegedly based on a classroom observation made on June 14, 2007. However, petitioner denies that any such evaluation took place and no documentation of the evaluation was produced at the administrative hearing or in the article 78 proceeding, and none appears in the record. The only observation report in the record is a satisfactory rating, dated February 8, 2007, by the assistant principal, who testified on petitioner's behalf at the hearing.

principal also refused to hear the accounts of other students concerning the incident, contrary to the Chancellor's regulations and school procedure, which require interviews with and written statements from all victims and witnesses as soon as practicable. Despite petitioner's concerns about this particular student, the principal nonetheless asked, on a subsequent occasion, that petitioner "cover" a class which included the student. The assistant principal, who witnessed the conversation between petitioner and the principal, testified that the principal refused to remove the student from the classroom, despite petitioner's concerns that she might make other accusations against him. The principal told the assistant principal that "[h]e had nothing to worry about."

The procedural irregularities in this case are troublesome. The signed but undated report of investigation does not appear to have been sent to the Office of Special Investigation until May 20, 2007, nearly two months after the incident. Lines where the preparer was to indicate the date the Office of Appeal and Review was contacted, the termination date and the date the report was prepared were left blank.

During the May 2007 incident, petitioner was allegedly unable to control a class that he escorted to the cafeteria.

However, the assistant principal, who shared lunchroom duties with petitioner that day and was his direct supervisor, testified that she too could not control the students at the time of the incident and that she specifically directed petitioner to seek assistance from the principal for the safety of the children. She described petitioner as "very effective" in his role as lunchroom monitor. Since the determination that petitioner's performance merited a U-rating lacked a rational basis, we hereby grant the petition to the extent it seeks to annul that determination.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4399 Fortress Credit Corp., et al., Index 603819/09
Plaintiffs-Respondents,

-against-

Dechert LLP,
Defendant-Appellant.

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Miller & Wrubel P.C., New York (Joel M. Miller of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Marc E. Kasowitz of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 4, 2010, which denied defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, and the motion granted, with costs. The Clerk is directed to enter judgment accordingly.

In 2005, Marc Dreier, who was then an attorney, proposed to plaintiffs that they participate in a short-term note program to finance the purchase of foreign real estate assets. The designated borrower would be Dreier's clients, Solow Realty & Development Company, LLC, and affiliated companies controlled by real estate developer Sheldon Solow (collectively Solow Realty), and Dreier would be the guarantor. The parties executed two loans totaling $60 million in 2006, and, in 2008, Dreier proposed

another $50 million loan transaction. For this last loan transaction, plaintiffs required Solow Realty and Dreier to retain independent counsel to issue a legal opinion as to whether Solow Realty and Dreier had carried out the necessary formalities to render the loan documents valid and binding on them. Ostensibly, Solow Realty and Dreier retained defendant for this purpose. Dreier furnished the necessary documents and information to defendant for the preparation of the opinion. All the documents to which Solow Realty was a signatory appeared to have been signed by Solow Realty, and some bore "what appeared to be" the signatures of Sheldon Solow and Solow Realty's CEO.

Plaintiffs contend that they relied on defendant's legal opinion that the loan documents were duly executed and delivered and that the loan was a valid and binding obligation on Solow Realty and Dreier. Plaintiffs wired $50 million to an attorney trust account set up at Dreier's firm. Several months later, Dreier was arrested in connection with another fraud scheme, and plaintiffs discovered that Solow Realty had no knowledge of and was never a party to the loan transactions and that Dreier had falsified the documents and forged the Solow Realty signatures.

The allegation that defendant acted recklessly in failing to confirm that Solow Realty was in fact involved in the loan

transaction is not a sufficient allegation of scienter, an element of the cause of action for fraud, especially since the factual allegations of this complaint do not establish that defendant made a knowingly false statement or that defendant was a knowing participant in the fraud (*see LaSalle Nat. Bank v Ernst & Young*, 285 AD2d 101, 110 [2001]).

The legal malpractice cause of action fails because the parties had no attorney-client relationship (*see Denenberg v Rosen*, 71 AD3d 187, 195-196 [2010], *lv dismissed* 14 NY3d 910 [2010]). While plaintiffs were meant to benefit by defendant's actions on behalf of Solow Realty, "that circumstance does not give rise to a duty [to plaintiffs] on the part of the attorney" (*Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52, 60 [2007]).

Although there is no contractual privity between the parties, the complaint sufficiently alleges a relationship of "near privity" for the purpose of stating a cause of action for negligent misrepresentation or negligence (*see Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 384-385 [1992]). Plaintiffs allege that the particular purpose of the opinion letter was to aid them in deciding whether to enter into the loan transaction, that defendant was aware that

they were relying on the opinion in making that decision, and that defendant evinced its understanding of that reliance by addressing the legal opinion to them. However, the complaint fails to allege (a) that plaintiffs informed defendant that its obligations were not limited solely to a review of relevant and specified documents or (b) that plaintiffs informed defendant that it was to investigate, verify and report on the legitimacy of the transaction. Absent such factual allegations, plaintiffs cannot establish that defendant breached a duty of care. As Dreier was Solow Realty's attorney and the guarantor of the loan, defendant had no reason to suspect that Solow Realty was not in fact a party to the loan transaction or that Dreier forged the signatures of its principal and CEO. We note that plaintiffs had previously made two large loans to Dreier, while represented by international firms that specialized in financial transactions. Prior to Dreier's arrest, plaintiffs never suspected fraud.

Moreover, the opinion, by its very terms, provided only legal conclusions upon which plaintiffs could rely. The opinion was clearly and unequivocally circumscribed by the qualifications that defendant assumed the genuineness of all signatures and the authenticity of the documents, made no independent inquiry into the accuracy of the factual representations or certificates, and

undertook no independent investigation in ascertaining those facts. Thus, defendant's statements as contained in the opinion, were not misrepresentations (*see Prudential Ins. Co.*, 80 NY2d at 386-387). Finally, in accordance with the loan agreement, the opinion was reviewed by plaintiffs' counsel before plaintiffs accepted it.

For the reasons discussed above, we also find that the complaint fails to state a cause of action for breach of fiduciary duty.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5191 & M-1611 Christopher Henry, Plaintiff-Respondent, Index 302635/09

-against-

Marisa Soto-Henry, Defendant-Appellant.

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Law Office of Joseph J. Mainiero, New York (Anthony Hilton of counsel), for appellant.

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Order, Supreme Court, New York County (Tandra L. Dawson, J.), entered on or about November 3, 2010, which, to the extent appealed from, as limited by the brief, denied defendant's motion to vacate the sale of the marital residence, unanimously reversed, on the facts and in the exercise of discretion, without costs, the order vacated as appealed, and the matter remanded for a hearing on whether the sale of the marital residence was a fraudulent conveyance, with the purchasers to be joined as necessary parties, and, in the event defendant prevails, the sale vacated, and in any event, said hearing to be followed by further proceedings, including a trial on the issue of equitable distribution.

In October 2009, defendant was granted exclusive use and occupancy of the marital residence, where she continues to reside

with the parties' two children. Shortly before a trial on equitable distribution was scheduled to take place, plaintiff transferred the marital residence, which he had purchased several years prior to the marriage, to his aunt, Hilma Gray, and a friend, Michael Pottinger (the purchasers), for $200,000. The purchasers then commenced proceedings in Civil Court seeking to evict defendant.

Defendant is a creditor to plaintiff as to equitable distribution of assets in a pending divorce even though the claim may be unmatured and unliquidated at the time of the conveyance (Debtor and Creditor Law § 270; *see Kasinski v Questel*, 99 AD2d 396 [1984], *appeal dismissed* 62 NY2d 977 [1984]; *Soldano v Soldano*, 66 AD2d 839 [1978]). Appreciation in the value of the separate property of one spouse due to the direct or indirect contributions of the other spouse would constitute marital property subject to equitable distribution (see Domestic Relations Law § 236[B][1][d][3]; *Hartog v Hartog*, 85 NY2d 36, 45-46 [1995]; *Price v Price*, 69 NY2d 8, 17-18 [1986]).

Defendant's allegations, if true, show that the sale of the apartment to purchasers was a fraudulent conveyance in that it was made with "actual intent . . . to hinder, delay, or defraud" her by defeating the award of exclusive possession and depriving

her of her potential equitable share in the apartment (Debtor and Creditor Law § 276; *see also Spencer v Hylton-Spencer*, 273 AD2d 374, 374-375 [2000], *lv denied* 96 NY2d 708 [2001]). In support, defendant pointed to many badges of fraud, including the timing of the sale, shortly before a hearing on equitable distribution was to commence, and the transfer of the apartment to plaintiff's aunt and friend, who were aware that defendant occupied the apartment (*see Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004], *lv denied* 3 NY3d 612 [2004]). Plaintiff's assertion that the sale was necessary to avoid foreclosure did not utterly refute these contentions.

Although defendant did not provide proof of inadequate consideration, at oral argument counsel for plaintiff and defendant both offered to produce an appraisal if given the opportunity to do so. Plaintiff's counsel also stated that the apartment sold at a lower price because "right now [it] qualifies as an occupied apartment." Further, Supreme Court had noted in a prior order dated September 17, 2010 that plaintiff was very evasive and did not provide straightforward answers when questioned regarding foreclosure proceedings, the amount of arrears owed on the mortgage for the marital residence and his actions regarding his attempt to sell the marital residence.

Given these circumstances, a hearing is warranted to determine whether the sale of the marital residence was a fraudulent conveyance.

We note that the purchasers are necessary parties to the hearing because their interest in the premises would be affected by an order vacating the sale. We also note that counsel for the purchasers were heard at oral argument on defendant's motion and asked that the sale not be set aside because they were bona fide purchasers. They also moved before this Court on multiple occasions to lift the stay of eviction we granted. Consequently, we direct that the purchasers be added as parties on remand with respect to the determination of the fraudulent conveyance issue.

M-1611 - Henry v Soto-Henry

Motion to vacate stay of eviction pending resolution of the appeal denied.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5426-
5426A-
5426B

Index 109557/07

B.R. Fries & Associates, LLC, et al.,
Plaintiffs-Respondents,

-against-

Illinois Union Insurance Company, et al.,
Defendants-Appellants,

J.C. Steel Corp., et al.,
Defendants.

_____

Rubin, Fiorella & Friedman LLP, New York (James M. Haddad of counsel), for Illinois Union Insurance Company, appellant.

Shay & Maguire, LLP, East Meadow (Jaret SanPietro of counsel), for Virginia Surety Company, Inc., appellant.

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

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Judgment, Supreme Court, New York County (Louis B. York, J.), entered November 10, 2010, against defendants Illinois Union Insurance Company and Virginia Surety Company, Inc., and in favor of nonparty Zurich American Insurance Company in the amount of $344,099.74, unanimously modified, on the law, to declare that defendant Virginia Surety Company, Inc. is not obligated to defend or indemnify plaintiffs, and to vacate the money judgment as against it, to declare that defendants are not obligated to defend or indemnify plaintiffs 168 Street Jamaica, LLC (168

Jamaica) and 166-28 Jamaica Avenue, LLC (166 Jamaica), and to reduce the amount of the judgment in favor of Zurich American and against Illinois Union by the principal amount of $32,681, and otherwise affirmed, without costs. Appeals from orders, same court and Justice, entered May 13, 2010, which granted plaintiffs' motions for summary judgment and referred the amount of damages to a special referee, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants contend that this action should be dismissed because plaintiffs sustained no damages, since Zurich paid all their legal fees and expenses in the underlying personal injury action. Under the circumstances, forcing Zurich to commence another action in its own name would not "secure the just, speedy and inexpensive determination" of this action (*see* CPLR 104). We note that the policy that Zurich issued to plaintiff Fries states that if Zurich's insurance is excess but no other insurer defends Fries and its additional insureds, Zurich will defend, but it "will be entitled to the insured's rights against" the non-defending insurers. The policy also states, "If the insured has rights to recover all or part of any payment we [Zurich] have made . . ., those rights are transferred to us . . . At our request, the insured will bring 'suit' or transfer those rights

to us and help us enforce them."

Plaintiffs 168 Jamaica and 166 Jamaica are not entitled to defense or indemnification under the policies. Defendants' additional insured endorsements cover organizations required by contract with the named insureds. The contracts of defendants' named insureds require plaintiffs Fries, Home Depot, "and all other parties required of [Fries]" to be included as additional insureds. Plaintiffs presented no evidence that Fries was required to include either 168 or 166 Jamaica as an additional insured. Nor are the Jamaica LLCs included as "Owners." The contracts between Fries and defendant J.C. Steel Corp. (Illinois's insured) and between Fries and defendant Atlas Concrete Construction Corp. (Virginia's insured) define "Owner" as Home Depot. Since the denial of coverage was based on lack of coverage pursuant to the additional insured endorsement, Illinois was not required to issue a timely disclaimer (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 407 [2010]; *see also e.g. Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 700 [1980] ["the defense of noncoverage . . . is never waived by a failure to assert it in a notice of disclaimer"]).

Virginia Surety has no duty under its policy to defend Fries and Home Depot as additional insureds. Under the liability

policy it issued to Atlas - the contractor that performed the concrete work for the project - additional insureds are covered only to the extent liability arises out of Atlas's work. Plaintiffs' interpretation of Virginia's policy, to the effect that it creates additional insured coverage "as required by written contract" without limitation, would leave the endorsement captioned "Additional Insured – Owners, Lessees or Contractors – (Form B)" without force and effect. The interpretation offered by Virginia Surety gives meaning to both that endorsement and endorsement IL 12 01 11 85 (*see Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222 [2002]). Not only was it ultimately determined that there was no liability arising out of Atlas's work, but there was nothing in the underlying complaint to justify any inference that liability might arise out of Atlas's work. The bare mention of anchor bolts in the bill of particulars in the underlying personal injury action was insufficient.

The record does not demonstrate that Illinois Union failed to disclaim on the ground that plaintiffs failed to cooperate in its investigation and thereby waived the defense (*see Continental Cas. Co. v Stradford*, 11 NY3d 443, 449-450 [2008]). However, Illinois Union did not satisfy its heavy burden of establishing

that plaintiffs wilfully failed to cooperate (*see Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 168 [1967]). For instance, it failed to demonstrate that it made the requisite efforts to bring about Zurich's cooperation with respect to the conflict of interest issue (*see Thrasher,* 19 NY2d at 168), since there is no indication that during the four months between March 7, 2007 (when Zurich suggested to Illinois that there was a conflict of interest in having the same lawyer represent both Fries and Home Depot) and July 6, 2007 (when Illinois threatened to disclaim for lack of cooperation), Illinois ever asked Zurich to explain the claimed conflict of interest. Similarly, with respect to Zurich, Fries and Home Depot's alleged refusal to turn over files, Illinois Union failed to show that it made efforts to respond to the additional insureds' expressed hesitations or concerns.

We reject defendants' contentions that the claimed legal fees were unreasonable, that the special referee improperly determined the reasonableness of the fees, and that Zurich acted as a volunteer.

Finally, to the extent the determination of Zurich's

entitlement to reimbursement for its defense costs includes the charges for counsel for the Jamaica LLCs, the total must be reduced by that amount since 168 Jamaica and 166 Jamaica are not entitled to defense or indemnification under the policies.

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

ENTERED: NOVEMBER 29, 2011

CLERK

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

5549-
5550-
5550A

Index 110403/08

David Mitchell,
Plaintiff-Respondent,

-against-

Steven Abrams,
Defendant-Appellant.

_____

Graubard Miller, New York (Edward H. Pomeranz of counsel), for appellant.

Dobshinsky & Priya, LLC, New York (Neal S. Dobshinsky of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 15, 2010, in plaintiff's favor, and bringing up for review an order, same court and Justice, entered December 13, 2010, which denied defendant's motion for summary judgment dismissing the complaint and granted plaintiff's cross motion for summary judgment in lieu of complaint, unanimously reversed, on the law, without costs, the judgment vacated and the cross motion denied. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from order, same court and Justice, entered January 18, 2011, which, to the extent appealed from, denied defendant's order to show cause seeking renewal of plaintiff's

motion for summary judgment, unanimously dismissed, without costs, as taken from a nonappealable paper.

Plaintiff seeks summary judgment based on language in a personal guaranty given by defendant, the principal of a nonparty contractor hired by plaintiff. Fairly construed, in context and so as to avoid a commercially unreasonable result (*see Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413 [2010]; *Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170 [2003]), the guaranty provides that defendant will be personally liable for the amount of a deposit that plaintiff "pre-fund[ed]" to the contractor only to the extent plaintiff either is not credited with the full amount of the deposit or does not otherwise receive the full benefit of the deposit. Plaintiff's interpretation, that the guaranty entitles him to the full amount of the deposit if any portion of it is misallocated by the contractor, notwithstanding that portions used for authorized renovation expenses incurred by the contractor were properly credited to his account, would effect a forfeiture by defendant, a result disfavored in the law (*see Lyon v Hersey*, 103 NY 264, 270 [1886]).

Summary judgment in defendant's favor is precluded by factual issues whether the pre-fund deposit was fully or

partially applied to renovation expenses expressly authorized by the guaranty agreement.

No appeal lies from the ex parte order denying defendant's motion for renewal, entered after the court declined to sign defendant's order to show cause seeking such relief (*see Naval v American Arbitration Assn.*, 83 AD3d 423 [2011]). In any event, defendant offered no new facts, as required, to support his motion for renewal (*see Eddine v Federated Dept. Stores, Inc.*, 72 AD3d 487, 487-488 [2010]).

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

ENTERED: NOVEMBER 29, 2011

CLERK

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

5702 GJF Construction, Inc., doing business as Builders Group, et al., Plaintiffs-Appellants,

-against-

The Sirius America Insurance Company, Defendant-Respondent.

Index 604221/05

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

Rubin, Fiorella & Friedman, LLP, New York (Paul Kovner of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Richard F. Braun, J.), entered on or about December 21, 2010, after a nonjury trial, declaring that the insurance policy issued by defendant Sirius America Insurance Company does not afford additional insured coverage to plaintiff GJF Construction, Inc. or plaintiff 101 Park Avenue Associates, LLC for claims asserted against them in an underlying personal injury action, affirmed, without costs.

All concur. Manzanet-Daniels and Román, JJ. concur in a separate memorandum by Román, J. as follows:

ROMAN, J. (concurring)

In this declaratory judgment action we find that where the insurance policy requires that the insurer be given notice of any additional insureds which its policy is intended to cover, the failure to provide such notice precludes coverage as to any such additional insured.

The insurance policy contains an endorsement amending the policy to include, as insureds, persons or organizations "as on file with company." While a written request was made to add 101 Park Avenue Associates to the policy, the record fails to indicate that such a request was made with regard to GJF Construction. Contrary to plaintiffs' contention, the act of requesting that an additional insured be named under the policy was not a purely ministerial act whose failure should be excused, because while not the only act required by the policy to have the person or organization named as an additional insured under the policy, it was a critical and material act which would have given defendant the option to deny coverage. Accordingly, while it is true that "[w]hen a substantial performance is shown, the party claiming the benefit of the contract should not be defeated for the want of a literal compliance as to some unimportant detail"

(*Porter v Traders' Ins. Co. of Chicago*, 2 Bedell 504, 509 [1900]; *see also Jacob & Youngs, Inc. V Kent*, 230 NY 239, 241 [1921]), here the failure to provide defendant with notice that GJF was an additional insured deprived defendant from exercising its right to deny coverage under the policy (*Blumberg v Paul Revere Life Ins. Co.*, 177 Misc2d 680, 682 [1998] ["The general rule is that an insurance application constitutes nothing more than an offer to the insurer, which it may accept or reject after determining whether an applicant is a desirable risk"]), such that the failure to fully comply with the policy cannot be deemed unimportant (*cf. Anderson Clayton & Co. v Alanthus Corp.*, 91 AD2d 985, 985 [1983] [plaintiff not excused from contractual obligations when defendant had substantially performed and its breach was trivial in nature]).

The trial court erroneously treated the letter sent by defense counsel to plaintiffs' counsel, advising that GJF was an additional insured under the policy, as an informal, rather than a formal, judicial admission. A formal judicial admission takes the place of evidence and is conclusive of the facts admitted in an action *(People v Brown*, 98 NY2d 226 n 2 [2002]). The hallmark of a formal judicial admission is that it "dispenses with the

production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary" (*id.* [internal quotation marks omitted]).

Here, on February 26, 2008, in response to plaintiffs' letter dated January 14, 2008, wherein plaintiffs stated that they "need[ed] either a letter . . . confirming that . . . GJF Construction, Inc. . . . [was an] . . . additional[] insured[] . . . under the . . . policy . . . or deposition dates for the Sirius underwriter," defendant sent plaintiff a letter, wherein defendant, clearly in order to avoid producing a witness from its underwriting department, acknowledged that GJF was an additional insured. On June 3, 2008, months after its initial letter and after plaintiffs filed their note of issue and made a motion in reliance on defendant's representation, defendant contended that its letter acknowledging that GJF was an additional insured was sent in error and retracted its statement by telephone and in writing. Certainly, defendant's statement had all the trappings of a formal judicial admission, and it was thus bound by it (*Brown* at 226 n 2; *Burdick v Horowitz*, 56 AD2d 882, 883 [1977] [statement made by defendant's counsel during a deposition, to preclude line of questioning, deemed a binding formal judicial admission]).

Contrary to the position taken by our concurring colleagues, while defendant ultimately produced its underwriter, a witness employed by its agent, it did so only *after* plaintiffs had already *relied* on defendant's representation to their detriment and notably only after the close of discovery. Accordingly, on these facts, it is evident that defendant's representation was designed to preclude the exchange of discovery and the production of defendant's witness did not make its prior admission any less binding. Moreover, we decline to limit the ambit of what constitutes a formal judicial admission to where within a proceeding, a letter, affirmation or deposition, happens to manifest itself. Guided by Court of Appeals precedent we instead think it more prudent to adhere to the definition promulgated in *Brown*, aptly applicable here-where plaintiff forewent discovery and relied on defendant's representation to support its motion for summary judgment-which defines a formal judicial admission as an admission made to avoid having to produce discovery on a fact at issue (*Brown* at 226 n 2). Notwithstanding the foregoing, defendant's formal judicial admission acknowledging that GJF was an additional insured under the policy fails to confer coverage to GJF since, as noted above, there was no compliance with a critical contractual provision of the insurance policy and even

by formal judicial admission, defendant an insurer, cannot be compelled to provide coverage where none exists by waiver (*Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698 [1980]; *Drew Chem. Corp. v Fidelity & Cas. Co. of N.Y.*, 60 AD2d 552, 552 [1977], *affd.* 46 NY2d 851 [1979]).

101 Park Avenue Associates failed to demonstrate that it acted reasonably and with due diligence in notifying defendant of the claim. In fact, 101 Park Avenue Associates never directly notified defendant of the claim at all, simply tendering it to GJF, who then tendered the claim to defendant 51 days after 101 Park Avenue Associates was first notified of the incident underlying the claim. While a justifiable lack of knowledge of insurance coverage may excuse a delay in reporting an occurrence, 101 Park Avenue Associates adduced no evidence that it made any effort, let alone reasonably diligent efforts to ascertain whether coverage existed pursuant to the project contract in order to promptly notify defendant (*see Winstead v Uniondale Union Free School Dist.*, 201 AD2d 721, 723 [1994]). As such, 101 Park Avenue Associates's failure to directly notify defendant and

the delay in notification stemming therefrom is inexcusable as a matter of law (*id.*). Nor can 101 Park Avenue Associates rely on the notice provided to defendant by GJF as a "similarly situated" insured, since, as noted above, GJF is not an insured under the policy (*see American Home Assur. Co. v BFC Constr. Corp.*, 81 AD3d 545 [2011]).

Catterson, J.P. and Richter, J. concur in a separate memorandum by Richter, J. as follows:

RICHTER, J. (concurring)

I agree that there is no coverage because GJF's status as an additional insured was not "on file" with Sirius, as required by the policy language. However, I do not conclude that the letter from defendant's counsel constitutes a formal judicial admission. During the course of discovery, plaintiffs' counsel sent a letter to defendant's counsel asking whether GJF was an additional insured under Sirius's policy. The letter advised that plaintiffs would seek to depose a Sirius underwriter if Sirius's position was that GJF was not an additional insured. In response, defendant's counsel sent a letter confirming that GJF was an additional insured under the policy.

Several months later, defendant's counsel realized that he had made a mistake and informed plaintiffs' counsel that GJF was not an additional insured. Defendant's counsel expressed his regret over the mistake and offered to submit a Sirius underwriter for deposition. Plaintiffs' counsel subsequently deposed Patrick J. Conklin, chief underwriting officer for Inter-Reco, the underwriting arm for Sirius, about GJF's status as an additional insured under the policy.

"A formal judicial admission is an act of a party done in the course of a judicial proceeding, which dispenses with the

production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary" (*People v Brown*, 98 NY2d 226, 232 n 2 [2002] [citation omitted]). "[A] formal judicial admission takes the place of evidence and is *conclusive* of the facts admitted in the action in which [it is] made" (*id.* [internal quotation marks and citation omitted]). An informal judicial admission is a fact "incidentally admitted during the trial or in some other judicial proceeding" (*Morgenthow & Latham v Bank of New York Co.*, 305 AD2d 74, 79 [2003], *lv denied* 100 NY2d 512 [2003] [internal quotation marks and citation omitted]). "Such an admission is not conclusive . . . in the litigation but is merely evidence of the fact or facts admitted" (*People v Brown*, 98 NY2d at 232 n 2 [internal quotation marks and citation omitted]).

Examples of formal judicial admissions include (1) statutory admissions, such as an admission of fact made pursuant to CPLR 3123, (2) facts admitted by stipulation, (3) facts formally admitted in open court and (4) facts admitted in pleadings (Prince, Richardson on Evidence, § 8-215 [Farrell 11th ed]; *see Penna, Inc. v Ruben*, 72 AD3d 523, 523-24 [2010] [statements in pleadings]; *Matter of Columbia County Support Collection Unit v Interdonato*, 51 AD3d 1167 [2008] [facts formally admitted in open

court]). Examples of informal judicial admissions include (1) statements made in a deposition, (2) statements in a bill of particulars and (3) statements in affidavits (*Morgenthow & Latham*, 305 AD2d at 79).

Defendant's counsel's letter to his adversary, which was sent during the course of discovery, and which was later discovered to be a mistake and corrected, constitutes, at most, an informal judicial admission. If statements made in affidavits and depositions do not qualify as formal judicial admissions, then a statement made in correspondence between counsel, which is unsworn, cannot be considered a formal judicial admission. The letter contains no indicia of formality, was not copied to the court and contains no language suggesting that it was meant to be a stipulation between the parties.

The language in *People v Brown* (98 NY2d at 232 n 2) relied upon by my colleagues, which is in a footnote, does not change the result here. There is no indication in counsel's letter, nor any testimony in the record, that the letter was written to "dispense[] with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary" (*id.*). Plaintiffs produced no evidence to refute defendant's contention that the statement in the letter was a

simple mistake (that was subsequently corrected).

Burdick v Horowitz (56 AD2d 882 [1977]), is distinguishable. In *Burdick*, which does not even use the term "formal judicial admission," the court found the defendants to be bound by "a stipulation which was made so as to preclude a certain line of questioning at a pretrial deposition" (56 AD2d at 883). Here, in contrast, there was no stipulation. Nor, as noted above, was it shown that the letter was written to preclude further discovery.

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

ENTERED: NOVEMBER 29, 2011

CLERK

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

5880 Ann Pearl Gary, Index 106841/08
Plaintiff-Respondent,

-against-

101 Owners Corp.,
Defendant-Appellant.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for appellant.

Diamond and Diamond LLC, New York (Stuart Diamond of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 5, 2011, which, in a personal injury action, denied defendant's 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 dismissing the complaint.

In February 2008, plaintiff tripped and fell while walking from the street onto the sidewalk at the corner of Stanton and Ludlow Streets in New York City. Using plaintiff's testimony and photographs, defendant established that it was entitled to summary judgment because plaintiff did not trip on the sidewalk flag abutting defendant's property; instead, plaintiff stumbled on either a crack running through the adjacent pedestrian ramp,

or against the edge of the sidewalk flag, which had been exposed when the bordering edge of the ramp sagged below the flag, possibly after the ramp cracked.

While New York City landowners are responsible for maintaining sidewalk flags that abut their property (Administrative Code of City of New York § 7-210; *see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 519-520 [2008]), a landowner is not liable for a defect in a pedestrian ramp leading from the street onto a sidewalk unless the landowner created the defect or the ramp was constructed for its special use (*see Ortiz v City of New York*, 67 AD3d 21, 27-28 [2009], *revd on other grounds* 14 NY3d 779 [2010]; *Vidakovic v City of New York,* 84 AD3d 1357, 1358 [2011]).

The defective ramp and not a defect in the flag caused plaintiff's injury. Plaintiff does not claim that defendant's

activity created the defect in the ramp or that it was constructed for defendant's special use. Thus, summary judgment should have been granted to defendant.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6149 The People of the State of New York, Ind. 1791/04
Respondent,

-against-

Robert Mitchell,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew I. Fleischman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered November 19, 2007, convicting defendant, upon his plea of guilty, of two counts of murder in the second degree, and sentencing him to concurrent terms of 25 years to life, unanimously affirmed.

The sentencing court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]).

The court afforded defendant a full opportunity to present his claims both orally and in writing, and with the assistance of newly appointed counsel. Defendant claimed that the attorney who represented him at the time of the plea rendered ineffective assistance. However, that claim was conclusory, unsubstantiated and contradicted by the record. The court relied on its familiarity with the plea allocution and prior proceedings, and properly concluded that the plea was knowing, intelligent and voluntary. The prior attorney negotiated a favorable disposition that avoided the consecutive sentences that could have been imposed given the facts of this case (*see People v Ford*, 86 NY2d 397, 404 [1995]), and neither defendant nor his new attorney cast any doubt on the prior attorney's effectiveness.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6150 Zoran Milosevic, Index 114612/09
Plaintiff-Appellant,

-against-

Owen O'Donnell, et al.,
Defendants-Respondents,

Joost UK Limited, et al.,
Defendants.

_____

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

Kent, Beatty & Gordon, LLP, New York (Joshua B. Katz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol Edmead, J.), entered June 21, 2010, which, in an action to recover for personal injuries sustained by plaintiff when he was struck by defendant coworker at an office party held at premises owned by defendant Obivia, LLC, granted defendant employer Joost US Inc.'s motion to dismiss the fourth and fifth causes of action against it for failure to state a claim, unanimously affirmed, without costs.

The motion court properly dismissed the fourth and fifth causes of action as against Joost, alleging negligence and "intentional and/or wanton conduct" respectively. The causes of

action fail to state a claim under the theory of respondeat superior. Pursuant to that doctrine, an employer will not be vicariously liable for its employee's alleged assault "where the assault was not within the scope of the employee's duties, and there is no evidence that the assault was condoned, instigated or authorized by the employer" (*Yeboah v Snapple, Inc.*, 286 AD2d 204, 204-205 [2001]). Here, there is no allegation or indication that plaintiff's coworker acted within the scope of his employment when he allegedly attacked plaintiff or that the alleged assault was precipitated by a work-related issue. Indeed, the complaint alleged, among other things, that the coworker "lost control of his senses" and attacked plaintiff "for no apparent reason." Moreover, there is no allegation or indication that Joost condoned, instigated or authorized the alleged assault. That the coworker was the chief financial officer (CFO) of Joost is of no moment (*see Velasquez-Spillers v Infinity Broadcasting Corp.*, 51 AD3d 427, 428 [2008]).

The causes of action also fail to state a claim based on a theory of common-law negligence in sponsoring an event. Even viewing the facts alleged in the complaint in the light most favorable to plaintiff, at best the complaint alleges that a "culture" of alcohol use at off-premises, after-hours company

events, contributed to the company CFO becoming intoxicated at the party. There are no allegations or indication that Joost controlled the premises such that it could be held responsible for injuries caused by the intoxicated CFO (*see D'Amico v Christie*, 71 NY2d 76, 85 [1987]). Nor are there any allegations or indication that Joost was aware of the CFO's violent propensities when intoxicated or of the possibility of an assault (*see generally D'Amico*, 71 NY2d at 85; *Yeboah*, 286 AD2d at 205). Dismissal of the claims cannot be avoided by speculation as to what discovery might reveal (*see Silverstein v Westminster House Owners, Inc.*, 50 AD3d 257, 258 [2008]).

In view of the foregoing, we need not determine whether plaintiff's claims are barred by the Workers' Compensation Law.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6151 Fron Nahzi, etc., Index 112000/06
Plaintiff-Respondent,

-against-

Gerald Lieblich, et al.,
Defendants-Appellants.

_____

Zane and Rudofsky, New York (Edward S. Rudofsky of counsel), for appellants.

Roy A. McKenzie, New York, for respondent.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered December 15, 2010, which, to the extent appealed from, denied defendants' motion to vacate a judgment entered January 27, 2009 in favor of plaintiff, unanimously affirmed, with costs.

In a prior appeal in this action, we affirmed the January 27, 2009 judgment upon finding that plaintiff established that he was entitled to recover a share of the proceeds realized on the sale of the corporation's real property. Plaintiff presented documentary evidence of his 25% interest in the corporation. Defendants failed to produce any documentary evidence that plaintiff's interest in the corporation had been transferred or that they purchased a cooperative apartment for him in consideration of his interest in the corporation (69 AD3d 427

[2010], *lv denied* 15 NY3d 703 [2010]).

Defendants now seek to vacate the judgment on the ground that plaintiff's deposition testimony in a subsequent action renders his version of events in this action false and misleading (*see* CPLR 5015[a][3]). Defendants brought the subsequent action against plaintiff to recover the purchase price of the apartment. In his deposition testimony in that action, plaintiff explained the events leading to the purchase of the apartment more fully than in his affidavit in support of summary judgment in this action. However, the additional facts to which he testified do not support defendants' contention that they purchased the apartment in consideration of plaintiff's interest in the corporation. Nor do the affidavits defendants submitted in support of this contention raise an issue of fact. One offers no support, and the other is based on inadmissible hearsay.

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 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6152-
6153-
6154 In re Lydia Denton,
Petitioner-Respondent-Appellant,

-against-

Thomas Barr, IV,
Respondent-Appellant-Respondent.

_____

Thomas Barr, IV, Sag Harbor, appellant-respondent pro se.

Peter F. Edelman, New York, for respondent-appellant.

_____

Order, Family Court, New York County (Stella Schindler, J.H.O.), entered on or about August 30, 2010, which awarded petitioner attorney's fees in the amount of $110,000 and child support arrears in the amount of $11,000, unanimously modified, on the law and the facts, to award petitioner $11,742 in child support arrears and $5,322 in interest on the arrears, and to remand the matter for clarification of the amount of attorney's fees awarded to petitioner, and otherwise affirmed, without costs. Order, same court and J.H.O., entered on or about September 15, 2010, which directed that the $110,000 in attorney's fees be paid to petitioner and mailed to the offices of her counsel, unanimously reversed, on the law, without costs, and the order vacated.

On a prior appeal, this Court found, inter alia, that pursuant to the parties' stipulation of settlement, petitioner was "entitled to attorney's fees and we accordingly remand for a hearing to determine the amount of those fees" (69 AD3d 24, 32 [2009]). There is no merit to respondent's argument that petitioner was not entitled to attorney's fees under the terms of the parties' stipulation. However, we find that the court, in determining the amount of fees due to petitioner, relied on documents that constituted inadmissible hearsay, namely, billing statements of respondent's former attorney (*cf. Seinfeld v Robinson*, 300 AD2d 208, 209 [2002]). Indeed, the order fails to specify any other basis for the specific amount awarded. Accordingly, the matter is remanded to the trial court for clarification of the basis for the amount of fees awarded.

Furthermore, the trial court improperly awarded $11,000 in child support arrears. According to the terms of the parties'

stipulation, the amount awarded should have totaled $11,742 in arrears and $5,322 in interest on the arrears.

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

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6155 Elizabeth Hinkle, Index 100908/07
Plaintiff-Appellant,

-against-

Jonathan R. Trejo, et al.,
Defendants-Respondents.

_____

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for appellant.

Gottlieb Siegel & Schwartz, LLP, Bronx (Shane M. Biffar of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered October 29, 2009, upon a jury verdict in defendants' favor in this action for personal injuries sustained when plaintiff pedestrian was struck by defendants' motor vehicle, unanimously affirmed, without costs.

The jury's finding that defendant driver was not negligent in striking plaintiff pedestrian was based upon a fair interpretation of the evidence (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). The jury clearly credited the driver's testimony that he had looked towards the curb immediately before the accident and had not seen anyone in his path, which determination is entitled to deference (*see Haiyan Lu v Spinelli*, 44 AD3d 546 [2007]). The jury could have inferred

from the evidence that plaintiff, who was on her cell phone, suddenly stepped out onto the street, without giving the driver enough time to avoid the accident (*see e.g. Jordan v Doyle*, 24 AD3d 107 [2005], *lv denied* 7 NY3d 705 [2006]).

The court properly included a charge as to Vehicle and Traffic Law § 1152(a) in light of the evidence that plaintiff may have been outside of the crosswalk at the time of the accident (*cf. Cavalli v Cohen*, 209 AD2d 240 [1994]). The trial court also did not abuse its discretion in sua sponte striking improper hearsay testimony (*see e.g. Campbell v Rogers & Wells*, 218 AD2d 576, 579 [1995]).

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6156 The People of the State of New York, Ind. 4270/03
Respondent,

-against-

Thomas Daniels,
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.

_____

Judgment of resentence, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered November 3, 2010, resentencing defendant to a term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6157 Asher Edelman, et al., Index 650670/10
Plaintiffs-Appellants,

-against-

Emigrant Bank Fine Art
Finance, LLC, et al.,
Defendants-Respondents,

John Does 1-20,
Defendants.

_____

Browne George Ross LLP, Uniondale (Lee A. Weiss of counsel), for appellants.

Foley & Lardner LLP, New York (Jeremy L. Wallison of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 23, 2011, which granted defendants' motion to dismiss the complaint, and awarded them $204,964.25, plus interest, in attorneys' fees, unanimously affirmed, without costs.

Plaintiffs' third cause of action, which is based on an alleged misrepresentation made in the fall of 2008, is barred by the release in the Standstill Agreement, which is dated as of October 14, 2009. The release includes contingent claims, and this claim of a March 2010 injury arising out of the parties' December 2008 and January 2009 agreements was a contingent claim

at the time the Standstill Agreement was executed (*see Matter of People*, 272 NY 210, 214 [1936]).

Plaintiffs make no arguments on appeal as to the fourth cause of action or the second cause of action to the extent it relates to the pre-Standstill Agreement period; they have therefore abandoned their appeal as to these claims (*see e.g. Matter of Metropolitan Museum Historic Dist. Coalition v De Montebello*, 20 AD3d 28, 34 [2005]).

With respect to the remainder of the second cause of action, plaintiffs' claim that defendants "never had [any] intention of finalizing" the loan modification on which defendant Emigrant Bank Fine Art Finance, LLC "ultimately reneged" does not make a fraud cause of action out of a breach of contract claim (*see Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1998]; *see also Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1988]).

As to plaintiffs' first cause of action, even if, under the March 8, 2010 Pre-Negotiation Agreement, defendants were required to send written notice of termination of discussions before sending a notice of default under the loan documents, the complaint's conclusory allegation of damages is insufficient to sustain the cause of action (*see e.g. Arcidiacono v Maizes &*

Maizes, LLP, 8 AD3d 119 [2004]; *Gordon*, 141 AD2d at 436).

The procedure directed by the motion court for entertaining defendants' request for attorneys' fees was proper.

The attorneys' fee provision in the Standstill Agreement applies to the "enforcement" thereof; defendants' defense of the instant action constitutes enforcement of the agreement (*see Soundview Shopping Ctr. v Port Bay Assoc.*, 230 AD2d 729 [1996]).

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6158 The People of the State of New York, Ind. 4386/08
Respondent,

-against-

Thomas Lee,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Cleary Gottlieb Steen & Hamilton LLP, New York (Amanda B. Bepko of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 22, 2009, convicting defendant, after a jury trial, of burglary in the second degree and grand larceny in the third degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). The court precluded any inquiry into more than half of the numerous prior bad acts identified by the People. In those instances where the court permitted inquiry into a conviction, it generally precluded inquiry into the underlying facts. The

probative value of defendant's extensive theft-related convictions outweighed their prejudicial effect.

The fact that one of the victims testified through a Cantonese interpreter who revealed that he was acquainted with the victims does not require a new trial under the circumstances of the case. "[I]t has been termed the better practice to avoid appointing a friend or relative of a party or witness as interpreter" (*Matter of James L.*, 143 AD2d 533, 534 [1988]). However, here the court and defense counsel thoroughly questioned the court interpreter about any possibility of bias, and there is no reason to believe that defendant was prejudiced by the use of this interpreter. Unlike the complainant's son who interpreted for his mother in *James L.*, the interpreter here was not a private citizen appointed as an ad hoc interpreter, but a career court employee who was presumably well aware of his duty to translate testimony verbatim and accurately. Furthermore, the

interpreter knew nothing of the facts of this case and there was substantial corroborating evidence through the testimony of another witness and video surveillance films.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6159 300 Park Avenue, Inc., Index 113795/09
Plaintiff-Respondent,

-against-

Café 49, Inc., et al.,
Defendants-Appellants.

_____

Law Office of Milton D. Ottensoser, New York (Milton D. Ottensoser of counsel), for appellants.

Greenberg Traurig, LLP, New York (Kenneth A. Philbin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Emily J. Goodman, J.), entered September 10, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the second cause of action as against defendant Young Dai Lee also known as Yong Dai Lee, unanimously affirmed, with costs.

The motion court properly found that Lee is personally liable for the post-judgment damages sought in the second cause of action pursuant to the terms of the guaranty he executed in June 1998, as well as the guaranty he subsequently executed in conjunction with a so-ordered stipulation.

In the initial guaranty, Lee unconditionally guaranteed defendant Café 49, Inc.'s "full and timely payment of all base rent, additional rent and all other sums payable by Tenant under the Lease during or attributable to any part of the Term." The guaranty further provided that the "Term" would end on the day after Café 49 completely vacated the premises, removed substantially all of its property, and delivered possession "together with all keys thereto." It is undisputed that the last condition was never satisfied and, thus, the motion court properly found Lee liable for damages until the end of the "Term," June 30, 2010, as set forth by the lease. We also reject defendants' substantial compliance argument. Defendants failed to satisfy all three conditions as required by the guaranty. The terms were unambiguous. The interpretation of the terms presented a question of law for the court, which accorded those terms their plain and ordinary meaning (*see White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). Thus, contrary to defendants' contention, there is no question of fact regarding

the interpretation of the guaranty.

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

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6160 In re Alexander Achilles S.,

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

Katherine Shanta S.,
Respondent-Appellant,

The Children's Aid Society, et al.,
Petitioners-Respondents.

_____

Joseph V. Moliterno, Scarsdale, for appellant.

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

Howard M. Simms, New York, attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about July 26, 2010, which, inter alia, upon a finding that respondent mother permanently neglected the subject child, terminated her parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that it is in the child's best interests to terminate respondent's parental rights and free the child for adoption by his foster mother (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148

[1984]). The evidence demonstrated that the child, who has special needs, has been provided a loving and stable home environment by his foster mother, in whose care he has remained since the age of six months. The foster mother expressed a willingness to continue visitation between the child and his siblings. Furthermore, contrary to respondent's suggestion, a suspended judgment is not warranted under the circumstances (*see Matter of Michael B.*, 80 NY2d 299, 311 [1992]).

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6161 Tamach Airport Manager, LLC, Index 603817/08
Plaintiff-Appellant, 590212/09

-against-

HRC Fund III Pooling
Domestic LLC,
Defendant/Third-Party
Plaintiff-Respondent,

-against-

Tamach Real Estate
Management, Inc., et al.,
Third-Party Defendants-Appellants.

_____

Buchanan Ingersoll & Rooney PC, New York (Richard A. Morgan of counsel), for appellants.

Polsinelli Shughart P.C., New York (Jason A. Nagi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered May 24, 2010, which granted defendant/third-party plaintiff HRC Fund III Pooling Domestic LLC's motion for summary judgment on its counterclaim and third-party complaint for amounts due pursuant to a promissory note, and denied plaintiff and third-party defendants' cross motion to dismiss the counterclaim and third-party complaint, unanimously affirmed, with costs.

Defendant/third-party plaintiff HRC Fund III Pooling

Domestic LLC (HRC) established its entitlement to summary judgment as to the causes of actions asserted in its counterclaim and third-party complaint. The record reveals that plaintiff and third-party defendants signed agreements which stated that should plaintiff contest or materially interfere with any foreclosure action or Uniform Commercial Code sale by making any motion, commencing any action, seeking any injunction or other restraint to prevent HRC from disposing of the collateral, HRC would be allowed to obtain full recourse from plaintiff and third-party defendants.

It is undisputed that after plaintiff defaulted on the loan, HRC notified plaintiff of its intention to sell the collateral. In response, plaintiff commenced this action and obtained a temporary restraining order preventing HRC from selling the collateral. After HRC voluntarily withdrew the sale, plaintiff continued with this action by filing a complaint which sought to permanently enjoin HRC from selling the collateral.

Under these circumstances, the fact that HRC voluntarily withdrew the sale is irrelevant. The record shows that plaintiff's actions, by commencing this action and seeking to prevent HRC from disposing of the collateral after plaintiff defaulted on the loan, fell within the agreement's provision that

would subject plaintiff and third-party defendants to liability for the full amount of the loan.

We have considered plaintiff and third-party defendants' remaining arguments, and find them unavailing.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6163 Elaine Y. Ovalles, Index 302334/09
Plaintiff-Appellant,

-against-

Mario A. Herrera, et al.,
Defendants-Respondents.

_____

Law Office of Arnold Treco, Jr., PLLC, Bronx (Arnold Treco of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered December 3, 2010, which, in this action for personal injuries sustained in a motor vehicle accident, granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law. Defendants submitted, inter alia, the affirmed reports of a neurologist and an orthopedist, who examined plaintiff and concluded that she had normal ranges of motion in her lumbar and cervical spine. To the extent the findings of the

experts differed, such differences were not so significant as to affect defendants' entitlement to summary judgment (*see Feliz v Fragosa*, 85 AD3d 417 [2011]).

In opposition, plaintiff did not raise a triable issue of fact. She failed to present any competent medical evidence contemporaneous to the time of the accident showing limitations in the range of motion in her lumbar and cervical spine (*see Rubencamp v Arrow Exterminating Co., Inc.*, 79 AD3d 509 [2010]). Nor did she present any explanation for the absence of such records. The only objective evidence of limitation of motion is contained in a report of a physician who examined plaintiff several years after the accident. This finding is "too remote to raise an issue of fact as to whether the limitations were caused by the accident" (*Lopez v Simpson*, 39 AD3d 420, 421 [2007]).

Dismissal of plaintiff's claim under the 90/180-day category of Insurance Law § 5102(d) was also warranted. Defendants submitted plaintiff's testimony that she only missed two or three days of work as a result of the accident (*see De La Cruz v Hernandez*, 84 AD3d 652 [2011]; *Canelo v Genolg Tr., Inc.*, 82 AD3d 584 [2011]). In opposition, plaintiff failed to raise a triable

issue of fact.

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

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6165 The People of the State of New York, Ind. 356/00
Respondent,

-against-

George Nieves,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered August 26, 2009, resentencing defendant, as a second felony offender, to a term of 13 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We have no authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: NOVEMBER 29, 2011

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6167N Diana Parker, as Executor of the Estate of Gertrude Neumark Rothschild, Plaintiff-Appellant, Index No. 111240/10

-against-

Troutman Sanders LLP, et al., Defendants-Respondents.

_____

Mintz Levin Cohn Ferris Glovsky & Popeo, PC, New York (John M. Delehanty of counsel), for appellant.

Meiselman, Denlea, Packman, Carton & Eberz P.C., White Plains (Joanna F. Sandolo of counsel), for Troutman Sanders LLP, respondent.

Davis & Gilbert LLP, New York (David S. Greenberg of counsel), for Albert Jacobs LLP and Albert Jacobs, respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 1, 2011, which, to the extent appealed from, denied plaintiff's motion to place venue of the consolidated action in New York County and granted the cross motions of defendants to place venue in Westchester County, unanimously affirmed, without costs.

Defendants filed their actions in Westchester County before plaintiff filed her action in New York County. Accordingly, upon consolidating the related actions pursuant to CPLR 602, the court providently exercised its discretion in placing venue in

Westchester County (*Teitelbaum v PTR Co.*, 6 AD3d 254, 255 [2004]). Plaintiff failed to show that material witnesses would be inconvenienced (*id.*), or that other special circumstances warranted placing venue in New York County, which would depart from the first-filed rule (*cf. Harrison v Harrison*, 16 AD3d 206, 207 [2005] and (*see Velasquez v C.F.T., Inc.*, 240 AD2d 178, 179 [1997]).

We decline to determine whether defendants' complaints were facially defective due to their alleged failure to comply with part 137 of the Judiciary Law (*see* 22 NYCRR 137.6[b]), as it is for the Westchester County court to address such a claim.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6171 Ulises Caraballo, Index 13406/04
Plaintiff-Appellant,

-against-

Montefiore Medical Center, et al.,
Defendants-Respondents.

_____

Arnold E. DiJoseph, New York, for appellant.

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 29, 2010, dismissing the complaint, and bringing up for review an order, same court and Justice, entered November 12, 2009, which denied plaintiff's motion to vacate the dismissal of the action, to restore the action to active status and to extend the time to file a note of issue, unanimously affirmed, without costs.

In this action alleging medical malpractice, the court served plaintiff with a CPLR 3216 notice, directing him to file his note of issue within 90 days or face dismissal. Plaintiff subsequently obtained two extensions of time to file and while the first order referenced the court’s original CPLR 3216 notice, the second, which granted an 85-day extension, stated only that

"plaintiff must file [the note of issue] on or before 9/30/08." Plaintiff failed to file or otherwise move prior to the last extension expiring, and, on September 30, 2008, the court sua sponte dismissed the action.

To vacate an order dismissing an action pursuant to CPLR 3216, "a plaintiff must demonstrate both a reasonable excuse for the failure to comply with the 90-day demand to serve and file a note of issue and a meritorious cause of action" (*see Cadichon v Facelle*, 71 AD3d 520, 521 [2010], *appeal dismissed* 15 NY3d 767 [2010]; *see Umeze v Fidelis Care N.Y.*, 17 NY3d 751 [2011]). Here, plaintiff failed to make any showing of merit.

Plaintiff also did not offer a reasonable excuse for his failure to file the note of issue. Plaintiff's purported reliance on an unnamed court employee's directive to "complete the discovery process then file [the] Note of Issue" is not a reasonable excuse (*see Frazzetta v P.C. Celano Contr.*, 54 AD3d 806, 809 [2008] [reliance on law clerk's view that compliance with deadlines was not mandatory not reasonable]). Moreover, plaintiff's claim that his failure to file a note of issue was caused by defendants' obstruction of efforts to obtain legitimate pretrial discovery, is unpreserved (*see Chares v K Mart of NY Holdings, Inc.*, 71 AD3d 471 [2010]). In any event, even assuming

that defendants caused the delay, it was plaintiff's obligation to move for an extension of time (*see Cadichon* at 521).

Plaintiff's argument that each extension order must either reference the original notice or itself strictly comply with CPLR 3216 anew, is unpersuasive. It is enough that the original notice complied with the Rule, giving plaintiff 90 days and explicitly advising him that dismissal would occur as a result of noncompliance.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6172 In re Sharon Crystal F.,

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

Nicole Valerie D., etc., et al.,
Respondents-Appellants,

Catholic Guardian Society
& Home Bureau, et al.,
Petitioners-Respondents.

_____

Neal D. Futerfas, White Plains, for Nicole Valerie D., appellant.

Dora M. Lassinger, East Rockaway, for John F., appellant.

Joseph T. Gatti, New York, for respondents.

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

_____

Order of disposition, Family Court, New York County (Susan Knipps, J.), entered on or about June 21, 2010, which, upon findings that respondent mother was unable to care for the subject child due to mental illness and that respondent father permanently neglected the child, terminated the parental rights of the mother and the father and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence established that the mother suffered from mental illness as defined by Social Services Law § 384-b(4)(c) and (6)(a) (*see e.g. Matter of Genesis S. [Irene Elizabeth S.]*, 70 AD3d 570 [2010]). A court-appointed psychologist examined the mother and determined that she suffers from a mental illness which impairs her ability to care for the child now and for the foreseeable future. He noted that she had been hospitalized numerous times for schizophrenia, paranoid type, and that despite medication, she was acutely symptomatic when he interviewed her.

There is also clear and convincing evidence that the agency exerted diligent efforts to reunite the father and the child, and that notwithstanding such diligent efforts, the father permanently neglected his daughter (*see* Social Services Law § 384-b[7][a]). The agency's progress notes reflected numerous attempts to encourage the father to comply with the service plan, but he refused to obtain a mental health evaluation, complete a drug treatment program, and participate in various referrals, including a domestic violence program (*see Matter of Robert Calvin R.*, 59 AD3d 265 [2009]). Although the father visited with the child on an intermittent basis when he was not incarcerated, this was insufficient to overcome the evidence of his failure to

address the problems that led to the child's placement.

A preponderance of the evidence demonstrated that the best interests of the child were served by the termination of the parents' parental rights to free the child for adoption by the foster mother, who tended to the child's special needs (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child had resided in the foster home for almost her entire life and was thriving in the foster home. The court properly found that a suspended judgment was not warranted since the child should not have to wait any longer to obtain stability in her life based on the father's plan to turn his life around after his release from prison (*see Matter of Lorenda M.*, 2 AD3d 370, 371 [2003]).

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6174 Expedia, Inc., et al., Index 650761/09
Plaintiffs-Appellants,

Priceline.com Incorporated, et al.,
Plaintiffs,

-against-

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

_____

Jones Day, New York (Robert W. Gaffey of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Joshua M. Wolf of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 22, 2010, which granted defendants' motion to dismiss the first cause of action seeking a declaration that Local Law No. 43 (2009) of City of NY violates the Constitution of the State of New York and declared in favor of the New York City Department of Finance and the City of New York (defendants or City) that there is no constitutional violation, unanimously reversed, on the law, without costs, the motion denied, and, upon a search of the record, it is declared that Local Law 43 violates the New York State Constitution.

Plaintiffs, on-line travel intermediaries that facilitate

hotel room reservations, commenced this action against defendants challenging the constitutionality of Local Law 43, which amended certain subdivisions of the Administrative Code of the City of New York § 11-2501 *et seq.* in order to extend the hotel room occupancy tax to include imposition of the tax on the service or booking fees earned by plaintiffs in connection with hotel room reservations. Plaintiffs seek, inter alia, a declaration that defendants lacked the authority to expand the hotel room occupancy tax to impose it on the fees earned by them. The enabling legislation authorized the City of New York to impose on a hotel occupant a tax at a rate of up to six percent of the rent or charge per day for each hotel room (CLS Uncons Laws of NY ch 288-C, § 1). Contrary to the motion court's finding, the plain language of the enabling legislation did not clearly and unambiguously provide the City with broad taxation powers with respect to imposing a hotel occupancy tax. Rather, it permitted the City to impose the tax on "hotel occupants." Given the well-established rule that a statute that levies a tax "must be narrowly construed" and "any doubts concerning its scope and application are to be resolved in favor of the taxpayer" (*Debevoise & Plimpton v New York State Dept. of Taxation & Fin.*, 80 NY2d 657, 661 [1993]), the plain meaning of this phrase did

not encompass the service fees charged by the travel intermediaries and the legislation may not be extended so as to permit the imposition of the tax in a situation not embraced by it (*id.*). To extend the tax to cover these fees requires action by the State Legislature, such as that taken in 2010 (*see* CLS Uncons Laws of NY, ch 288-C, § 1; L 2010, ch 7, Part AA § 1, effective September 1, 2010).

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6175 The People of the State of New York, Ind. 2854/04
Respondent,

-against-

Jovannie Florestal,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered March 16, 2010, convicting defendant, after a jury trial, of murder in the second degree, and sentencing her to a term of 25 years to life, unanimously affirmed.

The court properly granted the People's reverse-*Batson* application (*see Batson v Kentucky*, 476 US 79 [1986]; *People v Kern*, 75 NY2d 638 [1990], *cert denied* 498 US 824 [1990]). The record supports the court's finding, which is entitled to great deference, that since counsel failed to challenge non-Asian panelists possessing the same views as those cited as race-neutral reasons for challenging the panelist at issue, those reasons were pretextual (*see e.g. People v Lozado*, 303 AD2d 270 [2003], *lv denied* 100 NY2d 563 [2003]).

Defendant's argument that the trial court failed to follow the *Batson* protocol is unpreserved (*see People v Richardson*, 100 NY2d 847, 853 [2003]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court correctly followed the three-step *Batson* procedure, and properly found pretext based on its own "founded and articulated rejection of the race-neutral reason" offered by defense counsel (*People v Payne*, 88 NY2d 172, 184 [1996]). Even if "the court may have used the wrong nomenclature in describing its step-three ruling" (*People v Washington*, 56 AD3d 258, 259 [2008], *lv denied* 11 NY3d 931 [2009]), a defect that could have been cured immediately had defendant made a contemporaneous objection, it is clear from the surrounding context that the court's ultimate ruling was a finding of pretext.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6176 The People of the State of New York, Ind. 1917/08
Respondent,

-against-

Sofia Robinson,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about April 28, 2010,

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 29, 2011

CLERK

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

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6178 & Index 500155/10
M-4623 In re the Supplemental Application of Marc A. Landis, etc.,

- - - - -

Mark A. Landis,
Petitioner-Respondent,

David Debora,
Cross-Petitioner-Respondent,

Claire Debora,
Respondent-Appellant.

_____

Davidoff Malito & Hutcher LLP, New York (Derek Wolman of counsel), for appellant.

Lissner & Lissner LLP, New York (Barbara H. Urbach Lissner of counsel), temporary personal needs guardian for appellant.

Phillips Nizer LLP, New York (Elizabeth A. Adinolfi of counsel), for Marc A. Landis, respondent.

Anderson Kill & Olick, P.C., New York (Jerry S. Goldman of counsel), for David Debora, respondent.

_____

Order, Supreme Court, New York County (Lottie E. Williams J.), entered June 13, 2011, which, insofar as appealed from, vacated, sua sponte, a so-ordered stipulation of settlement, unanimously reversed, on the law and the facts, without costs, and the stipulation reinstated.

As the parties concede, the IAS court erred when it acted on its own initiative in vacating the parties' stipulation of

settlement of this article 81 proceeding (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *Charlop v A.O. Smith Water Prods.*, 64 AD3d 486, 486 [2009]). Rather, the proper course of action would have been to hold an evidentiary hearing (*see Kabir v Kabir*, 85 AD3d 1127, 1127-1128 [2011]). Alternatively, the petitioner or cross petitioner could have moved for enforcement of the stipulation (*see Hallock*, 64 NY2d at 230).

M-4623 - *Landis v Debora*

Motion to strike briefs of cross petitioner and temporary personal needs guardian denied.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6179 In re Theodore T.,

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

_____

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

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about October 20, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of petit larceny and criminal possession of stolen property in the fifth degree, and placed him on enhanced supervision probation for a period of 15 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility. The victim, who observed appellant on two

occasions prior to, and on two occasions immediately after, the theft, reliably identified appellant as the person who walked away with his bicycle.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6180 The People of the State of New York, Ind. 4464/08
Respondent,

-against-

Harold Deleon also known
as Juan Pedro,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about April 29, 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 29, 2011

CLERK

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

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6186 The People of the State of New York, Ind. 2811/08
Respondent,

-against-

Warren Temple,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered December 19, 2008, convicting defendant, upon his plea of guilty, of three counts of robbery in the second degree, and sentencing him, as a second felony offender, to concurrent terms of nine years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]).

The court afforded defendant a sufficient opportunity to present his claims. Although the court expressed skepticism about the merits of the application, it permitted defendant to address the court with regard to each of his claims. Defendant claimed that he was innocent, that his attorney coerced him into pleading guilty, and that he was under the influence of drugs at the time of the plea. However, these claims were conclusory and unsubstantiated. The record establishes that the plea was knowing, intelligent and voluntary.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6187 Porfirio Izquierdo, Index 18082/06
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

Rafoul Maleh, et al.,
Defendants.

_____

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

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 29, 2010, which, in a personal injury action arising from a multi-vehicle accident, granted defendant City of New York's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The City established prima facie that the police officers did not operate the police vehicle in reckless disregard for the safety of others (*see* Vehicle and Traffic Law § 1104[b][2],[3]; [e]; *Kabir v County of Monroe*, 16 NY3d 217 [2011]; *Saarinen v Kerr*, 84 NY2d 494 [1994]). The police officers testified that they were responding to an emergency; that the traffic light was

either green in their favor or turned green after they slowed down; and that they were slowly proceeding through the intersection when the co-defendants' van hit and pushed them into plaintiff's car. In addition, one of the officers testified that the turret light and siren were on as the police vehicle proceeded through the intersection.

Plaintiff's evidence failed to raise an issue of fact. Plaintiff testified at his 50-h hearing and deposition that, as he approached the intersection, the light was green in his favor and that he noticed the police vehicle heading northbound "slowly" and at an "average speed" with its turret light on. Although plaintiff's testimony that he did not hear a siren conflicts with one of the officer's testimony that the siren was on, this discrepancy is insufficient to raise an issue of fact. Indeed, pursuant to Vehicle and Traffic Law § 1104(c), police vehicles in emergency situations are not required to send emergency audible signals. This is "because they may need to approach suspected criminals without giving advance notice" (*Kabir*, 16 NY3d at 227 [internal quotation marks omitted]). Here, the officers testified that, at the time of the accident, they were nearing the location of a crime in progress, and plaintiff does not dispute that the officers were responding to

an emergency.

In any event, even if the officers operated the vehicle recklessly, the City demonstrated prima facie that the officers' conduct did not proximately cause plaintiff's injury, and plaintiff failed to raise an issue of fact. Indeed, in addition to the foregoing testimony, plaintiff testified that the co-defendants' van approached the intersection at a "grand velocity" before hitting the police vehicle, causing the police vehicle to collide into his car (*see Ventricelli v Kinney Sys. Rent A Car*, 45 NY2d 950 [1978]; *cf. White v Diaz*, 49 AD3d 134 [2008]).

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

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6188 Efren Meralla, Index 24347/98
Plaintiff-Respondent, 81193/99

-against-

Stephen M. Goldenberg,
Defendant-Respondent,

Philip L. Weinstein, et al.,
Defendants-Appellants.

- - - - -

Stephen M. Goldenberg,
Third-Party Plaintiff-Respondent,

-against-

Philip L. Weinstein, et al.,
Third-Party Defendants-Appellants.

_____

Rosen Livingston & Cholst LLP, New York (Peter I. Livingston of counsel), for appellants.

Friedman & Moses, LLP, Garden City (Lisa M. Comeau of counsel), for Efren Meralla, respondent.

Stephen M. Goldenberg, Hewlett, respondent pro se.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered February 24, 2011, which denied the motion of defendants/third-party defendants (Legal Aid defendants) to dismiss the amended and third-party complaints as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff seeks to recover for successive acts of legal malpractice allegedly committed by defendant Goldenberg, who represented him at a criminal trial at which he was convicted of murder in the second degree, and by the Legal Aid defendants, who delayed in successfully prosecuting the appeal of his conviction (*see* 228 AD2d 160 [1996], *lv denied* 88 NY2d 989 [1996] [reversing plaintiff's conviction on the grounds of ineffective assistance of counsel]). Goldenberg seeks contribution from the Legal Aid defendants for the portion of plaintiff's imprisonment allegedly attributable to the delay in appealing the criminal conviction.

Plaintiff's claim against the Legal Aid defendants, brought more than 10 years after they secured the reversal of his criminal conviction, is time-barred. Plaintiff, who admitted being aware of the Legal Aid defendants' alleged delay in prosecuting the appeal as early as 1998, made no mistake in the identity of these defendants and cannot now rely on the relation-back doctrine to assert a claim against them (*see Buran v Coupal*, 87 NY2d 173, 181 [1995]; *Goldberg v Boatmax://, Inc.*, 41 AD3d 255 [2007]).

Plaintiff also failed to state a cause of action against the Legal Aid defendants. It is well established that "[i]n order to sustain a claim for legal malpractice, a plaintiff must establish

. . . that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). Here, the bare legal assertion that the Legal Aid defendants were negligent based on the delay in prosecuting the appeal of plaintiff's conviction is insufficient to state a cause of action for legal malpractice. The delay was clearly attributable to the preparation of the Legal Aid defendants' motion to vacate the judgment of conviction, which was complicated by, inter alia, the fact that two separate murder trials were at issue.

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6190 The People of the State of New York, Ind. 1464/01
Respondent,

-against-

Shariff Alleyne,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Arlene Silverman, J.), rendered December 3, 2008, resentencing defendant to concurrent terms of eight years, with four 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 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6192N Eliza Quezada, etc., et al., Index 350516/08
Plaintiffs-Respondents,

-against-

Mensch Management Inc.,
Defendant,

Julio Taveras,
Defendant-Appellant.

_____

Morici & Morici, LLP, Garden City (Emily Ashman of counsel), for appellant.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for respondents.

_____

Appeal from order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered June 11, 2010, which, inter alia, granted plaintiffs' motion to strike the answer of defendant Taveras for failure to comply with a prior order of the court, unanimously dismissed, without costs, for failure to perfect the appeal in accordance with the CPLR and the rules of this Court.

Dismissal of the appeal is warranted because Taveras failed to assemble a proper appellate record. Notably, the order being appealed from explicitly referenced Supreme Court's reliance upon the affirmation of plaintiffs' counsel to find that Taveras failed to appear for a court-ordered deposition on March 22,

2010. The attorney's affirmation was a necessary paper upon which the subject "order was founded" and should have been included in the record (CPLR 5526; Rules of App Div, 1st Dept [22 NYCRR] § 600.10; *see Lynch v Consolidated Edison, Inc.*, 82 AD3d 442 [2011]; *UBS Sec. LLC v Red Zone LLC*, 77 AD3d 575, 579 [2010], *lv denied* 17 NY3d 706 [2011]).

Were we not dismissing the appeal, we would find that Taveras's answer was properly stricken. The limited record demonstrates that Taveras's failure to appear for the March 2010 deposition was the latest in a series of failures by Taveras to comply with court orders directing discovery (*see e.g. Henderson-Jones v City of New York*, 87 AD3d 498, 504 [2011]; *Elias v City of New York*, 87 AD3d 513, 514 [2011]).

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

ENTERED: NOVEMBER 29, 2011

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6193N Sheryl Menkes, etc., Index 29302/02
Plaintiff-Appellant,

-against-

Beth Abraham Services,
Defendant-Respondent.

_____

Alexander J. Wulwick, New York, for appellant.

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered June 17, 2010, which, to the extent appealed from, granted the motion of defendant nursing home and nonparty former nursing director to quash a subpoena seeking the deposition of the former nursing director, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting the motion, as plaintiff failed to demonstrate that the information sought from the former director could not be obtained from other sources, such as the nursing home's own records (*see*

Connolly v Napoli, Kaiser & Bern, LLP, 81 AD3d 530, 531 [2011]; *Kooper v Kooper*, 74 AD3d 6, 15, 16-17 [2010]). In view of the foregoing, we need not determine whether the disclosure sought is material and necessary.

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

ENTERED: NOVEMBER 29, 2011

CLERK