SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 27, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, Acosta, Freedman, Abdus-Salaam, JJ.

5194 & M-4130	The People of the State of New York, Respondent,	Ind. 2078/03 3126/03

-against-

Ramon Arroyo, etc.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (John P. Collins, J.), entered July 23, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously deemed withdrawn.

This appeal is moot because, in a subsequent order, Supreme Court found defendant eligible for consideration for resentencing

but denied resentencing on the merits.

M-4130 - *People v Ramon Arroyo, etc.*

Motion to withdraw appeal and for amendment of orders granted.

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

ENTERED: OCTOBER 27, 2011

CLERK

Tom, J.P., Andrias, Friedman, Catterson, JJ.

2122 Tremayne Saunders, et al., Index 23205/05
Plaintiffs-Respondents,

-against-

Apartment Investment and
Management Co., et al.,
Defendants-Appellants,

Guardsman Elevator Co., Inc.,
Defendant-Respondent.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (John A. Barone, J.), entered on or about March 5, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto entered October 12, 2011,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: OCTOBER 27, 2011

CLERK

Mazzarelli, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

4627-
4628 Susan Kamil, Index 601908/09
Plaintiff-Respondent,

-against-

David Richenthal,
Defendant-Appellant.

Appeals having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about June 22, 2010, and a judgment, same court and Justice, entered June 23, 2010,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated September 16, 2011,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: OCTOBER 27, 2011

CLERK

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

5353 Doreen Rhodes, Index 14810/05
Plaintiff-Respondent, 85782/07

-against-

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

Viacom, formerly known as
Infinity Outdoor,
Defendant-Appellant.
- - - - -
Viacom Outdoor, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Shelter Express Corp.,
Third-Party Defendant.

_____

McAndrew, Conboy & Prisco, Melville (Mary C. Azzaretto of counsel), for appellant.

Mitchell Lance Perry, White Plains, for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about July 16, 2010, which, upon reargument, denied defendant Viacom Outdoor, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

This action arises out of an incident in June 2004, where plaintiff allegedly fell after exiting a bus. Plaintiff testified that her foot became stuck in a hole in the sidewalk

located at the bus shelter, but she did not observe anything before she fell because she was looking straight ahead. At the time of plaintiff's accident, Viacom was a party to a franchise agreement with the City to install, maintain, repair and operate bus shelters in New York City. Viacom entered into a separate agreement with third-party defendant Shelter Express to maintain and clean the bus shelters.

Plaintiff explained that she had taken the same bus route to work for the past three years, and had not noticed the hole. She did not make any complaints about the sidewalk conditions at the bus shelter and was unaware of anyone else making any complaints. In support of the motion for summary judgment, Viacom submitted an affidavit from Glen Herskowitz, a manager whose responsibilities at the time of this accident included overseeing the maintenance and servicing of the bus shelters. Mr. Herskowitz confirmed that he had searched all the records maintained by Viacom and that there was no record of any prior complaints with respect to the brick work at the shelter prior to plaintiff's accident. He further explained that there was no documentation that Viacom had ever been placed on notice of the alleged defective condition before plaintiff fell.

In response to Viacom's motion, plaintiff submitted an affidavit from a professional engineer who stated that he had

inspected the sidewalk where the bus shelter stood and reviewed photographs of the location as it appeared at or about the time of the incident. He opined that the bus shelter was improperly installed and that due to this improper installation, the brick tiles immediately next to and around the front leg of the shelter separated and came loose. He further opined that it appeared that there was an improper repair and that "vibrations and shifting of the stand" caused stones adjacent to the tiles to become loose and to be ejected.

The motion court dismissed the complaint as against Viacom, noting there was no evidence that Viacom created or had any notice of the defect. The motion court found the affidavit of plaintiff's expert insufficient to raise an issue of fact, because it did not indicate when the expert inspected the shelter and it was dated over four years after the accident.

Plaintiff moved to renew and reargue. In the reply papers submitted on that motion, plaintiff attached an amended affidavit of her expert, which stated that the inspection took place on January 29, 2010, five years after the date of the accident. The motion court granted the motion to reargue and, upon reargument, denied Viacom's motion for summary judgment. The court concluded that the amended expert affidavit raised an issue of fact as to whether the bus shelter was negligently installed.

We have held that "[a]rguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion" (*Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1995]). Thus, the motion court should not have considered the amended affidavit, which was improperly submitted for the first time in reply papers on the motion to renew (*De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566, 566 [2010]). Plaintiff cannot argue that the information contained in the amended affidavit did not exist at the time the original motion papers were filed, and thus there were no new facts on which a motion to renew could be made (CPLR 2221[e][2]). Moreover, plaintiff offered no reasonable excuse for the failure to include the date of the inspection in the original opposition papers (*see Ahmed v Display Dye Cutting*, 235 AD2d 257 [1997]).

However, we find that summary judgment was correctly denied on reargument because issues of fact exist, including whether Viacom created the alleged dangerous condition by negligently installing the bus shelter (*see Patterson v New York City Tr. Auth.*, 5 AD3d 454, 455 [2004] ["notice need not be proven where a defendant is responsible for creating the allegedly dangerous condition"]). In his original affidavit, plaintiff's expert opines that the shelter was negligently installed because it was fixed in the earth with no additional support and covered with

brick paving tiles. According to the expert, as a result of the improper installation, the tiles became loose and broke apart.

In response, Viacom did not submit an expert affidavit to refute plaintiff's expert's conclusions. In its reply papers below, Viacom's counsel states that Shelter installed the bus shelter, but no documentary or testimonial evidence was submitted by Viacom to support that contention. In any event, Viacom's claim merely raises issues of fact since under the franchise agreement, Viacom was responsible for installing the shelter.

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5542 & M-4156 The People of the State of New York, Respondent, Ind. 6857/98

-against-

Arild Gonzalez,
Defendant-Appellant.

_____

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

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

_____

Appeal from order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about August 6, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously dismissed as moot.

This appeal is moot because Supreme Court has granted defendant's renewed motion for resentencing.

M-4156 Motion to dismiss appeal granted.

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

ENTERED: OCTOBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5565-
5566-
5567 In re Marianella Santiago,
Petitioner-Respondent,

-against-

Christian Halbal,
Respondent-Appellant.

_____

Lauren B. Abramson, Harrison, for appellant.

Marianella Santiago, respondent pro se.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about November 25, 2009, which granted petitioner mother's petition to suspend the father's unsupervised visitation with the parties' children and directed that the father's visitation be limited to supervised visitation, unanimously reversed, on the law, without costs, and the matter remanded for a hearing.

In May 2008, the mother filed a petition seeking to modify an August 2007 order granting unsupervised visitation to the father. The petition alleged that since the entry of the 2007 order, the father had become increasingly verbally, emotionally and physically abusive towards the children. In response, the

father filed an affidavit disputing the mother's allegations and offering his own version of events. The court set a date for a fact-finding hearing on the mother's petition. After the court set the hearing date, it conducted a *Lincoln* hearing with the children. On the scheduled date for the hearing on the petition, the court did not conduct the hearing but instead issued the order directing that the father's visitation be supervised.

A custody or visitation order may be modified only upon a showing that there has been a subsequent change of circumstances and modification is in the child's best interests (*see Matter of Wilson v McGlinchey*, 2 NY3d 375 [2004]). In general, an evidentiary hearing is necessary before a court modifies a prior order of custody or visitation (*see Matter of Rousseau v Kraft*, 72 AD3d 1643 [2010] ["(d)eterminations affecting custody and visitation should be made following a full evidentiary hearing, not on the basis of conflicting allegations"]; *Naomi C. v Russell A.*, 48 AD3d 203 [2008]).

Family Court should not have modified the prior order of visitation without holding an evidentiary hearing. We recognize that the judge here has presided over this matter for many years and is familiar with the parties and the children. Nevertheless, in light of the factual disputes and allegations of parental alienation, the court should not have summarily granted relief

without conducting a full hearing on whether any changes to visitation were in the children's best interests (*see Galanti v Kraus*, 85 AD3d 723 [2011]; *Matter of Richard W. v Maribel G.*, 78 AD3d 480 [2010]). Indeed, the court initially recognized the need for such a hearing but then inexplicably issued its order without conducting the hearing.

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5653N-
5654N

Russell Patterson,
Plaintiff-Appellant,

-against-

Turner Construction Company, et al.,
Defendants-Respondents.

Index 101638/09

Ephrem J. Wertenteil, New York, for appellant.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for respondents.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 7, 2011, which, in an action for personal injuries, granted defendants' motion to compel an authorization for all of plaintiff's Facebook records compiled after the incident alleged in the complaint, including any records previously deleted or archived, unanimously reversed, on the law and the facts, without costs, and the matter remanded for a more specific determination. Appeal from order, same court and Justice, entered January 24, 2011, which deferred determination on defendants' motion to compel to the extent of directing plaintiff to produce his Facebook records for an in camera review, unanimously dismissed, without costs, as taken from a nonappealable paper.

Plaintiff claims damages for physical and psychological injuries, including the inability to work, anxiety, post-

traumatic stress disorder, and the loss of enjoyment of life. Although the motion court's in camera review established that at least some of the discovery sought "will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Abrams v Pecile*, 83 AD3d 527, 528 [2011] [internal quotation marks and citation omitted]), it is possible that not all Facebook communications are related to the events that gave rise to plaintiff's cause of action (*see Offenback v L.M. Bowman, Inc.*, 2011 WL 2491371, *2, 2011 US Dist LEXIS 66432, *5-8 [MD Pa 2011]). Accordingly, we reverse and remand for a more specific identification of plaintiff's Facebook information that is relevant, in that it contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims.

The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access (*Romano v Steelcase Inc.*, 30 Misc 3d 426, 433-434 [2010]), just as relevant matter from a personal diary is discoverable (*see Faragiano v Town of Concord*, 294 AD2d 893, 894 [2002]).

Dismissal of the appeal from the January 24, 2011 order is warranted because the order does not affect a substantial right and is not otherwise appealable as of right (*see Marriott Intl. v Lonny's Hacking Corp.*, 262 AD2d 10 [1999]; *Garcia v Montefiore Med. Ctr.*, 209 AD2d 208, 209 [1994]; CPLR 5701[a][2][v]).

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5673 & M-4342 The People of the State of New York, Respondent, Ind. 8212/02 2100/03 4317/03

-against-

Corey Neely, also known as Corey Everette, Defendant-Appellant.

_____

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

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

_____

Appeal from order, Supreme Court, New York County (Daniel P. Conviser, J.), rendered May 17, 2010, which denied, on grounds of ineligibility, defendant's CPL 440.46 motion for resentencing, unanimously deemed withdrawn.

This appeal is moot because, in a subsequent order, Supreme Court found defendant eligible for consideration for resentencing but denied resentencing on the merits.

M-4342 Motion to withdraw appeal and for amendment of orders granted.

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5854 The People of the State of New York, Docket 4022C/07
Respondent,

-against-

Enrique Santiago,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered June 9, 2008, convicting defendant, after a jury trial, of driving while intoxicated and aggravated unlicensed operation of a motor vehicle in the third degree, and sentencing him to a term of 3 years' probation and a $200 fine, unanimously affirmed.

To the extent defendant is challenging the legal sufficiency of the evidence, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. In addition, we conclude that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The jury's mixed verdict does not warrant a different result (*see People v Rayam*, 94 NY2d 557 [2000]). There is no basis for disturbing the

jury's credibility determinations. The evidence supports the conclusions that defendant drove a car while his blood alcohol content was above the threshold for intoxication, and that he was aware his license had been suspended.

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5855 In re Drita F.,
Petitioner-Respondent,

-against-

Joseph I.R.,
Respondent-Appellant.

Andrew J. Baer, New York, for appellant.

Elisa Barnes, New York, for respondent.

Order, Family Court, New York County (Diane Costanzo, Referee), entered on or about July 14, 2010, which, upon a finding that respondent committed the family offense of harassment in the second degree and violated a temporary order of protection, issued a permanent order of protection against respondent for one year, unanimously affirmed, without costs.

The determination that respondent committed the offense of harassment in the second degree and violated an order of protection, was supported by a fair preponderance of the credible evidence (*see* Penal Law § 240.26[2]; Family Court Act § 832). A witness testified that respondent followed him and petitioner for several blocks, that respondent and petitioner argued, and that the witness and petitioner walked in a different direction in an effort to avoid respondent. There exists no basis to disturb the

credibility determinations of the Referee (*see Matter of Hunt v Hunt*, 51 AD3d 924, 925 [2008]).

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

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5858 The People of the State of New York, Ind. 8/08
Respondent,

-against-

Luis Fernandez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jenetha G. Philbert of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Barrett, J.), rendered on or about April 3, 2009,

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

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

ENTERED: OCTOBER 27, 2011

CLERK

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

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

5859 The People of the State of New York, Ind. 4748/02
Respondent,

-against-

Shamar Holloway,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Eduardo Padro, J.), entered on or about July 15, 2010, resentencing defendant to a term of 7 years, unanimously affirmed.

The court provided a sufficient reduction of sentence pursuant to CPL 440.46, and we perceive no basis for a further reduction.

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5860 Ramsey Henriquez, et al., Index 112788/06
Plaintiffs-Appellants,

-against-

New 520 GSH LLC, et al.,
Defendants-Respondents.

_____

Leav & Steinberg, LLP, New York (Edward A. Steinberg of counsel), for appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 19, 2010, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiffs' claim under Labor Law § 200, unanimously affirmed, without costs.

The record shows that plaintiff Ramsey Henriquez, an elevator maintenance mechanic, was injured when the elevator car in which he was riding rapidly descended to the bottom of the elevator shaft. Plaintiff and a coworker were taking the subject car, which had been taken out of service, to the building's twelfth floor to consult with the building's engineer about problems with the car.

Dismissal of the Labor Law § 200 claim was proper because defendants and plaintiff's employer New York Elevator (NYE) had

entered into a contract providing that NYE would provide a broad range of services to defendants, including a duty to "cover a complete maintenance service in every respect." As a result, "[t]here is no cause of action under Labor Law § 200 because '[n]o responsibility rests upon an owner of real property to one hurt through a dangerous condition which he has undertaken to fix'" (*McCullum v Barrington Co. & 309 56th St. Co.*, 192 AD2d 489, 489 [1993], quoting *Kowalsky v Conreco Co.*, 264 NY 125, 128 [1934]; *see Brugnano v Merrill Lynch & Co.*, 216 AD2d 18, 19 [1995], *lv dismissed in part, denied in part* 86 NY2d 880 [1995]).

Plaintiffs' reliance on the doctrine of res ipsa loquitur is misplaced. Plaintiffs failed to demonstrate that the accident could not have been caused by any voluntary action or contribution on plaintiff's part (*see Marszalkiewicz v Waterside Plaza, LLC*, 35 AD3d 176, 177 [2006]).

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

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5861 William Coffey, Index 116455/06
Plaintiff-Appellant,

-against-

Gloryvette L. Esparra,
Defendant,

2427 Restaurant Corp.,
doing buiness as Eugene,
Defendant-Respondent.

_____

Dell, Little, Trovato & Vecere LLP, Bohemia (Joseph G. Dell of counsel), for appellant.

Rosenbaum & Taylor, P.C., White Plains (Dara L. Rosenbaum of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered July 6, 2010, which, in this action to recover for personal injuries sustained by plaintiff when he was allegedly struck by defendant driver's motor vehicle sometime after the driver left defendant restaurant, to the extent appealed from as limited by the briefs, granted defendant restaurant's motion for summary judgment dismissing as against it plaintiff's cause of action under the Dram Shop Act (General Obligations Law § 11-101), unanimously affirmed, without costs.

Plaintiff sufficiently stated a cause of action under the Dram Shop Act by referring in his complaint to General Obligations Law § 11-101 and alleging that the restaurant served

alcohol to the visibly intoxicated driver (*see Bongiorno v D.I.G.I., Inc.*, 138 AD2d 120, 123 [1988]; *Morrissey v Sheedy*, 26 AD2d 683 [1966]). Nevertheless, Supreme Court properly granted the restaurant's motion. The restaurant satisfied its initial burden of negating the possibility that it served alcohol to a visibly intoxicated person by submitting the driver's testimony that she had nothing to drink in the six hours before she went to the restaurant and had only one drink at the restaurant (*see generally Cohen v Bread & Butter Entertainment LLC*, 73 AD3d 600 [2010]). The driver's testimony is sufficient to meet the restaurant's burden, since she did not have exclusive knowledge of her condition while at the restaurant. Indeed, there were other witnesses at the restaurant that could have testified as to the driver's condition. Thus, it cannot be said that plaintiff was unable to refute by evidentiary proof the driver's testimony. (*See Terbush v Buchman*, 147 AD2d 826, 828 [1989]; *cf. Koen v Carl Co.*, 70 AD2d 695 [1979].)

The medical expert affirmation submitted by plaintiff failed to raise an issue of fact. The expert's conclusions were based in large part on inadmissible evidence — namely, a blood alcohol

calculation test result that was offered without proper foundation (*see Costa v 1648 Second Ave. Rest.*, 221 AD2d 299, 300 [1995]). Moreover, plaintiff did not give an acceptable excuse for failing to tender evidence in admissible form (*id.*).

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5862 Aaron Richard Golub, Index 106902/09
Plaintiff-Appellant,

-against-

Tanenbaum-Harber Co., Inc.,
Defendant-Respondent.

_____

David Lu, New York, for appellant.

Rubin, Fiorella & Friedman LLP, New York (Mandie R. Forman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered November 16, 2010, which granted defendant's motion to dismiss the complaint, and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, with costs.

Supreme Court properly granted the motion to dismiss the complaint. Affording the complaint a liberal construction and according plaintiff the benefit of every possible inference, as we must (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we find that plaintiff failed to sufficiently plead causes of action for fraudulent inducement, unjust enrichment and violation of GBL § 349.

Plaintiff's claims for fraudulent inducement are based on defendant's alleged failure to provide plaintiff with certain information relating to the insurance policies it was offering.

However, an omission does not constitute fraud unless there is a fiduciary or "special" relationship between the parties (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 46 AD3d 400, 402 [2007], *affd* 12 NY3d 553 [2009]) and plaintiff did not allege in the original complaint the existence of a fiduciary relationship or special relationship which would give rise to a duty to disclose. In any event, "an insurance agent has a common-law duty to obtain requested coverage, but generally not a continuing duty to advise, guide or direct a client based on a special relationship of trust and confidence" (*Chase Scientific Research v NIA Group*, 96 NY2d 20, 30 [2001]; *see also Murphy v Kuhn*, 90 NY2d 266, 270 [1997]).

In addition, with regard to plaintiff's Long Island property, the documentary evidence established that plaintiff affirmatively requested wind coverage in his homeowners' insurance applications from 2005 through 2008, and did not decide to forego such coverage until 2009, at which time defendant had him complete an application declining such coverage despite the proximity of his LI property to the water. At that time, he was given a policy without wind coverage. Of course, plaintiff is "presumed to have read and understood his policy" (*see McGarr v Guardian Life Ins. Co. of Am.*, 19 AD3d 254, 256 [2005]), and thus the documentary evidence defeats the claim that plaintiff did not

know the policy included wind coverage or that he was fraudulently induced into agreeing to wind coverage.

As for plaintiff's claim under GBL § 349, he failed to allege in the complaint the type of conduct that would have a broad impact on consumers at large (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]) and his conclusory allegations about defendant's practices with other clients are insufficient to save the claim (*see Northwestern Mut. Life Ins. Co. v Wender*, 940 F Supp 62, 65 [SD NY 1996]). The unjust enrichment claim was also properly dismissed, as it was merely based on the three previous claims, each of which failed to state a cause of action.

Supreme Court also properly denied the cross motion for leave to amend the complaint, as the proposed amendments were plainly lacking in merit (*see Sharon Ava & Co. v Olympic Tower Assoc.*, 259 AD2d 315 [1999]). First, there is no merit to the proposed amendment to the unjust enrichment claim based on Insurance Law § 2123, which does not apply to the homeowners' insurance policies at issue. Nor is there any merit to plaintiff's proposed breach of fiduciary duty claims or his proposed changes to his fraudulent inducement claims, since defendant had no fiduciary duty or special relationship with plaintiff.

The proposed breach of contract claims are barred by the parol evidence rule, since the terms of the insurance contract and applications here are unambiguous (*see R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 33 [2002]). In addition, plaintiff erroneously suggests that a contract was formed when he requested that defendant procure the least expensive policies. Indeed, when plaintiff requested that defendant procure insurance quotes, he was submitting a request for an offer, which cannot be the basis for a enforceable contract since a further act was required in order for the contract to take effect (*see Farago Adv., Inc. v Hollinger Intl., Inc.*, 157 F Supp 2d 252, 258 [SD NY 2001]).

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: OCTOBER 27, 2011

CLERK

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

5863 In re Analuisa P.,
Petitioner-Respondent,

-against-

Warnell H.,
Respondent-Appellant.

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

Dora M. Lassinger, East Rockaway, for respondent.

Appeal from order, Family Court, Bronx County (Alma Cordova, J.), entered on or about February 25, 2010, which, after a fact-finding hearing, granted petitioner an order of protection for one year, unanimously dismissed as moot, without costs.

Because the order of protection has expired, this appeal is moot (*see Matter of Diallo v Diallo*, 68 AD3d 411 [2009], *lv dismissed* 14 NY3d 854 [2010]). Were we to reach the merits, we would find that a fair preponderance of the evidence (Family Ct Act § 832), including the testimony of petitioner and a school district guard, supports the court's finding that, on the day at

issue, respondent committed acts that constituted the family offense of disorderly conduct (Family Ct Act § 812[1]; Penal Law § 240.20). There is no basis to disturb the court's credibility determinations (*Matter of F.B. v W.B.*, 248 AD2d 119 [1998]).

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5864 Wandra Brown, Index 7159/05
Plaintiff-Appellant,

-against-

Parrocks Associates,
Defendant-Respondent.

_____

Ginsberg & Wolf, P.C., New York (Robert M. Ginsberg of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Michael E. Sande of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 8, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that at approximately 1:15 A.M., while working at defendant's building as a security guard for a nonparty security company, she slipped and fell on cooking oil that had leaked from a bag sitting on the stairs between the fifth and sixth floor. A nonparty tenant testified that she saw plaintiff shortly after the incident and also observed an oily bag. The security guard who worked the previous shift testified that at about 4:15 P.M. (nine hours earlier), he had observed an oil-filled bag at that same location. He stated that he threw the bag away and cleaned the area with a damp mop he obtained

from a janitor's closet. Furthermore, defendant's porter averred that shortly after 4:00 P.M., he inspected the subject stairs and found them clean and dry.

Under the circumstances presented, summary judgment was improperly granted since there are triable issues of fact as to whether defendant had constructive notice of the condition upon which plaintiff slipped and fell (*see Qevani v 1957 Bronxdale Corp.*, 232 AD2d 284 [1996]; *compare Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). A determination of whether the bag and oil spill that plaintiff's coworker observed was remedied by him, as defendant claims, or whether it was the same bag present later that plaintiff claims caused her to fall, invokes questions of credibility for a jury to resolve (*see Castillo v New York City Tr. Auth.*, 69 AD3d 487 [2010]; *see also Corrales v Reckson Assoc. Realty Corp.*, 55 AD3d 469 [2008]).

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

ENTERED: OCTOBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Acosta, Freedman, Moskowitz, JJ.

5866 The People of the State of New York, Ind. 5734/00
Respondent,

-against-

John Reese,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Richard Joselson 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 (Patricia M. Nunez, J.), rendered December 2, 2009, resentencing defendant to a term of 11 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: OCTOBER 27, 2011

CLERK

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

5868 Joseph J. Chessey, Jr., Index 111662/07
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.

_____

Ginsberg & Wolf, P.C., New York (Robert M. Ginsberg of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered December 8, 2010, after a jury trial in an action for personal injuries, dismissing the complaint, unanimously reversed, on the law, without costs, the complaint reinstated, and the matter remanded for a new trial.

The City concedes that in light of the Court of Appeals' decision in *Kabir v County of Monroe* (16 NY3d 217 [2011]), it was error to charge the jury with the "emergency doctrine." It was undisputed that the driver of the City's vehicle involved in the

accident was not "involved in an emergency operation" or "engage[d] in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b)" at the time of the accident (*Kabir* at 220). Accordingly, the driver's conduct "is governed by the principles of ordinary negligence" (*id.*).

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5869 The People of the State of New York, Ind. 1408/00
Respondent,

-against-

Edward Lee,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Arlene Goldberg, J.), rendered June 17, 2010, resentencing defendant to an aggregate term of 12 years, unanimously affirmed.

The court provided a sufficient reduction of sentence pursuant to CPL 440.46, and we perceive no basis for a further reduction.

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5870 Lola M. Ross, Index 110881/07
Plaintiff-Appellant,

-against-

AXA Financial, Inc., et al.,
Defendants-Respondents,

Platinum Maintenance Service Corp.,
Defendant.

_____

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for appellant.

Harrington, Ocko and Monk, LLP, White Plains (Adam Greenberg of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 29, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiff's post-trial motion for an order setting aside the verdict as contrary to the weight of the evidence, unanimously affirmed, without costs.

The court properly admitted the unredacted "aided report" because there was sufficient evidence that plaintiff was the source of the information therein, including the location of the

accident (*see Martinez v New York City Tr. Auth.*, 41 AD3d 174, 175 [2007]; *see also McDermott v Barker*, 20 AD2d 546 [1963]). In light of this and the other evidence presented at trial, the verdict was not contrary to the weight of the evidence.

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5871 Thomas McGlinchey, et al., Index 7089/05
Plaintiffs, 83749/09

-against-

Vassar College,
Defendant/Third-Party
Plaintiff-Respondent,

-against-

Kirchhoff Construction Management, Inc.,
Third-Party Defendant-Appellant.

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Kenney Shelton Liptak Nowak LLP, Buffalo (Nancy A. Long of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Christine Bernstock of counsel), for respondent.

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Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered March 22, 2011, which, to the extent appealed from as limited by the briefs, granted defendant/third-party plaintiff Vassar College's motion for summary judgment on its causes of action against third-party defendant Kirchhoff Construction Management for contractual and common-law indemnification, unanimously modified, on the law, to deny the motion as to the cause of action for common-law indemnification, and otherwise affirmed, without costs.

The injured plaintiff's testimony and the two unsworn medical reports submitted on the motion are insufficient to

demonstrate that plaintiff sustained permanent and total loss of use of his left arm or foot, i.e., a "grave injury" within the meaning of Workers' Compensation Law § 11 (*see Castro v United Container Mach. Group*, 96 NY2d 398, 401-402 [2001]; *Vincenty v Cincinnati Inc.*, 14 AD3d 392 [2005]). Thus, Vassar has no cause of action for common-law indemnification against Kirchhoff, plaintiff's employer.

The record demonstrates conclusively that Vassar was free from active negligence in connection with plaintiff's injuries. Thus, General Obligations Law § 5-322.1 does not bar its cause of action for contractual indemnification (*see Colozzo v National Ctr. Found., Inc.*, 30 AD3d 251 [2006]).

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5872 In re Chelsea Antoinette A., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Anna S.,
Respondent-Appellant,

-against-

Mercyfirst,
Petitioner-Respondent.

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Tennille M. Tatum-Evans, New York, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

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

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Order, Family Court, New York County (Jody Adams, J.), entered on or about September 27, 2010, which denied respondent's motion to vacate an order, entered on her default, which, upon a fact-finding of permanent neglect, terminated her parental rights and committed the subject children to the custody and guardianship of petitioner and the Commissioner of the Administration for Children's Services, unanimously affirmed, without costs.

Respondent did not meet her burden of establishing a reasonable excuse for her default and a meritorious defense to

this proceeding (*see* CPLR 5015[a][1]; *Matter of Jones*, 128 AD2d 403 [1987]). She failed to substantiate her excuse that her train to the courthouse was late by submitting either an affidavit by someone with personal knowledge of the facts or official documentation of a delay in public transportation (*see Adefioye v Volunteers of Am.*, 222 AD2d 246 [1995]). She failed to controvert the allegation of permanent neglect by presenting competent evidence that she had taken measures to remove the obstacles to her regaining custody of the children and that she had a realistic plan to support the children (*see Matter of Leon RR*, 48 NY2d 117, 125 [1979]; *Matter of Male J.*, 214 AD2d 417 [1995]; *see also Matter of Lorenda M. [Lorenzo McG.]*, 2 AD3d 370 [2003]).

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5873N 1010Data Inc., Index 601160/10
Plaintiff-Respondent,

-against-

Firestone Enterprises, Inc., et al.,
Defendants/Counterclaim
Plaintiffs-Appellants,

-against-

1010Data Inc., et al.,
Counterclaim Defendants-Respondents.

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Mauro Lilling Naparty LLP, Great Neck (Anthony F. DeStefano of counsel), for appellants.

Storch Amini & Munves PC, New York (Steven G. Storch of counsel), for respondents.

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Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered February 15, 2011, which denied defendants/counterclaim plaintiffs' motion to disqualify plaintiff's attorney and his law firm, unanimously affirmed, without costs.

The motion court properly exercised its discretion (*see Harris v Sculco*, 86 AD3d 481 [2011]) in finding that plaintiff's attorney did not have a conflict with either his present or former client and was not a necessary witness.

The attorney's interest as a director and 2% owner of plaintiff did not pose an impediment and, in any event, any

resulting conflicts were waived. Nor did the attorney's prior interests or small financial stake obtained in a later transaction constitute improperly acquired interests.

The circumstances do not show that the attorney had formerly represented Evan Firestone in either a 2003 transaction or with respect to a 2005 licensing agreement, since Firestone was on both occasions represented by his own counsel, acknowledged that in the 2003 matter his interests were adverse to the attorney's client's and in the 2005 matter the attorney had expressly told Firestone that he was uncomfortable representing him (*see Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 99 [2008]).

Nor did defendants carry their heavy burden of demonstrating that the attorney would be a necessary witness (*see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 445-446 [1987]), since his testimony about a modification of Firestone's agreement was based on an announcement at a board meeting where others were present; his testimony regarding his statement about Firestone's not providing support to customers was not relevant to Firestone's at-will termination for which no relief was sought and was, in any event, already the subject of an e-mail in which

the attorney denied making the statement; and, although the attorney had drafted and negotiated the agreement whose provisions are the basis of the instant dispute, Firestone failed to specify any ambiguity that would warrant, or even permit, interpretation by parol.

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

ENTERED: OCTOBER 27, 2011

CLERK

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

5159 John J. Shalam, Index 112732/05
Plaintiff-Respondent,

-against-

KPMG LLP, et al.,
Defendants,

Bayerische Hypo-Und Vereinsbank AG, et al.,
Defendants-Appellants.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Mark W. Lerner of counsel), for appellants.

Fensterstock & Partners LLP, New York (Blair Courtney Fensterstock of counsel), for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), reversed, on the law, without costs, and the motion for summary judgment granted. The Clerk is directed to enter judgment accordingly.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Karla Moskowitz
Rolando T. Acosta
Sheila Abdus-Salaam, JJ.

5159
Index 112732/05

_____x

John J. Shalam,
Plaintiff-Respondent,

-against-

KPMG LLP, et al.,
Defendants,

Bayerische Hypo-Und Vereinsbank AG,
et al.,
Defendants-Appellants.
_____x

Defendants Bayerische Hypo-Und Vereinsbank AG, HVB Structured Finance Inc., HVB Risk Management Products, Inc. and HVB America Inc., appeal from an order of the Supreme Court, New York County (Bernard J. Fried, J.), which, insofar as appealed from, denied their motion for summary judgment dismissing the complaint as against them.

Kasowitz, Benson, Torres & Friedman LLP, New York (Mark W. Lerner, Mark P. Ressler and Jon Avins of counsel), for appellants.

Fensterstock & Partners LLP, New York (Blair Courtney Fensterstock, Eugene D. Kublanovsky, Allison M. Charles and Michael T. Phillips, II of counsel), for respondent.

SAXE, J.

Plaintiff John J. Shalam paid $3.85 million to participate in a tax shelter, on the recommendation of a financial advisor, in order to avoid paying taxes on capital gains of approximately $50 million. After the IRS disallowed the scheme, plaintiff claimed he had been defrauded by defendants into believing that the scheme was legal. Based on what plaintiff admittedly knew and what he should have known, we hold that he has no viable claim of fraud, because he cannot establish reasonable reliance on the claimed misrepresentations or omissions.

The complex tax avoidance structure at issue, known as "Bond Linked Issue Premium Structure," or BLIPS, was created, orchestrated and operated by defendants. According to the complaint, between 1999 and 2000, defendants solicited the participation in BLIPS of hundreds of taxpayers, including plaintiff. In April 2000, facing the prospect of having to pay taxes on capital gains of approximately $50 million he earned as a result of a public offering of securities for a company he founded and owned, plaintiff decided to participate in BLIPS so that he could claim capital losses to offset those capital gains.

Plaintiff's federal tax return for the year 2000 claimed $57.8 million in BLIPS-generated losses; his 2001 federal tax return claimed a carry-over deduction of $9.9 million in BLIPS losses.

In March 2002, plaintiff received a letter informing him of an IRS voluntary disclosure program in which taxpayers who reported their participation in questionable tax shelters were offered protection from the imposition of penalties "if an underpayment of tax attributable to the questionable item [was] found upon audit." Plaintiff disclosed to the IRS his participation in BLIPS, and, in 2004, the IRS disallowed his deduction of losses from BLIPS. Plaintiff then entered into a negotiated agreement with the IRS to pay additional federal taxes and interest.

Plaintiff sued all the parties that participated in the creation, orchestration, or operation of BLIPS, claiming as losses the fee he paid to BLIPS and the tax deficiencies and interest he was later assessed by the IRS. It is plaintiff's position that, despite his business degree, he had no education or experience in tax law, and therefore was entitled to, and did, rely on representations that the BLIPS structure was lawful. He

says that if he had been told the truth, he would not have invested any money in BLIPS and would have pursued other ventures instead.

This appeal concerns a motion by defendants Bayerische Hypo-Und Vereinsbank AG and its related entities (collectively, HVB) for summary judgment dismissing the complaint as against them, based on the contention that, in view of plaintiff's admitted knowledge at the time he chose to participate in BLIPS, he cannot establish reasonable reliance on any misrepresentations regarding the lawfulness of the BLIPS tax avoidance structure. The motion court denied the motion, holding that HVB's prior admissions of wrongdoing precluded any finding as a matter of law that it did not participate in a civil conspiracy to defraud plaintiff. We now reverse.

To be entitled to proceed with his fraud claim against HVB, plaintiff must prove not only that HVB made misrepresentations or omissions of fact for the purpose of inducing him to act in reliance on them, but also that his reliance was justifiable (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Based on plaintiff's own statements and admissions, we fine as a matter of law that he cannot prove justifiable reliance on any claimed assurances either that the tax shelter was legal or that it was more likely than not to be allowed by the IRS.

The "Deferred Prosecution Agreement" in which HVB admitted to participating in fraudulent tax shelters designed to defraud the United States is of no avail to plaintiff. While it certainly establishes that HVB used BLIPS to perpetrate frauds *on the IRS*, earning enormous fees from participants such as plaintiff in the process, HVB's admissions do not serve to demonstrate that plaintiff was an unwitting victim of the fraud.

In fact, the information that plaintiff *acknowledged* possessing at the time, along with information contained in documents in his possession, conclusively establish that he knew or should have known that he was participating in a scheme of doubtful legality. During his deposition, plaintiff acknowledged that he understood that BLIPS was not an investment, but strictly a tax avoidance strategy, an artificial transaction to create paper losses against which he could offset his capital gains so as to avoid paying taxes on those gains. Much paperwork was generated, including loan documents that required his signature and that reflected purported loans that were not actually made. From these documents plaintiff either knew or should have known that an appearance of investment was being created to give the structure the appearance of legitimacy.

Plaintiff also acknowledged being informed, and understanding, that the best possible scenario for him would be

one in which the IRS did not examine his tax returns. Indeed, he was specifically told by defendant KPMG that the losses created by BLIPS would be disguised in the back of his tax return to minimize the chance that the IRS would discover them. Furthermore, it was his understanding that if the IRS "discovered" or "picked up" on BLIPS, he could negotiate a settlement that "would probably be a lot less than the amount of tax that [he] would have to pay." Consequently, even if HVB had known and failed to specifically explain to plaintiff that the BLIPS structure was an illegal tax shelter under IRS rules, plaintiff was in possession of sufficient information to preclude him from accepting without question any representations that BLIPS deductions would be allowed by the IRS.

Plaintiff's testimony also makes clear that he understood that the official opinion letter with which he was provided was not a true assessment of the legality of the tax shelter. The letter stated that it was more likely than not that claimed losses from BLIPS would be allowed, and all parties, *including plaintiff*, understood that its purpose was to protect participants from incurring any penalties in the event that the BLIPS' true construct was uncovered by the IRS. As this Court has had occasion to observe, opinion letters that state that the IRS will "more likely than not" accept a tax shelter "put[] an

ordinary person on notice that the odds in favor of legality could be as slim as 51% to 49%" (*see Gaslow v QA Invs. LLC*, 36 AD3d 286, 291 [1st Dept 2006]). Where the odds in favor of legality are virtually equivalent to the odds in favor of illegality, even a taxpayer with less business experience than plaintiff will apprehend the substantial risk that his tax avoidance strategy will not pass muster with the IRS.

While the complexities of the BLIPS structure may have limited plaintiff's understanding of it, and while some information about BLIPS may have been unavailable to participants absent extraordinary efforts, nevertheless, plaintiff understood enough to know that BLIPS was a scheme to create artificial losses and that the IRS, if it investigated, might very well disallow deduction of those losses. Plaintiff was presented with information sufficient to cause him to doubt the propriety of the BLIPS scheme for tax avoidance purposes, and willfully blinded himself to that information by failing to ask questions, pay attention to details, or read the documents he signed. Thus, he cannot demonstrate reasonable reliance.

Accordingly, the order of the Supreme Court, New York County (Bernard J. Fried, J.), which, insofar as appealed from, denied defendants-appellants' motion for summary judgment dismissing the

complaint as against them, should be reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: OCTOBER 27, 2011

CLERK