SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 19, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7422 The People of the State of New York, Respondent, Ind. 1042/08

-against-

Vincent Rosado, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), and DLA Piper LLP (US), New York (Jeffrey Rottenberg of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered April 6, 2009, convicting defendant, after a jury trial, of two counts of criminal possession of a controlled substance in the seventh degree, and sentencing him to concurrent terms of nine months, reversed, as a matter of discretion in the interest of justice, and the matter remanded for further proceedings.

The evidence in this case met all the conditions for instructing the jury on the drug factory presumption (Penal Law §

220.25[2]). Although stored in containers filled with rice to prevent deterioration due to moisture, the 95 glassines of cocaine and heroin were clearly visible, and were thus in open view. Defendant was observed in close proximity to the drugs and all of the circumstances evinced the presence of a drug operation preparing drugs for sale.

However, defendant argues that even if the instruction was proper with regard to the charge of third-degree possession, which in this case required intent to sell, the jury should have been instructed that the presumption did not apply to the charge of seventh-degree possession, which requires only simple possession. Defendant argues that the presumption was only intended to apply to possession charges containing a weight or intent element, not simple possession charges.

The issue was highlighted by the jury's inquiry whether the "definition of room presumption and constructive possession" applied "equally to the charges of possession in the third degree and the seventh degree." The court answered that question in the affirmative, without objection by defense counsel. Thus, defendant's current argument is unpreserved.

Nevertheless, we reach the question in the interest of justice in order to clarify the scope of the drug factory

presumption. The underlying purpose of the drug factory presumption is to hold criminally responsible those participants in a drug operation who may not be observed in actual physical possession of drugs at the moment the police arrive (*see* Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 220.25; *People v Tejada*, 183 AD2d 500, 502 [1992], *affd* 81 NY2d 861 [1993]). We note that defendant was acquitted of the third degree possession counts. We do not believe that the drug factory presumption was intended to apply to seventh-degree possession, because implicit in the idea of a drug factory is that drugs are being prepared for sale. Therefore it should only apply to crimes requiring intent to sell, or crimes involving amounts of drugs greater than what is required for misdemeanor possession (*see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 111).

However, even without the presumption, the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Bundy*, 90 NY2d 918, 920 [1997]). Therefore, the appropriate remedy is a new trial.

All concur except Saxe and Sweeny, JJ. who dissent in a memorandum by Sweeny, J. as follows:

SWEENY, J. (dissenting)

I dissent.

The majority concedes that a challenge to the room presumption was never preserved.[1] As my colleagues also concede that the verdict was legally sufficient and not against the weight of the evidence, the only basis to review this conviction is in the interest of justice. Such review is not warranted under the facts of this case.

Pursuant to the execution of a no-knock warrant, the police entered the small apartment and immediately saw defendant coming out of the bedroom. Ignoring a call to stop, defendant ran into the bathroom and slammed the door shut. Having to break open the door, the police found defendant "hovering" over the toilet. Placed under arrest, the police found $550 on his person in denominations of 20 and 100 dollar bills.

Then, upon entering the "small" bedroom from where defendant had fled, the police saw, in plain view, among other items, two plastic containers that held glassine envelopes encased in rice. Looking into the open bedroom closet they saw an additional clear

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[1]Defendant's counsel not only did not object to the subsequent charge but even agreed with the court that the presumption applied to 3rd degree and 7th degree.

plastic container with a see-through lid, also with glassine envelopes encased in rice. A total of 95 glassines of cocaine and heroin were recovered. In the bedroom closet, the police also found clothing that fit defendant.

The discretionary act to vacate a conviction in the interest of justice is to be "exercised sparingly and only in that rare and unusual case where it cries out for fundamental justice beyond the confines of conventional considerations" (*People v Harmon*, 181 AD2d 34, 36 [1992]. [internal quotation marks omitted]; CPL 470.15[6][a]). Contrary to the majority's position, interest of justice review is neither warranted nor appropriate in this case.

The majority argues that interest of justice review is needed "in order to clarify the scope of the drug factory presumption". This is a curious position since, as noted, this issue was neither raised or preserved for our review at trial. Indeed, precedential cases involving interest of justice review make clear that such review applies on a case by case basis, individually and is not designed or intended to be used for statutory interpretation (*see People v Harmon, supra* 181 AD2d at 36; *see also* CPL 210.40). By way of analogy, considering whether to dismiss an indictment in the interest of justice, the factors

set forth in CPL 210.20 are "all inclusive" (*People v Cileli*, 137 AD2d 829, 829 [1988]) and reflect a "sensitive balance between the *individual* and the State" (*People v Clayton*, 41 AD2d 204, 208 [1973]; *see People v Reyes*, 174 AD2d 87, 89 [1992]). Therefore, the basic premise of the majority that an issue, not preserved for our review, should in any event be reviewed in the interest of justice to "clarify" a legal presumption stands on dubious grounds.

To accept this reasoning would mean that interest of justice review is now available in any case to review any issue, whether fundamental or not, which has either been waived or not preserved at the trial level. Such a procedure is patently unfair to the trial bench who will now be left with the task of ensuring that any potential issue, even those that may be waived as part of counsel's trial strategy, must be taken into consideration in formulating jury instructions.

In fact, the majority's position today does away with the long-standing principle of the necessity to preserve issues by objection at trial. In *People v Ivey*, (204 AD2d 16 [1994], *aff'd* 86 NY2d 10 [1995]), we held: "defendant's failure to register any objection to the charge . . . or to request any jury instructions that would have directed the trial court's attention to his

current complaint . . . renders the claim unpreserved and forecloses this Court's consideration of it as a matter of law" (204 AD2d at 19). Significantly, we went on to hold: "Nor should we reach the issue in the interest of justice since, had scienter been an issue at trial, the People might well have been able to present their evidence in a way that would have satisfied that element of the crime" (*id.*). The object of preservation, of course, is to avoid the situation which the majority now creates. As the Court of Appeals noted in *People v Gray* (86 NY2d 10, 20-21 [1995]):

> "The preservation rule is necessary for several reasons . . . The chief purpose of demanding notice through objection or motion in a trial court, as with any specific objection, is to bring the claim to the trial court's attention . . . [and] might provide the opportunity for cure before a verdict is reached . . . Second, a timely objection alerts all parties to alleged deficiencies in the evidence and advances the truth-seeking purpose of the trial".

The majority's position does just the opposite. Not only was there no objection to the charge as it related to criminal possession of a controlled substance in the seventh degree, but there was an affirmative agreement by defendant that the charge was proper.

The majority reveals its real reason for invoking an

interest of justice review when it states that "We do not believe that the drug factory presumption was intended to apply to seventh-degree possession". However, if the majority truly believes that to be the case, then the proper remedy would be to reverse and dismiss, not reverse and remand for a new trial. Either the presumption applies, as the trial court (and defendant) asserted, or it does not, as the majority contends. If it does apply, then it is a non-issue and should not be reviewed by this Court. If it does not apply, then there is nothing to retry.

Essentially, the majority is utilizing our power to reverse in the interest of justice (CPL 470.15[6]) to treat this case through the prism of a CPL 210.40 motion to dismiss in the interest of justice. The rub, however, is that this particular case, and this particular defendant, do not present "that rare and unusual case where it cries out for fundamental justice beyond the confines of conventional considerations" (*People v Harmon*, 181 AD2d at 36 [internal quotation marks omitted]). Interest of justice review is properly designed for a limited purpose both by statute and precedent. This case presents nothing that even remotely lends itself to the exercise of that review power.

In view of the facts presented, including defendant's close proximity to the drugs that were recovered, the amount of money and denominations in his pocket, and his actions upon the entry of the police into the apartment, "the inference that defendant was, at least, a participant in a drug-selling operation and constructive possessor of the drugs, rather than a customer or visitor" is clearly warranted (*People v Jones*, 72 AD3d 452 [2010], *lv denied* 15 NY3d 801 [2010]). These facts, coupled with defendant's failure to preserve the issue for review, not only fail to support the exercise of our discretion to review in the interest of justice, but actually militate against such exercise.

The conviction should be affirmed.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Tom, J.P., Sweeny, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

6650-
6651-
6652-
6653 Index 401762/09

Casey Ryan,
Plaintiff-Respondent-Appellant,

-against-

Trustees of Columbia University in the City of New York, Inc.,
Defendant-Respondent-Appellant,

Perimeter Bridge and Scaffold Co., Inc.
Defendant-Respondent,

West New York Restoration of CT, Inc.,
Defendant,

F.J. Sciame Construction Co., Inc.,
Defendant-Appellant-Respondent.

Nicoletti Hornig & Sweeney, New York (Barbara A. Sheehan of counsel), for appellant-respondent.

Rivkin Radler, LLP, Uniondale (Merril S. Biscone of counsel), for Trustees of Columbia University in the City of New York, respondent-appellant.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for Casey Ryan, respondent-appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Debra A. Adler of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 3, 2011, which, to the extent appealed from denied defendant F.J. Sciame Construction Co., Inc.'s (Sciame)

motion for summary judgment dismissing the complaint as asserted against it, and denied defendant Trustees of Columbia University in the City of New York's (Columbia) motion for summary judgment dismissing the complaint as asserted against it, unanimously affirmed, without costs. Judgment, same court and Justice, entered July 8, 2011, dismissing the complaint as against Perimeter Bridge and Scaffold Co., Inc. (Perimeter), and bringing up for review an order, same court and Justice, entered March 3, 2011, which granted Perimeter's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, the judgment vacated, and the complaint reinstated as against Perimeter. Appeals from order, same court and Justice, entered March 3, 2011, which granted Perimeter's motion for summary judgment dismissing the complaint as asserted against it, unanimously dismissed, without costs, as subsumed in the appeals from the judgment.

Plaintiff was injured when a sidewalk bridge collapsed and material from the roof of the bridge fell on her. Perimeter erected the bridge for a project that nonparty B&A Restoration Contractors (B&A) performed for Columbia, pursuant to an agreement between B&A and Perimeter. Meanwhile, Columbia retained defendant Sciame as a construction manager for an

unrelated project and, near the conclusion of B&As project, entered into an agreement with Perimeter for the rental of the bridge for use in the Sciame project. Sciame was not a party to the agreement, and there was no line item concerning construction of a sidewalk bridge in the Construction Management Agreement between Sciame and Columbia.

The court properly denied Sciame's motion for summary judgment dismissing the complaint. Sciame argues that it had no duty, contractual or otherwise, related to the sidewalk bridge, and thus owed no duty of care to plaintiff. However, the broad language of the Construction Management Agreement and Site Safety Plan governing Sciame's obligations demonstrates that Sciame had overall responsibility to maintain safety at the work site (*see Church v Callanan Indus.*, 99 NY2d 104, 112-114 [2002]; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]; *Piccirillo v Beltrone-Turner*, 284 AD2d 854, 856 [2001]). Further, issues of fact exist as to whether the sidewalk bridge fell within the scope of Sciame's work and, thus, whether Sciame had a duty to inspect the bridge.

The court also properly denied Columbia's motion for summary judgment dismissing the complaint. As a landowner, Columbia owed a nondelegable duty of reasonable care to pedestrians (*see Tytell*

v Battery Beer Distrib., 202 AD2d 226 [1994]; *Tipaldi v Riverside Mem. Chapel, Inc.*, 273 App Div 414, 417 [1948], *affd* 298 NY 686 [1948]). An issue of fact exists as to whether Columbia adequately inspected the bridge, and whether further inspections would have revealed a defective condition.

Although plaintiff argues that she is entitled to summary judgment against Columbia, she did not file a notice appealing from the order denying her motion for summary judgment. In any event, given the existence of triable issues of fact, and the fact that the sidewalk bridge collapsed in windy conditions, the court properly denied her motion for summary judgment (*see Tora v GVP AG*, 31 AD3d 341, 343 [2006]; *Dickert v City of New York*, 268 AD2d 343 [2000]).

However, the court erroneously granted Perimeter summary judgment dismissing the complaint. Despite Perimeter's vice-president's testimony that Perimeter inspected its sidewalk bridge components before erecting the bridges, and that the used wood components are "structurally sound" and "good, usable wood," its employees stated that the wood used in assembling the scaffolding was stored where it was exposed to the elements. After the accident, Columbia's project manager observed rotted wood at the location of the collapse and directed Perimeter to

replace it with new lumber.

Additionally, plaintiff's expert, a certified site safety manager, stated that photographs of the damaged structure show wood that "was extremely discolored, old, degraded, poor quality, warped, cracked, split at the nails, deteriorated, weakened, and structurally unsound." She further concluded that the lumber used "was not fastened at the various joints with sufficient nails or bolts of a suitable size to produce a secure joint capable of withstanding the design load and that said scaffold was not of sufficient strength and quality as required."

Moreover, at the time Columbia entered into a contract with Perimeter to rent the existing sidewalk bridge for an initial period of 16 months, it is uncontested that no inspection of the completed sidewalk shed was ever made. Notably, at this point in time, the scaffolding had been erected more than year prior and Perimeter performed no inspections prior to entering into the lease with Columbia. Given the lack of inspection of the sidewalk bridge at any time after it was erected, there is no evidence to support Perimeter's contention that the structure was sound when erected or when the new lease was entered into with Columbia. Because the agreement with Columbia was a new scaffolding lease, Perimeter was obligated to inspect and make

sure that the sidewalk bridge was structurally sound before placing it into the stream of commerce. The failure by Perimeter to inspect the scaffold places the issue of the integrity of the structure at the time of the lease with Columbia in question (*see Winckel v Atlantic Rentals & Sales*, 159 AD2d 124, 127 [1990]).

We have stated that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [2010]). Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]). The photographic and testimonial evidence of rotted wood indicates deterioration that occurred over a period of time (*see e.g. McKee v State of New York*, 75 AD3d 893, 895-896 [2010]; *Banks v Odd Job Trading Corp.,* 299 AD2d 248 [2002]). The testimony that Perimeter stored wood scaffolding parts in the open and exposed to the elements, coupled with the expert's opinion that the substandard wooden components rendered the sidewalk bridge structurally unsound,

presents a question of fact concerning the safety of the scaffolding that requires resolution at trial.

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

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

6862-
6863 Index 115641/07

Frantz J. Leon,
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

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Isaacson, Schiowitz & Korson, LLP, New York (Jeremy Schiowitz of counsel), for appellant.

Steve S. Efron, New York, for respondent.

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Order, Supreme Court, New York County (Harold B. Beeler, J.), entered December 3, 2009, which granted defendant New York City Transit Authority's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court (Michael D. Stallman, J.), entered February 17, 2011, which denied plaintiff's motion to renew and reargue, unanimously dismissed, without costs.

Plaintiff alleges he was injured when he fell into a gap between the platform and a subway car at the Union Square station in Manhattan. Specifically, he testified that when he attempted to board the subway car, his left leg fell, up to his buttocks, into the gap of eight or nine inches between the platform and the

car. Plaintiff suffered, among other injuries, a torn meniscus. In support of its motion to dismiss, the Transit Authority (TA) asserted that case law has established that, due to the swaying of trains as they move, some gap between the train and the platform is necessary to avoid having the car strike the platform, that, through the application of a mathematical formula, it calculated that the maximum permissible gap at the curved section of the track where plaintiff's accident occurred was 9.2 inches, and that the gap in question did not exceed 9.2 inches. The TA argued that compliance with its internal gap policy entitles it to qualified immunity.

To establish its entitlement to qualified immunity, a governmental body must show that "a public planning body considered and passed upon the same question of risk as would go to a jury in the case at issue" (*Jackson v New York City Tr. Auth.*, 30 AD3d 289, 290 [2006]). A mere informal review or internal policy will not suffice. The defendant must demonstrate that a "study, inquiry or investigation" into that question was conducted and reached the determination now relied upon (*id.*). The TA submitted several documents that refer to the 6-inch-gap standard for straight tracks, including a 1987 memorandum that states that the gap between the platform and straight track must

not exceed 6 inches, and an affidavit by the TA engineer who calculated the 9.2-inch-gap standard for curved tracks. All these documents address the risk that trains will scrape against the platform as they travel along the track. None of the documents, however, address "the same question of risk" that is at issue in this case, i.e., the risk that a passenger will fall into the gap between platform and track.

This Court, on two occasions, has already found that the 1987 memorandum does not constitute a study for purposes of the qualified immunity doctrine because it does not cite any basis for the six-inch standard *(Sanchez v City of New York*, 85 AD3d 580 [2011]; *see Tzilianos v New York City Tr. Auth.*, 91 AD3d 435 [2012]). Indeed, the TA concedes that the 1987 memorandum "was not a study, did not purport to be a study, and contained no reference to any study." And yet, it submitted the 1987 memorandum and two Memoranda of Understandings detailing

clearance requirements, dated 2001 and 2002, that merely incorporate the six-inch standard set forth in the 1987 memorandum. This is insufficient to demonstrate the TA's entitlement to qualified immunity.

We dismiss the appeal from the February 17, 2011 order since no appeal lies from the denial of reargument, and the appeal is otherwise academic in light of our reversal of the prior order.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

6866 Eddy Rodriguez, Index 303734/07
Plaintiff-Appellant,

-against-

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

Berkowitz & Vargas, New York (Damian Vargas of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for respondents.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered April 29, 2010, which, in an action for personal injuries sustained when plaintiff slipped and fell as he ascended the interior stairs of defendants' building, granted defendants' motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion denied.

Although defendants, the owner and manager of the building, established prima facie their entitlement to judgment with evidence, including portions of plaintiff's deposition testimony

in which he seemed unable to identify the cause of his fall (*see Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [2006], *lv denied* 8 NY3d 801 [2007]), plaintiff raised triable issues of fact in opposition to the motion. The affidavit by an expert engineer who inspected the subject stairs and found a variety of defects and building code violations, particularly at the top tread of the step before the landing, when read in combination with plaintiff's testimony stating, through an interpreter, that "the staircase was bad" and identifying on a photograph the spot where he slipped as the top step of that stairway, was sufficient to raise triable issues as to whether defective conditions at the identified location caused plaintiff to fall (*see Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [2010]).

The facts here are comparable to those in *Babich*, *supra*, where the plaintiff was able to testify only that her foot slipped on the top step of a restaurant stairway, but her expert, on examining the stairs, asserted that a slippery condition had been created where the non-slip finish on the nosing was worn off. This Court held that the combination of the plaintiff's deposition and the expert's affidavit "provided sufficient

circumstantial evidence to raise an issue of fact as to whether her fall was caused by the allegedly defective condition" (75 AD3d at 440). The same reasoning applies here. Plaintiff explained that he did not look, after he fell, to determine what had caused his fall, because he was in too much pain and he lost consciousness; however, it is enough to avoid summary judgment that he was able to identify the site of his fall, and his expert was subsequently able to identify defective conditions at that spot.

References to alcohol and cocaine in the ambulance report and emergency room records have no place in this analysis of whether defendants are entitled to summary judgment; even assuming that those materials were admissible, at best they amount to evidence of a competing cause of plaintiff's fall. Nor should our analysis be affected by the observation of the motion court that the photograph of the top step showed only ordinary wear and tear; an expert asserted that defective conditions existed at the top step on which plaintiff fell, which permits a finding that it was a defective condition – not merely a superficially worn tread – that caused plaintiff's fall.

Summary judgment is not warranted based on any perceived deficiency in the expert's affidavit. His failure to identify the specific building code provisions that were allegedly violated does not preclude consideration of his submission. The affidavit specified the measurements that he took, the problems he observed, and the nature of the violations and defective conditions he claimed, and that is all that is needed to oppose summary judgment. In *Cintron v New York City Tr. Auth.*, 77 AD3d 410 [2010]), cited by the dissent for the proposition that the expert affidavit is deficient, the plaintiffs had failed to timely inform the defendants of the specific nature of the defect as well as the specific provisions of the code they sought to rely on. The grant of summary judgment was not based on the expert's failure to cite provisions by number when discussing their alleged violation.

The dissent cites *Kane v Estia Greek Rest.* (4 AD3d 189 [2004]) for the proposition that it is speculative to attribute the cause of plaintiff's accident to the claimed defective condition. However, in that case, the plaintiff was unable to identify the spot at which he slipped. While his expert reported the presence of defective conditions on the restaurant stairs, summary judgment was granted to the restaurant because the

plaintiff “did not remember or know why he fell, if indeed he fell on the staircase itself; he only knew that he was found at the bottom of the staircase” (4 AD3d at 190).

That is not the case here. The question of whether plaintiff’s fall was caused by any allegedly defective condition present at the spot at which he fell is appropriately left for the trier of fact.

All concur except Andrias, J.P. who dissents in a memorandum as follows:

ANDRIAS, J.P. (dissenting)

We all agree that defendants established prima facie their entitlement to judgment by submitting evidence, including plaintiff's deposition testimony, demonstrating that plaintiff was unable to identify the cause of his fall (*see Scott v Rochdale Vil., Inc.*, 65 AD3d 621 [2009]; *Reed v Piran Realty Corp.*, 30 AD3d 319 [2006], *lv denied* 8 NY3d 801 [2007]). The majority believes that plaintiff's testimony that he slipped on the top step of the stairway, together with an affidavit by his expert engineer stating that there were "code violations at the subject stairway, specifically the top tread of the lower run that cause[d] [p]laintiff to slip and fall," is sufficient to raise an issue of fact. On the record before us, I disagree. Therefore, I dissent and would affirm the order granting defendants' motion for summary judgment dismissing the complaint.

According to his bill of particulars, on October 7, 2007, at approximately 2:00 a.m., plaintiff slipped "on the top step before the intermediate landing of the stairs between the first and second floors" of the five-story walk-up building owned and managed by defendants. Although plaintiff alleged that he fell due to "the dangerous and defective condition existing at the time of the accident," he did not identify any specific statutes,

ordinances or rules that defendants allegedly violated. The ambulance report indicates that the cause of plaintiff's injury was alcohol and a fall. The emergency room records indicate that plaintiff had alcohol on his breath and cocaine in his urine.

At his examination before trial, plaintiff testified that he had lived in apartment 2-F for about two years, that he had been the building superintendent until he was fired, and that he used the staircase regularly. He had never had an accident on the staircase before and had not heard of anyone else having one.

The accident occurred when plaintiff was returning home from his girlfriend's apartment, but he could not remember anything about it. Plaintiff could not recall the date or time it occurred, the weather or lighting conditions, or whether he had consumed any alcohol in the three hours before he slipped. When told that the emergency room records indicated that he had tested positive for cocaine, plaintiff replied that no one had ever told him that he used drugs.

Plaintiff could not recall whether he stepped onto the first step before he fell, or how many steps beneath the second floor he was when the accident occurred. He stated, "I fell in between the two staircases . . . [o]r in the middle." Nevertheless, he marked the alleged location of his fall on a photograph,

“[i]ndicating,” counsel stated, “the top of the staircase or the junction of the landing and the top stair,” and testified that he slipped when he put his left foot there.

Plaintiff also testified that he was looking straight ahead, towards the window on the landing, when he slipped. He did not remember if any light or cold air was coming through the window or if he saw anything on the ground before he fell. Plaintiff said that “the staircase was bad,” but he could not describe what caused him to fall and did not look to see what it was after he fell.

Where a plaintiff identifies a defect “based on his recognition of the approximate location where he fell -- not his recognition of the defect itself,” that "basis for identification of the defect amounts to the type of ‘rank speculation' that generally warrants summary judgment dismissal" (*Siegel v City of New York*, 86 AD3d 452, 455 [2011] [internal quotation marks omitted]). “Even if an expert alludes to potential defects on a stairway, the plaintiff still must establish that the slip and fall was connected to the supposed defect, absent which summary judgment is appropriate” (*Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [2004]).

The report of plaintiff’s expert is patently deficient.

While the expert contends that the stairway between the first and second floor and the top landing did not conform with the requirements of the building code, neither he nor plaintiff in his bill of particulars cites any specific sections (*see Cintron v New York City Tr. Auth.*, 77 AD3d 410 [2010] [expert improperly relied on code violations that had not been pleaded]). While the expert states that the treads were not level and true and were worn, and that the tread widths and heights varied by more than is permitted by the building code, he does not set forth the allowable variations or explain why the variations he observed were more than de minimis. Nor does he give specific measurements for the top step or explain, other than in conclusory fashion, how the alleged defects on that step or the landing caused plaintiff's fall. Plaintiff's deposition testimony is also bereft of any claim that his fall was caused by the alleged defects identified by his expert.

Under these circumstances, plaintiff's submissions do not suffice to satisfy his burden of proof in opposition to defendants' prima facie showing (*see Deutsch v City of New York*, 69 AD3d 523, 523 [2010] ["Plaintiff testified that he does not know why he fell, and the expert's opinion that plaintiff fell because of dangerously uneven riser heights is speculative in the

absence of evidence tending to show the existence of the alleged uneven risers at the time plaintiff fell”]; *Batista v New York City Tr. Auth.*, 66 AD3d 433, 434 [2009] ["The assertion of plaintiff's expert that there were defects in the staircase on which plaintiff fell is insufficient to raise an issue of fact as to proximate cause, because there is no evidence connecting plaintiff's fall to those defects"]; *see also Noel v Starrett City, Inc.*, 89 AD3d 906, 907 [2011] [“Although the plaintiffs submitted an affidavit from an engineer who claimed that the staircase violated certain provisions of the Multiple Dwelling Law and the Administrative Code of the City of New York, the plaintiffs presented no evidence connecting these alleged violations to the injured plaintiff's fall. Therefore, it would be speculative to assume that these alleged violations were a proximate cause of the accident"] [internal quotation marks omitted]); *Rajwan v 109-23 Owners Corp.*, 82 AD3d 1199, 1201 [2011] ["Since it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation. Although the engineer's report alleged that unsafe conditions in the staircase where the plaintiff fell violated various provisions of

the building code, the plaintiff presented no evidence connecting these alleged violations to his fall"][internal quotation marks and citations omitted]).

The majority finds it insignificant that plaintiff's expert did not identify the specific building code provisions that were allegedly violated. However, unless the provisions are identified, it cannot be determined whether they are applicable to the subject premises. While the majority contends that *Cintron v New York City Tr. Auth.*, 77 AD3d 410 [2010], *supra*, is inapposite, like the plaintiff in that case, the instant plaintiff failed to identify in his bill of particulars the applicable statutes, laws, ordinances, codes, rules and regulations allegedly violated by defendants.

"Nor does evidence of worn treads [or tile] imply a dangerous condition, especially in the absence of testimony causally connecting the worn treads to the accident" (*Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 111 [2006] *citing Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [2004], *supra*). Indeed, the motion court observed that the photograph of the top marble step showed nothing more than ordinary wear and tear,

which does not render it a dangerous and defective condition (*see Tryon v Chalmers*, 205 App Div 816 [1923], *appeal dismissed* 240 NY 580 [1925]).

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7553 Poah One Acquisition Holdings V Limited,
Plaintiff-Respondent,

-against-

Gilbert Richard Armenta, et al.,
Defendants-Appellants.

Index 600917/10

Fulbright & Jaworski L.L.P., New York (Charles D. Schmerler of counsel), for appellants.

Latham & Watkins LLP, New York (James E. Brandt of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 8, 2010, which, inter alia, denied defendants' cross motion to dismiss the complaint for lack of personal jurisdiction, lack of standing and failure to state a cause of action, and granted plaintiff's motion for summary judgment in lieu of complaint only as to liability as against defendant Armenta, unanimously affirmed, with costs.

Plaintiff demonstrated its entitlement to summary judgment as against Armenta by submitting the guaranty executed by him and an affidavit of nonpayment (*see Bank of Am., N.A. v Solow*, 59 AD3d 304, 304-305 [2009], *lv dismissed* 12 NY3d 877 [2009]). Plaintiff appropriately moved based on the absolute and

unconditional guaranty, which expressly waived demand or presentment, and is "an instrument for the payment of money only" within the meaning of CPLR 3213 (*see European Am. Bank v Competition Motors*, 182 AD2d 67, 71 [1992]). Defendant's contention that plaintiff did not include an executed copy of the 2008 reaffirmation of the guaranty is insufficient to raise an issue of fact in light of the language of the 2007 executed guaranty. Moreover, defendant's affidavit is equivocal as to his recollection of the execution of the 2008 document.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7954 The People of the State of New York, Ind. 4873/09
Respondent,

-against-

Guy Fisher,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered July 27, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of 7 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The police account of the transaction was not implausible, and the

evidence does not support defendant's suggestion that he may have been the buyer rather than the seller.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7955 Richard Denise M.D. P.C. as assignee of Irene Trapp, Plaintiff-Respondent,

-against-

New York City Transit Authority, Defendant-Appellant.

Index 570366/07
38863/04

Jones Jones LLC, New York (Agnes Neiger of counsel), for appellant.

Israel, Israel & Purdy, LLP, Great Neck (Jennifer Greenhalgh Howard of counsel), for respondent.

Order of the Appellate Term of the Supreme Court, First Department, entered July 22, 2009, which reversed an order of the Civil Court, Bronx County (Francis M. Alessandro, J.), entered on or about May 7, 2007, granting defendant's motion to dismiss the complaint as time-barred, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Because defendant New York City Transit Authority's obligation to provide no-fault benefits arises out of the no-fault statute, the three-year statute of limitations as set forth in CPLR 214(2) bars plaintiff's claim (*see M.N. Dental Diagnostics, P.C. v New York City Tr. Auth.*, 82 AD3d 409 [2011]).

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

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7956 In re Jennifer O.-T.,
Petitioner-Respondent,

-against-

Frederick T.,
Respondent-Appellant.

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

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about November 19, 2010, which denied respondent father's objections to the Support Magistrate's order directing him to pay $1,030 per month in child support, unanimously affirmed, without costs.

The Support Magistrate properly imputed income to respondent in calculating the support obligation and there exists no basis to disturb the Support Magistrate's credibility determinations particularly in light of respondent's undocumented account of his finances (*see Matter of Sena v Sena*, 65 AD3d 1244 [2009]; *see*

also Matter of Childress v Samuel, 27 AD3d 295 [2006]).

Moreover, the record shows that respondent, who was represented by counsel at the hearing, was not deprived of the opportunity to present evidence as to his alleged business expenses.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7957 Americana Capital Corp., Index 604179/05
Plaintiff-Respondent,

-against-

Phyllis Nardella, Executrix of the
Estate of Allen J. Goodman, Esq.,
Defendant-Appellant.

Wilson Elser Moskowitz Edelman & Dicker, LLP, New York (Anastasios P. Tonorezos of counsel), for appellant.

The Flomenhaft Law Firm, New York (Stephen D. Chakwin, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered November 16, 2011, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing plaintiff's cause of action alleging legal malpractice, unanimously affirmed, without costs.

Plaintiff's legal malpractice claim was not barred by the statute of limitations (*see* CPLR 214[6]). Plaintiff alleges that the deceased negligently drafted a security agreement preventing plaintiff, as the creditor, from being able to enforce the agreement as against the debtor once the debtor defaulted.

Plaintiff's legal malpractice claim accrued no earlier than when the agreement was executed, which occurred on November 29,

2002, the date of the last signature on the agreement (*see McCoy v Feinman*, 99 NY2d 295 [2002]), and this action was commenced less than three years later.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7959 Segundo Jesus Tenamaza, Index 114809/08
Plaintiff-Respondent,

-against-

Knickerbocker Construction II, LLC, et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

-against-

MC&O Contracting, Inc.,
Third-Party Defendant-Appellant,

MC&O Masonry, Inc., et al.,
Third-Party Defendants.

_____

Rutherford & Christie, LLP, New York (Jon E. Newman of counsel), for Knickerbocker Construction II, LLC, East 170th Street Associates, L.P., and The Doe Fund, Inc., appellants.

Cascone & Kluepfel, LLP, Garden City (Michael T. Reagan of counsel), for MC&O Contracting, Inc., appellant.

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered July 27, 2011, which, in this personal injury action, granted plaintiff's motion to vacate an order, same court and Justice, entered January 25, 2011, granting defendants' motion and third-party defendant MC&O Contracting, Inc.'s cross motion to strike the complaint pursuant to CPLR 3126, unanimously

reversed, on the law, without costs, and plaintiff's motion denied. The Clerk is directed to enter judgment dismissing plaintiff's complaint.

Although "there is a strong public policy favoring resolution of cases on the merits" (*Ferguson v Hess Corp.*, 89 AD3d 599, 599 [2011]), the excuse plaintiff offered for his failure to attend multiple depositions and to keep in contact with his counsel was unreasonable. The affidavit plaintiff submitted in support of his motion fails to mention, let alone explain, how he was unaware of the deposition scheduled for June 23, 2010, when he executed medical authorizations a mere 20 days earlier. Nor did plaintiff's counsel demonstrate that they undertook reasonable efforts to locate plaintiff. As a "plaintiff's failure to maintain contact with his attorney and to keep himself apprised of the progress of his lawsuit [does not] constitute a reasonable excuse for [a] default," plaintiff's motion should have been denied (*Sheikh v New York City Tr. Auth.*, 258 AD2d 347 [1999]).

Plaintiff's arguments pertaining to defendants' motion and MC&O's cross motion to strike the complaint are misplaced, as

plaintiff never appealed from the order granting those motions (*see Pergamon Press v Tietze*, 81 AD2d 831 [1981], *lv dismissed* 54 NY2d 605 [1981]). In any event, the arguments are unavailing.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7962 & M-2443 Carmine N. Pagano, Plaintiff-Appellant, Index 108018/03

-against-

Pasquale J. Malpeso, D.M.D, et al., Defendants-Respondents.

_____

Carmine N. Pagano, appellant pro se.

Murphy & Higgins, LLP, New Rochelle (Andrew M. Harrison of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered May 19, 2011, dismissing the action pursuant to an order which, inter alia, granted defendants' motion to strike the complaint, unanimously affirmed, without costs.

The court did not abuse its discretion in dismissing the action based on pro se plaintiff's pattern of disobeying court orders and failing to provide discovery (*see* CPLR 3126[3]; *Arts4All, Ltd. v Hancock*, 54 AD3d 286, 287 [2008], *affd* 12 NY3d 846, [2009], *cert denied* __ US __, 130 S Ct 1301 [2010]).

We have considered plaintiff's remaining arguments and find them unavailing. In addition, defendants did not appeal from that portion of the court's prior order denying sanctions, and, in any event, sanctions are unwarranted.

M-2443 - Pagano v Malpeso, et al.,

Motion to compel production of deposition tapes denied.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

CORRECTED ORDER - June 28, 2012

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7965-
7965A Ronald Alleva, Index 16510/03
84226/04
Plaintiff-Appellant,

-against-

United Parcel Service, Inc.,
Defendant-Respondent,

Gary Callwood,
Defendant.
- - - - -
United Parcel Service, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Pitt Investigations, Inc.,
Third-Party Defendant-Respondent.

Law Offices of Edmond J. Pryor, Bronx (William **C**. Clyne of counsel), for Ronald Alleva, appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for United Parcel Service, Inc., respondent/appellant.

Churbuck, Calabria, Jones & Materazo, Hicksville (Joseph A. Materazo of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered May 5, 2011, which denied plaintiff's motion to strike defendant United Parcel Service, Inc.'s (UPS) answer, unanimously affirmed, without costs. Order, same court and Justice, entered May 6, 2011, which, to the extent appealed from as limited by the briefs, granted UPS's motion for summary judgment dismissing the

complaint as against it, and granted third-party defendant Pitt Investigations, Inc.'s motion for summary judgment dismissing the claim for contractual indemnification, unanimously modified, on the law, to deny UPS's motion as to the negligent retention and supervision claims, to deny Pitt's motion, and to grant UPS's motion for summary judgment on its claim for contractual indemnification against Pitt, and otherwise affirmed, without costs.

Plaintiff, a security guard employed by defendant Pitt at a UPS distribution center, seeks to recover for injuries he sustained when he allegedly was assaulted by defendant Callwood, a UPS employee, while searching Callwood's belongings.

UPS's unexplained failure to provide plaintiff with its "center file" on Callwood, which, inter alia, would document any previous disciplinary issues, and which UPS's counsel asserted, without elaboration, "no longer exist[s]," constitutes spoliation. The file would be critical in determining whether UPS had notice of Callwood's propensity for violence, an issue central to plaintiff's claims. Plaintiff cannot be faulted for his inability to establish that the missing records contained critical evidence (*see Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 17 [2000], *lv dismissed* 96 NY2d 937 [2001]). However, the extreme sanction of striking UPS's answer – the only relief plaintiff sought – is not warranted, since the center file does

not constitute the sole source of the information and the sole means by which plaintiff can establish his case (*see Schantz v Fish*, 79 AD3d 481 [2010]; *Minaya v Duane Reade Intl., Inc.*, 66 AD3d 402 [2009]). A lesser sanction, such as an adverse inference charge, if sought, at trial, would be more appropriate.

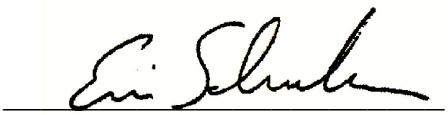
In opposition to UPS's motion for summary judgment dismissing the complaint, plaintiff raised a triable issue of fact as to UPS's negligent retention and supervision of Callwood. Plaintiff's testimony that a UPS supervisor told him to keep an eye on Callwood on the night of the incident and the supervisor's admission as to his suspicions that Callwood was stealing could reasonably be found to have made Callwood's violent reaction to plaintiff's search of his belongings foreseeable (*see Coffey v City of New York*, 49 AD3d 449 [2008]). However, UPS cannot be held vicariously liable for its employee's assault, since the tort was not committed in furtherance of UPS's interests but was personal in nature (*see Kawoya v Pet Pantry Warehouse*, 3 AD3d 368, 369 [2004], *appeal dismissed* 2 NY3d 752 [2004]; *Adams v New York City Tr. Auth.*, 211 AD2d 285, 294 [1995], *affd* 88 NY2d 116 [1996]).

The agreement between UPS and Pitt provides that Pitt shall indemnify UPS for "any and all claims . . . of any kind or nature whatsoever related to the Work hereunder," and for "any claims . . . arising . . . out of or in consequence of the work

hereunder . . . *and any injury suffered by any employee of [Pitt]*, . . . except [for] losses . . . arising out of the sole negligence of UPS" (emphasis added). Since plaintiff was performing his work as a security guard employed by Pitt when he sustained his injuries, the claim against UPS arises from, and is related to, Pitt's work and falls within the agreement's broad indemnification provision (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *Sovereign Constr. Co. v Wachtel, Dukauer & Fein*, 55 NY2d 627 [1981]).

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

ENTERED: JUNE 19, 2012



DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7966 In re Terri Patterson, Index 111175/10
Petitioner-Respondent,

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Tahirih Sadrieh of counsel), for appellants.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered April 11, 2011, in this proceeding brought pursuant to Education Law § 3020-a and CPLR article 75, to the extent appealed from as limited by the briefs, granting the petition to vacate an arbitration award to the extent of vacating the penalty of termination, unanimously reversed, on the law, without costs, the petition denied and the proceeding dismissed.

For three years, petitioner, while residing in Brooklyn, provided an Albany home address to respondent Department of Education, and used the W-2 wage statements issued by respondent with the false address to evade paying New York City income taxes. The penalty of termination does not shock the conscience

(*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 234-235 [1974]; *Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543 [2011]; *Green v New York City Dept. of Educ.*, 17 AD3d 265 [2005], *lv denied* 5 NY3d 711 [2005]). Our conclusion is not altered by petitioner's 10-year record of employment with no disciplinary history (*see Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856 [2011]; *Matter of Chaplin v New York City Dept. of Educ.*, 48 AD3d 226 [2008]) or the relatively small sum of money involved (*see Matter of Pell*, 34 NY2d at 235, 238-239). The hearing officer properly considered petitioner's lack of remorse in imposing the penalty (*see Cipollaro*, 83 AD3d at 544).

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7967 In re Grace L.,
Petitioner-Appellant,

-against-

James C.,
Respondent,

Sheila L.,
Respondent-Respondent.

Steven N. Feinman, White Plains, for appellant.

Elisa Barnes, New York, for Sheila L., respondent.

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

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about February 17, 2011, which denied petitioner maternal grandmother's petition for custody of the subject children, and awarded custody to respondent mother, unanimously affirmed, without costs.

The award of custody to respondent is in the best interests of the children and was warranted by the totality of the circumstances (*see generally Eschbach v Eschbach*, 56 NY2d 167 [1982]). The children were removed from respondent and placed with petitioner when respondent was only sixteen years old and the removal was based on domestic abuse committed by the

children's father who resided in petitioner's home with respondent. A decade later, the evidence established that respondent has a stable and loving home with a different partner and is better able to provide the children with the discipline and structure that they require. She consistently sought the return of the children over the ten year period, complied with all of the conditions imposed upon her during this time, and has always been involved in the children's day-to-day lives.

Although petitioner provided the children with a loving home and met all of their needs, the family court's determination is amply supported by the record. Notably, petitioner admitted that she is unable to control at least one of the children, has difficulty maintaining order in her home, and relies on the mother to keep the children from hurting each other (*see id.*).

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7969 Timothy M. Sonbuchner, Index 5125/09
Plaintiff-Appellant,

-against-

Lakshmi Swamy Sonbuchner,
Defendant-Respondent.

_____

Herman Kaufman, Rye, for appellant.

Greener & Schioppo, P.C., New York (Richard A. Schioppo of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered August 9, 2011, which, after a nonjury trial, to the extent appealed from as limited by the briefs, awarded defendant sole custody of the subject child, permitted defendant to relocate with the child to Connecticut and then North Carolina, and awarded defendant child support and counsel fees, modified, on the law and the facts, to vacate the awards of counsel fees and child support, to remand the matter for a proper determination of child support pursuant to all applicable provisions of Domestic Relations Law § 240(1-b), and otherwise affirmed, without costs.

The court's determination that it was in the best interests of the child to grant defendant sole custody and permission to

relocate has a sound and substantial basis in the record (*see Matter of Tropea v Tropea*, 87 NY2d 727, 741 [1996]; *Eschbach v Eschbach*, 56 NY2d 167, 174 [1992]). Indeed, the record shows that defendant was the child's primary caregiver, that her decisions centered around the child, and that she would continue to foster a relationship between plaintiff and the child (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [2006], *lv denied* 7 NY3d 717 [2006]). The court considered all of the proof and the relevant factors (*see Eschbach*, 56 NY2d at 171-173; *Tropea*, 87 NY2d at 740-741), and there is no basis for disturbing its findings (*see Matter of Alaire K.G. v Anthony P.G.*, 86 AD3d 216, 220 [2011]).

The question of whether defendant should be allowed to relocate to Connecticut is essentially moot because she will be moving to North Carolina shortly. The testimony established that defendant is pursuing postgraduate medical clinical training, and has been matched with a residency program located in North Carolina; defendant has no control over where she will be placed. Although her move to North Carolina undoubtedly will have an impact on plaintiff's visitation, the court properly allowed defendant to relocate because she has been the primary custodial parent, is moving to ensure that she can earn a living wage to

help support the child, and is prepared to ensure that plaintiff continues to have access to the child. The court has not yet ruled on the visitation schedule that will be in place following the move, and any diminution of regular in-person contact can be addressed in a visitation order that provides for phone or Skype access following the move.

During the direct examination of the forensic expert, the forensic report was introduced into evidence, and plaintiff, who was proceeding pro se, had access to it before his cross-examination. On appeal, plaintiff argues that the court improperly prevented him from reviewing the report in advance of the forensic expert's direct testimony. Although the court erred in not allowing plaintiff to read the report before the expert testified, plaintiff had an opportunity when he was represented by counsel at an earlier point in the case to review the report with counsel. He also had an opportunity, long before the trial commenced, to review the report with the court-appointed social worker in the case.

The record shows that plaintiff questioned the forensic expert about a number of issues that were covered in the report. Most of the expert's testimony turned on his recollection of his numerous interviews with the parties and his opinion as to the

parties' parental fitness, and plaintiff had an opportunity to cross-examine him about those opinions. The court's reliance on the expert's testimony, as opposed to the report, is apparent from the fact that the court's decision cites to specific pages of that testimony. Plaintiff also was aware of the issues he had discussed during his interviews with the expert, and many of those issues were explored by plaintiff on cross-examination. The evidence about defendant's strong bond and parenting history with the child was substantial, and the court's decision on custody and relocation has ample record support. Thus, any error in not allowing plaintiff access to the report in advance was harmless, and provides no basis for reversal (*see Ekstra v Ekstra*, 78 AD3d 990, 991 [2010]; *Matter of Anderson v Harris*, 73 AD3d 456, 457 [2010]).

We nonetheless reiterate, as we have previously, that counsel and pro se litigants should be given access to the forensic report under the same conditions (*see Matter of Isidro A.-M. v Mirta A.*, 74 AD3d 673 [2010]). Because defendant's attorney had a copy of the report, the court should have given the report to pro se plaintiff, even if the court set some limits on both parties' use, such as requiring that the report not be copied or requiring that the parties take notes from it while in

the courthouse.

There is no merit to plaintiff's contention that he was deprived of the opportunity to present evidence at trial. Although the court could have given plaintiff a little more time and latitude because he was pro se, the court permitted plaintiff to testify in narrative form, to introduce exhibits during his testimony, and to cross-examine witnesses.

The record below is insufficient to determine whether the court's award of child support was unjust or inappropriate (*see* Domestic Relations Law § 240[1-b][f]). The child support award fails to specify any dollar amounts, and simply directs plaintiff to pay "17% of his current salary based on his current pay stubs and income tax return," as well as one half of child care expenses, unreimbursed medical bills and health insurance premiums. Thus, the court failed to follow the specific steps set forth in Domestic Relations Law § 240(1-b). In particular, the court's decision contains no discussion of the parties' income and deductions; nor is there any calculation of the combined parental income or the parties' pro rata share. Furthermore, the court failed to abide by the direction of Domestic Relations Law § 240(1-b)(c)(4) to determine the reasonable cost of child care expenses and separately state each

party's pro rata share of those expenses. Thus, this matter must be remanded for a proper determination of plaintiff's child support obligation pursuant to all applicable provisions of Domestic Relations Law § 240(1-b), including a determination as whether the calculated amount of support is unjust or inappropriate (*see* Domestic Relations Law § 240[1-b][f]; *Kent v Kent*, 291 AD2d 258 [2002]).

Plaintiff should not be required to pay defendant's counsel fees. Based on the parties' testimony at the time of the trial, their incomes were comparable (*see Cvern v Cvern*, 198 AD2d 197, 198 [1993]), and defendant has not shown that plaintiff has the resources to pay her fees (*see Bzomowski v Rollin*, 238 AD2d 298, 298 [1997]). Indeed, the record shows that plaintiff could not continue with his own counsel and proceeded pro se at the trial.

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

All concur except Saxe, J. who dissents in part in a memorandum as follows:

SAXE, J. (dissenting in part)

I respectfully dissent, to the extent that the majority upholds the custody determination. I agree with the majority that the record fails to provide sufficient support for the trial court's child support award. However, I would remand the matter not just for a new determination of child support, but also for a new custody trial before a different judge, based on the fundamental unfairness created by the denial of the pro se plaintiff's right to have sufficient access, before trial, to the 84-page report prepared by the court-appointed psychologist on the issue of custody.

Expert reports by mental health professionals are an important element of child custody litigation. The procedure typically employed by New York trial courts in recent years is to provide a copy of the expert's report to the attorneys, with the direction that copies not be provided to the client or others outside the litigation team (*see* Tippins, *Forensic Custody Reports: Where's the Due Process?*, NYLJ, May 6, 2010 at 3, col 1). In 2006, a Matrimonial Commission appointed by the Chief Judge recommended a procedure in which it attempted to balance due process concerns with concerns about confidentiality:

"Copies of the reports should be given to counsel for

> the parties and the attorney for the child, with the express instruction that no additional copies be made or disseminated without court permission. Clients can review the report at the attorney's office. If a litigant is self-represented, a separate copy of the report should be maintained at the courthouse for use by that litigant to review and make confidential notes. The litigant would not be permitted to remove this copy from the courthouse."

(New York State Matrimonial Commission, Report to the Chief Judge of the State of New York at 54 [Feb. 2006], available at http://www.nycourts.gov/reports/matrimonialcommissionreport.pdf [accessed June 12, 2012]).

The court here provided copies of the expert's December 16, 2010 report to the attorneys only. But, by the time of the pretrial conference held on February 24, 2011, plaintiff was proceeding pro se. In an effort to provide him with the information necessary for cross-examination of the expert, the court arranged that the social worker who had previously worked out a temporary visitation schedule between the parties would "sit with the parties and go over the report, and ... explain to you what the report says, what it represents, and how the Court, what the Court will hear and consider, so that you will have the opportunity notwithstanding the fact that they gave a copy to your attorney." Later at that same pretrial conference, plaintiff remarked that the forensic evaluation was going to be a

very significant part of the case, and that he was going to need a lot of access to it; in response to the court's warning that "[y]ou can't take it with you and discuss it with another person," plaintiff stated that he might be able to discuss it with an expert witness. The court then explained that not even an expert hired by a party would be given access to the forensic report:

> "Not everybody, including the experts. *We don't even show it to you and to you, and it's about you*. All right? This is just something that's used as an aid to the Court. So you're not going to have access. I'm not giving it to you to take with you, if that's what you want." (Emphasis added.)

Before trial began on May 9, 2011, plaintiff protested to the trial court that while he had reviewed *some* of the report with his attorney during the time when he was still represented, he had not been able to review the whole report thoroughly, and he had not been able to prepare adequately for cross-examination of the expert regarding the report and its conclusions. After further discussion, plaintiff asked: "Will I have any access to that at all in this trial? Will I be able to? How am I supposed to prepare to cross examine him if I am not going to be able to see that report?" These legitimate questions were not satisfactorily handled.

Effective cross-examination of the forensic expert is not possible without access to the report. Once plaintiff was permitted to proceed pro se, it was incumbent on the court to give him access to the report equivalent to that which was given to his adversary, defendant's counsel. In *Matter of Isidro A.-M. v Mirta A.* (74 AD3d 673, 674 [2010]), this Court considered another situation in which one parent was represented by counsel and the other was pro se, and we held that the denial of a copy of the report was not an improvident exercise of discretion, as long as the pro se party was permitted to review and take notes regarding the report before trial. We observed, however, that "the better practice in most cases would be to give counsel and pro se litigants access to the forensic report under the same conditions" (*id.*). At the very least, the court should have employed the procedure recommended by the Matrimonial Commission in 2006: if the litigant is not given a copy, then a separate copy of the report must be maintained at the courthouse for exclusive use by that litigant, for trial preparation and use during cross-examination of the expert.

Lacking adequate access to the expert's report, the pro se plaintiff had no hope of successfully cross-examining the expert. This failure of due process should be corrected and a new trial granted.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7970-
7970A The People of the State of New York,
Respondent,

-against-

Adam Jamison, etc.,
Defendant-Appellant.

Ind. 4213/07

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

Adam A. Jamison, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered April 30, 2009, convicting defendant, after a jury trial, of robbery in the first degree, attempted assault in the second degree, and criminal trespass in the second degree, and sentencing him, as a second violent felony offender, to consecutive terms of 15 years and 2 to 4 years, concurrent with a term of 1 year, and order, same court and Justice, entered on or about December 22, 2010, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

By failing to make any effort to obtain an allegedly exculpatory videotape after the People informed him of it and

offered to make it available to him, defendant abandoned the claim that the People failed to disclose it (*see People v Graves*, 85 NY2d 1024, 1027 [1995]; *People v Bethune*, 65 AD3d 749, 754 [2009], *lv denied* 17 NY3d 792 [2011]). The People disclosed the existence of this tape at defendant's arraignment, but defendant made no mention of the tape before or during trial, except for a general reference to videotapes made in a discovery motion. Defendant never alerted the court to any claim that this videotape had not been produced. In any event, the record refutes defendant's assertion that the tape may have been exculpatory.

Any deficiency in the People's CPL 710.30(1)(b) notice became irrelevant when defendant moved to suppress the identification testimony and received a full hearing on the fairness of the identification procedure (*see People v Kirkland*, 89 NY2d 903 [1996]).

Defendant's argument that his lawyer was ineffective in failing to move to reopen the suppression hearing based on the trial testimony of two identifying witnesses is unavailing because this evidence would not have resulted in a different suppression ruling (*see People v Evans*, 16 NY3d 571, 576 [2011]). Based on the accounts of the identifications given at trial, both

identifications would have still constituted constitutionally permissible showups (*see e.g. People v Gatling*, 38 AD3d 239, 240 [2007], *lv denied* 9 NY3d 865 [2007]).

We have considered defendant's pro se arguments, including his additional claims of ineffective assistance, and find them to be without merit.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7971N Sherry Pryor, et al., Index 107095/09
Plaintiffs-Respondents,

-against-

Inger K. Witter, etc., el al.,
Defendants-Appellants.

Wuersch & Gering LLP, New York (Samuel D. Levy of counsel), for appellants.

Derek T. Smith Law Group, P.C., New York (Derek T. Smith of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered May 24, 2011, which, to the extent appealed from, granted plaintiffs' motion for a default judgment against the corporate defendant William D. Witter, Inc. (Witter Inc.), and denied, sub silentio, Witter Inc.'s cross motion for an extension of time to answer the complaint, unanimously reversed, on the law, without costs, the motion denied, and the cross motion granted.

Personal jurisdiction was obtained over Witter Inc. by plaintiffs' delivery of a copy of the summons and complaint to the office of the Secretary of State in accordance with Business Corporation Law § 306(b) (*see Micarelli v Regal Apparel*, 52 AD2d 524 [1976]). However, the record shows that Witter Inc. did not

receive notice of the action from the Secretary of State, inasmuch as plaintiffs occupied Witter Inc.'s former corporate address (where a copy of the summons and complaint would have been sent by the Secretary of State) and plaintiffs never delivered to Witter Inc. such a notice even though plaintiffs, who had recently left Witter Inc.'s employ, undertook to collect and forward mail addressed to Witter Inc. to its agent. Under the circumstances, which indicated that Witter Inc. lacked notice of the summons in time to respond, and in light of Witter Inc.'s prompt application to remedy its default and its demonstration of a meritorious defense, Witter's application for an extension of time to respond to the complaint should have been granted (*see Spearman v Atreet Corp.*, 238 AD2d 194 [1997]; *Epstein v Abalene Pest Control Serv., Inc.*, 98 AD2d 832 [1983]; CPLR 3012[d]).

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7972 The People of the State of New York, Respondent, Ind. 2157/08

-against-

Bryan Vermont, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered October 19, 2009, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the seventh degree, and sentencing him to a term of 90 days, unanimously affirmed.

The court properly denied defendant's suppression motion without granting a hearing. Defendant's allegations failed to raise a legal basis for suppression (*see People v Burton*, 6 NY3d 584, 587 [2006]). The information provided by the People apprised defendant that his arrest was based on an undercover drug sale. Defendant's assertion that he "had not committed any act which justified his arrest" was insufficiently specific to address the alleged sale or raise any factual dispute requiring a

hearing (*see e.g. People v Bonnet*, 288 AD2d 161, 162 [2001], *lv denied* 97 NY2d 751 [2002]; *People v Hernandez*, 283 AD2d 190 [2001], *lv denied* 97 NY2d 641 [2001]).

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7974 In re Rasheid B.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about October 6, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted the crimes of robbery in the first and second degrees, attempted assault in the first degree, assault in the second degree, criminal possession of a weapon in the fourth degree and criminal possession of stolen property in the fifth degree, and placed him with the Office of Children and Family Services for a period of 18 months, with no credit for time served, unanimously modified, as a matter of discretion in the interest of justice, to the extent of crediting appellant with time served in detention prior to the dispositional order,

and otherwise 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 credibility determinations. The evidence established that appellant used force to retain stolen property.

We find the length of the placement excessive to the extent indicated.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7975 Gigi Jordan, Index 113403/11
Plaintiff-Appellant,

-against-

Dora Schriro, etc., et al.,
Defendants-Respondents.

Law Office of Ronald L. Kuby, New York (Ronald L. Kuby of counsel), for appellant.

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

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

Amended order, Supreme Court, New York County (Anil C. Singh, J.), entered February 10, 2012, which denied plaintiff's motion for a preliminary injunction enjoining defendants from accessing plaintiff's non-privileged telephonic conversations recorded by the Department of Correction (DOC) at Rikers Island, and granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously modified, on the law, to the extent of declaring that DOC is authorized, under 40 RCNY § 1-10(h), to record inmates' non-privileged telephonic conversations, and otherwise affirmed, without costs.

Plaintiff may not employ this declaratory judgment action as

a vehicle for obtaining interlocutory appellate review of the ruling of the Supreme Court, New York County, Criminal Term (Charles H. Solomon, J.), dated September 16, 2011 (the suppression ruling), which denied her motion, in effect, to suppress recordings of her telephone conversations made by DOC at Rikers Island (*see Matter of Morgenthau v Erlbaum*, 59 NY2d 143 [1983], *cert denied* 464 US 993 [1983]). In *Erlbaum*, the Court of Appeals clearly stated that declaratory relief may not be sought by a criminal defendant for the purpose of "attacking a criminal court's interlocutory ruling" (*Erlbaum*, 59 NY2d at 151-152). Plaintiff here admits that the purpose of her declaratory judgment action is to "challenge" and "address the merits of Justice Solomon's ruling." Moreover, the suppression ruling of which plaintiff seeks interlocutory appellate review is precisely the sort of "mere evidentiary ruling[]" which the *Erlbaum* Court indicated "would not be [a] proper subject[]" for declaratory relief (59 NY2d at 152).

We note that, in its suppression ruling, the Criminal Term found that plaintiff was on notice that her DOC phone calls might be recorded, that she implicitly consented to such recording by using the phones, and that she had no expectation of privacy in those phone calls. Hence, plaintiff is foreclosed from seeking

collateral review of any of those aspects of the Criminal Term's ruling.

By contrast, we note that the Criminal Term acknowledged, but expressly declined to address, plaintiff's contention that DOC's routine recordings were ultra vires. Indeed, the Criminal Term essentially invited plaintiff to relitigate this issue in another forum. Accordingly, the instant declaratory judgment action is properly brought with respect to the single issue of DOC's regulatory authority to record.

On the merits of this issue, however, we reject plaintiff's contention that DOC lacked regulatory authority to engage in recording of telephone conversations. DOC's construction of 40 RCNY 1-10(h), which expressly authorizes it to "listen[] to" or "monitor[]" inmate telephone conversations, as permitting it to record such conversations, is not unreasonable or irrational, and should be upheld (*see Matter of Salvati v Eimicke*, 72 NY2d 784, 791 [1988]).

Finally, we note that dismissal of plaintiff's cause of action for a declaration required that Supreme Court declare in favor of defendants, and we modify accordingly (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7976 In re MK Link Investment Partnership, Petitioner-Respondent, Index 604274/04

Levine Investments, L.P., Petitioner,

-against-

WSW Capital, Inc., et al., Respondents,

CSAM Capital, Inc., etc., Respondent-Appellant.

Wilmer Cutler Pickering Hale and Dorr LLP, New York (Peter J. MacDonald of counsel), for appellant.

Paduano & Weintraub LLP, New York (Anthony Paduano of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Harold G. Leventhal, Special Referee), entered December 1, 2010, which, to the extent appealed from, permitted a double recovery, unanimously reversed, on the law, with costs, and so much of the order and judgment as permits petitioner MK Link to retain its capital account at respondent CSAM in addition to receiving a new strip of securities, vacated.

The arbitral award, which was confirmed without modification in 2006, states that MK Link's 1996 Fund "limited partnership capital account position shall be effected for the full 13-year

term of the . . . Fund, *without calculation of any participation in the Master Fund*" (emphasis added). The Special Referee's decision, which permitted petitioner MK Link to retain its capital account (i.e., its participation in the Master Fund) at respondent CSAM in addition to receiving a new strip of securities, impermissibly modified the arbitral award (*see* CPLR 7511[c]) and violated the rule against double recoveries (*see e.g. Dabbah Sec. Corp. v Croesus Capital Corp.*, 297 AD2d 531, 534 [2002]). MK Link contends that the award of its capital account compensated it for the damages caused by CSAM's delay in complying with the arbitral award. However, the Special Referee specifically denied MK Link's requests for consequential damages and interest.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7978 In re Jerome P.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Elana E. Roffman of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 4, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of marijuana in the fifth degree, and placed him on probation for a period of 12 months, unanimously reversed, on the law, without costs, and the petition dismissed as a matter of discretion.

As the presentment agency concedes, appellant should have been permitted to establish a prior inconsistent statement made by a police witness. "Since the appellant has already served the one-year term of probation imposed at the dispositional hearing, this matter is dismissed instead of remanded for a new

fact-finding hearing" (*Matter of Tracy B.*, 80 AD2d 792, 792 [1981]).

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7979 Autumn Brockman, Index 104660/10
Plaintiff-Respondent,

-against-

Cipriani Wall Street,
Defendant/Third-Party
Plaintiff-Appellant/Respondent,

-against-

Exquisite Staffing, LLC,
Third Party Defendant-Respondent/Appellant.

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Gallo Vitucci & Klar LLP, New York (Jessica A. Clark of counsel), for appellant/respondent.

McGaw, Alventosa & Zajac, Jericho (Dawn C. DeSimone of counsel), for respondent/appellant.

Krentsel & Guzman LLP, New York (Justin Hartman of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 30, 2012, which, insofar as appealed from, denied the cross motion of defendant Cipriani Wall Street (Cipriani) for summary judgment dismissing the complaint, or, in the alternative, for summary judgment on its claims for common-law and contractual indemnification against third-party defendant Exquisite Staffing, LLC (Exquisite), and denied the cross motion of Exquisite for summary judgment dismissing plaintiff's

complaint and the third-party complaint, unanimously modified, on the law, Exquisite's cross motion granted solely to the extent of dismissing Cipriani's third-party claim for contractual indemnification, and otherwise affirmed, without costs.

Plaintiff was injured when she slipped and fell on broken glass on the dance floor of a banquet facility owned by Cipriani. The event that plaintiff was attending was staffed by employees of Exquisite, a staffing agency.

Cipriani's cross motion seeking dismissal of the complaint was properly denied. The record shows that plaintiff testified that the broken glass was present on the dance floor for at least 15 to 20 minutes and that she told one of the service staff of the condition. Moreover, plaintiff submitted affidavits from witnesses who stated that the glass was present on the floor for an even longer period of time and that they had asked the service staff to clean up the broken glass. Accordingly, triable issues of fact exist as to whether Cipriani had constructive notice of the dangerous condition on the dance floor (*cf. Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Although the event was staffed with waiters and busboys from Exquisite, there is evidence that they worked under the control of Cipriani personnel, and Cipriani may be held liable on the basis of its

nondelegable duty to keep the public areas of its premises reasonably safe (*see Toote v Canada Dry Bottling Co. of N.Y.*, 7 AD3d 251 [2004]).

Cipriani's cross motion seeking summary judgment on its claim for common-law indemnification against Exquisite is denied as premature, since no finding as to responsibility for plaintiff's accident has been made (*see Barraco v First Lenox Terrace Assoc.*, 25 AD3d 427, 429 [2006]).

Cipriani's cause of action against Exquisite for contractual indemnification is dismissed. The provision of the contract at issue did not evince a clear intent for Exquisite to indemnify Cipriani for tort claims (*see Fatirian v Monti's Holding, Inc.*, 65 AD3d 1280, 1282 [2009]). Rather, the provision dealt with the payment of wages, benefits and claims or suits "arising from or relating to the Exquisite Employee's employment with Exquisite and provision of temporary services to Cipriani," and other employment-related claims.

Exquisite's cross motion for summary judgment dismissing

plaintiff's complaint is also denied, since a reasonable inference can be drawn that plaintiff slipped and fell on broken glass that caused her injuries (*see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 745 [1986]).

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7980-
7981-
7981A-
7981B

Index 104005/07

Jean Walton Leser,
Plaintiff-Respondent,

-against-

Christopher Penido,
Defendant-Appellant.

Law Office of Richard A. Altman, New York (Richard A. Altman of counsel), for appellant.

Jean Walton-Leser, respondent pro se.

Appeal from order, Supreme Court, New York County (Paul G. Feinman, J.), entered September 28, 2010, which, inter alia, granted plaintiff's motion for summary judgment on her cause of action for libel per se, and appeal from order, same court (Milton A. Tingling, J.), entered March 23, 2011, which granted judgment to plaintiff and directed the parties to settle judgment, deemed appeals from order and judgment (one paper), same court (Milton A. Tingling, J.), entered March 23, 2011, awarding plaintiff compensatory and punitive damages and directing a hearing on attorneys' fees (CPLR 5501[c]; 5520[c]), and, so considered, said judgment unanimously affirmed, with costs. Appeal from order, same court (Paul G. Feinman, J.),

entered January 6, 2011, which denied defendant's motion for reargument, unanimously dismissed, without costs, as taken from a non-appealable paper. Appeal from the decision of the same court (Milton A. Tingling, J.), entered January 19, 2012, which, following a hearing, awarded plaintiff $20,000 in attorneys' fees and directed the parties to settle order and judgment on notice, unanimously dismissed, without costs, as taken from a non-appealable paper.

The record demonstrates that defendant is responsible for blog and website postings that, on their face, impugned plaintiff's chastity and therefore were libelous per se (*see Ava v NYP Holdings, Inc.*, 64 AD3d 407, 412 [2009], *lv denied* 14 NY3d 702 [2010]). Defendant admitted that he created the website that posted the remarks and pornographic materials and that he alone possessed the password to get into the website, and plaintiff's unrebutted expert evidence linked defendant's IP addresses and a telephone number to the subject website and to his own business website. The evidence adduced at the hearing on damages demonstrates disinterested malevolence on defendant's part, which establishes plaintiff's entitlement to attorneys' fees and supports the court's award of both compensatory and punitive damages (*see Chiavarelli v Williams*, 281 AD2d 255 [2001]). To

the extent plaintiff challenges the amount of attorneys' fees awarded, his arguments are unavailing, since no appeal lies from a decision directing the parties to settle order, and there is no indication in the record that an order was settled. Nor do we reach defendant's challenge to an order that sealed the pleadings and an exhibit, since the record contains no notice of appeal therefrom.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7983-
7984 Julie Karen Nacos,
Plaintiff-Appellant,

-against-

John Christopher Nacos,
Defendant-Respondent.

Index 306730/10

McNamee, Lochner, Titus & Williams, P.C., Albany (Bruce J. Wagner of counsel), for appellant.

McLaughlin & Stern, LLP, New York (Eric Wrubel of counsel), for respondent.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered February 10, 2011, which, to the extent appealed from, granted plaintiff's motion for pendente lite relief to the extent of awarding her $40,000 per month in unallocated interim non-taxable maintenance and support, inclusive of monthly rent, and $50,000 in interim counsel fees, and directing defendant to pay retroactive temporary support of $120,000 at the rate of $3,500 per month, and denied so much of plaintiff's motion as sought $8,750 in unreimbursed school tuition deposits for the parties' children, and granted defendant's cross motion to the extent of directing plaintiff to provide an accounting of all the monies paid to her since June 1, 2009, unanimously modified, on

the law, to increase defendant's monthly payment of retroactive support from $3,500 to $10,000, and to deny defendant's cross motion for an accounting, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about June 20, 2011, which granted plaintiff's motion for renewal and reargument only to the extent of increasing the award of interim counsel fees from $50,000 to $100,000, unanimously affirmed, without costs.

In determining the award of temporary maintenance and support to plaintiff in the amount of $40,000, inclusive of monthly rent, the court considered the appropriate factors, including plaintiff's and the four children's needs, defendant's ability to pay and history of paying all marital and household expenses, and the parties' pre-separation standard of living (*see Konecky v Kronfeld*, 2 AD3d 371 [2003]; *Aron v Aron*, 216 AD2d 98 [1995]; *Barasch v Barasch*, 166 AD2d 399 [1990]).

Given the large discrepancy in the parties' respective incomes, the nature of the issues in dispute, and plaintiff's lack of sufficient funds of her own with which to compensate counsel, the court properly increased the award of interim counsel fees from $50,000 to $100,000 (*see* Domestic Relations Law § 237; *Charpie v Charpie*, 271 AD2d 169 [2000]; *see also Dodson v Dodson*, 46 AD3d 305 [2007]). An additional increase is not

warranted at this time.

In light of defendant's substantial income, ability to pay, significant financial assets, and relatively minimal liabilities, we find that he should pay the $120,000 in retroactive maintenance and support at a rate of $10,000, rather than $3,500, per month.

Plaintiff submitted no evidence of her purported payment of the children's school tuition deposits and thus failed to establish her entitlement to reimbursement thereof (*see e.g. Desautels v Desautels*, 80 AD3d 926 [2011]).

Disclosure "by both parties of their respective financial states" is compulsory in a matrimonial action in which maintenance and support are at issue (Domestic Relations Law § 236[B][4][a]). Thus, defendant can obtain information material to the issues in dispute through disclosure devices. He failed

to set forth a factual basis for his request of a broad accounting of plaintiff's use of all monies paid to her for maintenance and child support (*see e.g. Rosenblatt v Birnbaum*, 16 NY2d 212 [1965]).

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7985 The People of the State of New York, Respondent, Ind. 5892/06 3323/07

-against-

Kareem McCutheon, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra Keeling of counsel), and Debevoise and Plimpton LLP, New York (John C. Dockery of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

Appeal from judgment, Supreme Court, New York County (Carol Berkman, J.), rendered May 28, 2008, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to a term of three years, held in abeyance, and the matter remitted for a de novo suppression hearing before another Justice.

The hearing court denied suppression after crediting police testimony about the circumstances leading to the recovery of pistol in the course of the stop of a livery cab in which defendant was a passenger. However, the People failed to disclose grand jury testimony by the cab driver that materially

contradicted the police account of the incident. A defendant is entitled to disclosure of favorable "evidence of a material nature which if disclosed could affect the ultimate decision on a suppression motion" (*People v Geaslen*, 54 NY2d 510, 516 [1981]).

As the People concede, defendant is entitled to a reopened suppression hearing (*see People v Feerick*, 93 NY2d 433, 451-452 [1999]). We reject defendant's argument that, on this appeal, this Court should accept the driver's account of the incident and grant suppression. Instead, the suppression court should make the necessary credibility determinations "with its peculiar advantages of having seen and heard the witnesses" (*People v Prochilo*, 41 NY2d 759, 761 [1977]).

Contrary to defendant's argument, the principle set forth in *People v Havelka* (45 NY2d 636 [1978]) does not preclude a reopened hearing. "[T]here is no claim here that the People's proof at the suppression hearing was insufficient; the claim was

that there was an error at the hearing – that, because of the nondisclosure of *Brady* material, defendant did not have a fair chance to refute the People's case" (*People v Williams*, 7 NY3d 15, 21 [2006]).

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7986 Honeywell International Inc., Index 652163/10
Plaintiff-Appellant,

-against-

Northshore Power Systems, LLC,
Defendant,

Oaktree Capital Management, L.P.,
Defendant-Respondent.

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Reed Smith LLP, New York (John C. Scalzo of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Eric Seiler of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Bernard J. Fried, J.), entered on or about July 26, 2011,

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 order so appealed from be and the same is hereby affirmed for the reasons stated by Fried, J., with costs and disbursements.

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7988 Cedarwoods CRE CDO II, Ltd., et al., Index 653624/11
Plaintiffs-Appellants,

-against-

Galante Holdings, Inc., et al.,
Defendants-Respondents,

Hotspur Resorts Nevada, Ltd., et al.,
Defendants.

_____

Allen & Overy LLP, New York (Jacob S. Pultman of counsel), for appellants.

Squire Sanders (US) LLP, New York (Alan Heblack of counsel), for Galante Holdings, Inc., respondent.

McKenna Long & Aldridge LLP, New York (Charles E. Dorkey III of counsel), for Trimont Real Estate Advisors, respondent.

Polsinelli Shughart, New York (Daniel J. Flanigan of counsel), for KeyCorp Real Estate Capital Markets, Inc., respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about January 4, 2012, which denied plaintiffs' motion for a preliminary injunction and dissolved a temporary restraining order issued on December 28, 2011, unanimously affirmed, with costs. The stay granted by this Court by order entered February 14, 2012 is continued for 45 days from the date of service of the order on this appeal with notice of entry.

The court properly denied plaintiffs' motion seeking to enjoin defendants from taking any action to transfer the mortgage loan, which was part of a securitization trust, to defendant Galante Holdings, Inc. The court properly found that plaintiffs failed to comply with the pooling and servicing agreement's "no-action" clause. That clause provides that no certificate holder has the right to bring any suit unless the holders of certificates representing interests of at least 25% of "each affected [c]lass" shall have first given notice to a trustee requesting that the suit be brought and the trustee shall not bring the suit within a 60-day period. Plaintiffs only hold an interest in two of the affected classes constituting far less than the required 25%. Furthermore, they did not obtain the consent of any other classes before commencing this action.

Moreover, even if plaintiffs could show that they were not required to comply with the "no action" clause before commencing this action, they failed to demonstrate that they were otherwise likely to succeed on the merits of their claims, that they would suffer irreparable injury in the absence of an injunction and that a balance of the equities tips in their favor (*see generally*

Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839 [2005]; *see also* CPLR 6301).

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

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7989 Adam Ullrich, Index 300805/07
Plaintiff-Respondent,

-against-

Bronx House Community Center, et al.,
Defendants-Appellants.

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

Wingate, Russotti & Shapiro, LLP, New York (William P. Hepner of counsel), for respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered January 12, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Dismissal of the complaint is warranted in this action where plaintiff was injured during a basketball game at defendants' facility, when another player punched him in the jaw. Plaintiff and his father both testified that the assault was unprovoked, unanticipated, and that there was no warning of an impending assault. Thus, by plaintiff's own account, the assault occurred in such a short span of time that even the most intense

supervision could not have prevented it (*see e.g. Espino v New York City Bd. of Educ.*, 80 AD3d 496 [2011], *lv denied* 17 NY3d 709 [2011]).

Plaintiff's father testified that he observed a dispute on the basketball court involving the assailant and other club members two years earlier. However, plaintiff failed to show that the notice was sufficiently specific for defendants to have reasonably anticipated the assault upon plaintiff (*see Kamara v City of New York*, 93 AD3d 449, 450 [2012]). Defendants' failure to terminate the assailant's club membership after the earlier incident was not the proximate cause of the assault, which was an intentional and unforeseeable act of a third party (*see Sugarman v Equinox Holdings, Inc.*, 73 AD3d 654, 655 [2010]).

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

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

7990 & M-2441 — Bari Yunis Schorr, Plaintiff-Respondent, — Index 305587/11

-against-

David Evan Schorr, Defendant-Appellant.

David Evan Schorr, New York, appellant pro se.

Chemtob Moss Forman & Talbert, LLP, New York (Andrew Eliot of counsel), for respondent.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered on or about January 10, 2012, which, to the extent appealed as limited by the briefs, granted plaintiff's motion for pendente lite relief to the extent of ordering defendant to pay $1,500 in interim monthly child support, 35% of the costs of the child's unreimbursed medical and dental expenses, 100% of the carrying charges on the marital residence, 50% of the cost of a neutral forensic accountant, and $1,500 in plaintiff's interim counsel fees, and denied defendant's motion to order plaintiff to pay 50% of defendant's 2010 tax liability or to pay 50% of her 2010 bonus to defendant, and to order plaintiff to provide make-up "parenting" weekends for defendant or to permit defendant to attend the child's school and extracurricular activities, and

limited defendant's discovery relating to plaintiff's lease, unanimously modified, on the law, to describe the child's unreimbursed medical and dental expenses to be paid by defendant as "reasonable," and otherwise affirmed, without costs.

Defendant failed to substantiate his claim of exigent circumstances warranting a modification of the interim child support award (*see Anonymous v Anonymous*, 63 AD3d 493, 497 [2009], *appeal dismissed* 14 NY3d 921 [2010]). Contrary to defendant's assumption, there is no basis on which to conclude that the court accepted all or any of his factual and numeric assertions. Defendant failed to provide objective evidence of his 2010 income, such as his 2010 tax return; he submitted only documents that he created for purposes of this litigation. However, the record includes the parties' 2009 joint tax return, which shows defendant's gross income in 2009 as $243,503, plaintiff's 2010 W-2 statement, and another document created by defendant that indicates that his income in 2010 was $258,539.46. This evidence is a proper basis for the award, which accommodates plaintiff's reasonable needs and defendant's financial ability, taking into consideration the parties' pre-separation standard of living (*see e.g. Marfilius v Marfilius*, 239 AD2d 299 [1997]). The motion court did not err in refusing to order plaintiff to

pay 50% of the carrying costs on the marital residence, given the remainder of the pendente lite relief.

The court properly declined to order plaintiff to pay defendant 50% of her 2010 bonus or 50% of his 2010 tax liability. While defendant is correct that his 2010 tax liability constitutes marital debt (*see Lekutanaj v Lekutanaj*, 234 AD2d 429, 430 [1996]), the court properly reserved the apportionment of that debt for trial.

The court erred in omitting the word "reasonable" from the description of the unreimbursed medical and dental expenses to be paid by defendant (*see* Domestic Relations Law § 240[1-b][c][5][v]; *Lueker v Lueker*, 72 AD3d 655, 659 [2010]).

The court properly awarded plaintiff counsel fees upon consideration of the financial circumstances of the parties and all the circumstances of the case (*see* Domestic Relations Law § 237; *Marren v Marren*, 11 AD3d 291 [2004]). Defendant had engaged in extensive motion practice, including motions that had little merit. In responding to each of defendant's motions, as well as bringing her own, plaintiff incurred counsel fees, while defendant, a trained attorney, represented himself. Defendant's contention that he is the non-monied spouse is without support in the record.

The court also properly ordered defendant to pay 50% of the cost of the neutral forensic expert (*see* Domestic Relations Law § 237).

The court properly declined to order plaintiff to provide defendant with three make-up weekends with the child, while encouraging the parties to find additional time for defendant to spend with the child. Defendant concedes that he cancelled the original weekends to work on this litigation. The court also properly declined to order that defendant has the right to attend school and extracurricular activities since defendant never alleged that plaintiff prevented him from doing so.

The court properly limited defendant's disclosure relating to plaintiff's lease of a new apartment (*see* CPLR 3103).

M-2441 - Bari Yunis Schorr v David Evan Schorr

Motion to strike portions of brief denied.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5621 In re William Dement, Index 112761/09
Petitioner-Appellant,

-against-

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

Chet Lukaszewski, P.C., Lake Success (Chet Lukaszewski of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen J. Seemen of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered February 9, 2010, reversed, without costs, the petition reinstated and the matter remanded for further proceedings.

Opinion by Manzanet-Daniels, J. All concur except Friedman, J., who concurs in a separate Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
Dianne T. Renwick
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

5621
Index 112762/09

_____x

In re William Dement,
Petitioner-Appellant,

-against-

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

_____x

Petitioner appeals from the order and judgment (one paper), of the Supreme Court, New York County (Carol R. Edmead, J.), entered February 9, 2010, which denied the petition seeking, inter alia, to annul respondents' determination denying his application for accident disability retirement benefits, and dismissed the proceeding brought pursuant to CPLR article 78.

Chet Lukaszewski, P.C., Lake Success (Chet Lukaszewski of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen J. Seemen, Paul T. Rephen and Inga Van Eysden of counsel), for respondents.

MANZANET-DANIELS, J.

Petitioner William Dement brings this CPLR article 78 proceeding to challenge respondents' denial of his application for a World Trade Center (WTC) line-of-duty accident disability retirement (ADR) pension upon a determination that there is no causal connection between his disability and his actions as a first responder at the World Trade Center site.

Petitioner was a lieutenant with the NYPD on the date of the 9/11 attacks. On September 14, 2001, he performed a 12-hour tour of duty at the World Trade Center site. During September, October and November 2011, petitioner was assigned to the Fresh Kills landfill on Staten Island in connection with 9/11 recovery and investigative work. Petitioner alleges that starting in November 2001, he experienced labored breathing, persistent heavy coughing, chest congestion, nasal fluid and throat discharge.

In late 2002, petitioner applied for a disability pension, alleging that he had "difficulty in breathing," caused by exposure to the WTC site and the landfill. He was found, at that time, not to be disabled. Petitioner's conditions worsened following his retirement, and in 2007, he applied for a WTC-ADR disability pension under the WTC Law, which establishes a presumption that "if any condition or impairment of health is caused by a qualifying World Trade Center condition" as defined

in the Retirement and Social Security Law, "it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident . . . unless the contrary be proved by competent evidence" (Administrative Code of City of NY § 13-252.1[1][a]).[1] This presumption extends to WTC rescue workers who, like petitioner, have retired on a disability pension and subsequently seek a reclassification.

In his initial application, petitioner alleged that he was disabled due to WTC cough, RADS (reactive airway dysfunction syndrome), asthma, gastroesophageal reflux disease (GERD), esophagitis, sinusitis, chronic rhinitis and severe sleep apnea. Petitioner alleged that these conditions resulted in, inter alia, chronic cough, difficulty breathing, severe stomach indigestion, and obstructive sleep apnea which prevented him from sleeping and resulted in excessive daytime sleepiness. Petitioner also filed

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[1] "Qualifying condition or impairment of health" is defined by the Retirement and Social Security Law as, inter alia, a "qualifying physical condition," including (i) diseases of the upper respiratory tract such as rhinitis, sinusitis, pharyngitis and upper airway hyper-reactivity; (ii) diseases of the lower respiratory tract such as asthma, reactive airway dysfunction syndrome and different types of pneumonitis; (iii) diseases of the gastroesophageal tract including esophagitis and reflux, acute or chronic, caused by or aggravated by exposure; and (iv) new onset diseases resulting from exposure, including cancer, asbestos-related disease and heavy metal poisoning (§ 36[b],[c]).

an updated application for reclassification requesting that his service retirement pension be reclassified as an ADR pension pursuant to the WTC Law. In his application for reclassification, petitioner similarly alleged that he suffered from diseases of the respiratory and gastroesophageal tracts.

On or about August 10, 2007, the Medical Board recommended approval of the application for ordinary disability retirement (ODR) and disapproval of the application for ADR. The board determined that petitioner was disabled "due to his sleep deprivation secondary to his severe sleep apnea," but found no medical evidence to substantiate the allegation that petitioner's sleep apnea was related to environmental exposure. The board's report did not discuss the contributory effect, if any, of petitioner's nighttime gastric reflux to his sleep deprivation.

Petitioner was permitted under respondents' procedural rules to adduce additional medical evidence and to have his case remanded to the Medical Board for re-evaluation. In support of his application, petitioner submitted additional medical records, including reports from Dr. James Baum diagnosing him with GERD as well as heavy metal poisoning, specifically lead and aluminum toxicity, for which petitioner underwent chelation therapy. Petitioner also submitted a report from Dr. Milagros Diaz Teves-Mani of the World Trade Center Medical Monitoring and Treatment

Program diagnosing him as suffering from, inter alia, GERD, Barrett's esophagus,[2] and sleep apnea secondary to WTC exposure. During his physical examination, petitioner complained to the Medical Board doctors of acid reflux at night, shortness of breath and constant fatigue.

On or about March 21, 2008, the Medical Board reaffirmed its prior decision recommending approval of petitioner's application for ODR and disapproval of his application for disability under the WTC Law, finding that sleep apnea had not been shown to be a sequela of exposure at the World Trade Center. The final diagnosis was sleep deprivation secondary to sleep apnea.

On August 8, 2008, petitioner's new attorney wrote to the executive director of the Board of Trustees seeking an upgrade of petitioner's recommended pension from ODR to WTC-ADR. He submitted additional evidence demonstrating that petitioner's sleep apnea was connected to WTC exposure and that several of his recognized WTC ailments, including respiratory and gastrointestinal tract illnesses and heavy metal poisoning, were disabling in and of themselves. Petitioner's attorney submitted, inter alia, a May 1, 2008 report from Dr. Diaz Teves-Mani in

[2]Barrett's esophagus may be defined as abnormal changes in the cells of the esophagus caused by GERD. Barrett's greatly increases the sufferer's chances of developing esophageal cancer.

which she opined that petitioner suffered from a number of ailments causally related to WTC exposure, including GERD and obstructive sleep apnea; an April 29, 2008 report from Karen B. Mulloy, DO, Director of the Denver Health Center for Occupational Safety and Health, explaining the causal connection between petitioner's various WTC illnesses and his sleep apnea and sleep deprivation; a June 17, 2008 report from Dr. Denise Janus in which she opined, inter alia, that petitioner's ailments, including his sleep apnea, were the direct result of his exposure to toxins at the WTC site; a July 22, 2008 report from James E. Baum, DO, who was overseeing petitioner's chelation therapy for heavy metal poisoning, in which he opined that heavy metals had played a "major role" in petitioner's symptomology; and a May 29, 2008 report from Dr. Ben Hill Passmore, finding petitioner disabled based on the effects of heavy metal poisoning. These materials were supplemented by the August 8, 2008 report of Raymond Singer, Ph.D., who opined that petitioner suffered from neuropsychological deficits, including dysfunctions of cognition, memory, emotion and judgment, as a result of exposure to neurotoxic chemicals at the site.

On September 10, 2008, petitioner's case was considered by the Board of Trustees and remanded to the Medical Board.

Petitioner's counsel wrote the Medical Board enclosing medical journal articles discussing a link between sleep apnea and GERD and asthma, including an article from the Journal of Gastroenterology called "The relationship between gastroesophageal reflux disease and obstructive sleep apnea [OSA]," which stated, in relevant part:

> "There has been an accumulating body of research concerning the extraesophageal complications of gastroesophageal reflux disease over the past decade. . . The most recognized manifestations are noncardiac chest pain, bronchial asthma, chronic bronchitis, chronic cough, and posterior laryngitis, as well as the acidic damage of dental enamel. This article focuses on the potential relationship between reflux disease and obstructive sleep apnea, which has been raised only more recently. Because of the decrease of primary peristalsis and the reduced production of saliva, as well as the diminished acid and volume clearance of the esophagus, sleeping can be considered as a risk factor of the reflux event by itself."

The article discussed the "complex causal relationship" between OSA and GERD, noting, inter alia, that in certain studies conducted by Teramoto et al. in a young patient population, nocturnal GERD comprised an independent risk factor for snoring, insomnia, daytime somnolence and other sleep disturbances. Research by Suganuma et al. showed that GERD itself could cause sleep disorders. The article concluded:

> "In the light of the above reviewed lines of evidence, there is a strong reason to believe that GERD and OSA potentially exhibit a two-way, mutually reinforcing relationship . . . It is [] a plausible hypothesis that GERD contributes to the development of arousal from sleep . . . [T]he further narrowing of the pharyngeal region of the upper respiratory tract could lead to several forms of sleep-disordered breathing, such as OSA or snoring."

On December 5, 2008, petitioner's case was once again considered by the Medical Board. Once again, the Medical Board denied petitioner's application for WTC disability and recommended approval of his ODR application, finding, inter alia, that although there were reports of individuals exposed to the WTC having sleep apnea, there was "no evidence of any etiologic connection." The Medical Board did not cite any research, or any evidence in the record, to support its determination. The final diagnosis was sleep deprivation due to sleep apnea. While acknowledging receipt of petitioner's new evidence, including reports that he had suffered heavy metal poisoning linked to WTC exposure, the board did not address in its conclusion petitioner's claim that he suffered from heavy metal poisoning.

Subsequently, petitioner's counsel wrote to the Board of Trustees, asserting, inter alia, that the board had failed to recognize the disabling nature of petitioner's WTC conditions, including respiratory and gastrointestinal illnesses and heavy

metal poisoning, and had "improperly disregarded medical evidence of a link between GERD and [a]sthma and sleep apnea."

On May 13, 2009, petitioner's case was considered by the Board of Trustees, which voted to deny his application for a WTC disability pension.

In September 2009, petitioner filed the instant article 78 petition alleging that respondents' denial of his application for ADR was arbitrary and capricious, unreasonable and unlawful. The court denied the petition and dismissed the proceeding, finding that petitioner "failed to establish that the Medical Board arbitrarily and/or capriciously failed to find that requisite 'causation' between petitioner's sleep apnea and his GI problems to the degree sufficient to warrant overturning the respondents' determination."

We disagree, and now reverse. Administrative Code § 13-252 provides that a police pension fund member who is physically or mentally incapacitated for the performance of service as a proximate result of such service shall be retired on an ADR pension. The WTC Law (Administrative Code § 13-252.1) amended this provision to address cases involving WTC injuries. The WTC Law established a presumption that "any condition or impairment of health [] caused by a qualifying World Trade Center condition"

as defined in the Retirement and Social Security Law, “shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident . . . unless the contrary be proved by competent evidence” (subd. [1][a]).

Once a petitioner establishes that he worked the requisite number of hours at the site, the “World Trade Center presumption” puts the burden on the police department to show that the petitioner’s qualifying injury was not incurred in the line of duty (*see Matter of Maldonado v Kelly*, 86 AD3d 516, 519 [2011], *lv granted* 18 NY3d 808 [2012]).

Petitioner demonstrated that he was incapacitated for the performance of service as a proximate result of his WTC line-of-duty toxic exposure injuries. The evidence showed that petitioner developed disabling sleep apnea in the wake of his WTC exposure, and that his apnea was in part attributable to severe gastroesophageal reflux disease, indisputably a WTC condition. The medical literature submitted by petitioner discusses the “two-way, mutually reinforcing relationship” between GERD and obstructive sleep apnea, noting, inter alia, that narrowing of the pharyngeal region of the upper respiratory tract can lead to sleep-disordered breathing such as obstructive sleep apnea or snoring.

Indeed, sleep apnea has been recognized as a WTC condition. The James Zadroga 9/11 Health and Compensation Act of 2010 (Pub L No 111-347, 124 Stat 3623 [2011]), which re-opened the federal 9/11 Victims' Compensation Fund, recognizes sleep apnea as a WTC condition for which a WTC claimant can receive medical care and compensation.

Respondents, in turn, have failed to rebut the presumption that petitioner's condition was incurred in the line of duty. Respondents' determination that there was no causal connection between petitioner's disabling apnea and his 9/11 exposure, and the related determination that his GERD (which respondents do not dispute is a recognized WTC exposure injury) had no exacerbating effect on the apnea and his sleep deprivation, lacked a rational basis and were not based on credible evidence (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760-61 [1996]). Indeed, the Medical Board, while acknowledging receipt of petitioner's medical evidence, summarily concluded, without citation to any medical journal or to any report in the record, that there was "no evidence" of any etiologic connection between petitioner's GERD and his obstructive sleep apnea. In the absence of any credible explanation as to how the board arrived at this conclusion, and

in the face of petitioner's credible evidence to the contrary, we find that the determination of the board lacked a rational basis, and therefore, that respondents failed to rebut the presumption that petitioner incurred his injury in the line of duty (*compare Maldonado*, 86 AD3d at 520-21 [presumption rebutted where petitioner's own physician could only equivocate as to whether a sarcoma that developed prior to 9/11 had been exacerbated by the petitioner's WTC exposure]; *Matter of Jefferson v Kelly*, 51 AD3d 536 [2008] [presumption rebutted where record contained no evidence of a causal connection between WTC exposure and the petitioner's claimed psychiatric injuries]).

Respondents insinuate that petitioner's weight, rather than WTC exposure, is the cause of his obstructive sleep apnea. Yet they do not refute the proposition that his apnea was at least in part attributable to his 9/11 rescue work, or that he suffered other 9/11 injuries, such as RAD and asthma that had an effect on his breathing, stamina and ability to exercise, and in turn his fitness level. Dr. Janus recognized that petitioner's weight gain, on the order of 30-40 pounds, as well as upper airway trauma occurring with toxin exposure, contributed to petitioner's sleep apnea. She noted that petitioner was in perfect health before 9/11 and that his weight gain was attributable to his inability to exercise, opining that it was "all related" to WTC

exposure.

The avowed legislative intent of the WTC Law is to protect workers harmed by the September 11th tragedy. The Memorandum in Support of the Law states:

> "JUSTIFICATION: Many public employees, including police, fire, correction, sanitation and civilians rendered rescue, recovery and clean up at the former World Trade Center site and other designated locations. Early statistics indicate that these workers were exposed to numerous hazards which may have, and may, impact their health in the years to come. If any public employee was exposed to these hazards and can no longer perform their jobs, even after retirement, this legislation will permit them to apply for an accidental disability retirement subject to the respective Retirement System review process by proving, by competent evidence, that the illness or injury was caused in connection with exposure to any elements at the World Trade Center site.
>
> "It is beyond question that the State must recognize the services that these individuals provided not only to the victims and their families, but to all citizens of the City and State of New York and the United States of America. As a result, it is only fitting that they be protected when a disability ensues as a consequence of their selfless acts of bravery working at the World Trade Center site and other sites" (Mem in Support, L 2005, Ch 104, 2005 McKinney's Session Laws of NY, at 2007).

Respondents' narrow reading of the law would defeat the avowed purpose of the statute, i.e., to protect 9/11 workers as a result of their heroic efforts. Indeed, the full extent of the health challenges faced by these workers, arising from chronic, acute exposures to a toxic brew of substances at the site, may not be known for years. The statutory language "an impairment of health caused by a qualifying [WTC] condition" must be interpreted in a manner consistent with the underlying purposes of the statute.

Even assuming, arguendo, that petitioner's sleep apnea was not "caused" by 9/11 exposure, petitioner would nonetheless be entitled to a WTC pension based on the *Toobin* rule. In *Matter of Toobin v Steisel* (64 NY2d 254 [1985]), the Court of Appeals held that if a disability pension applicant's accidental line-of-duty injury precipitated the development of a latent condition or aggravated a preexisting condition, resulting in disability, the applicant is entitled to a line-of-duty disability pension. Thus, petitioner is entitled to a WTC pension because he has shown that his apnea and sleep deprivation were exacerbated by his WTC-related breathing and GI problems. Respondents' claim that petitioner's breathing and GI problems had absolutely no effect on his sleep apnea lacks any rational basis whatsoever.

Respondents' determination that petitioner was not disabled

by heavy metal poisoning was not supported by credible evidence and lacked a rational basis (*see Matter of Cusick v Kerik*, 305 AD2d 247 [2003], *lv denied* 100 NY2d 511 [2003]). While petitioner admittedly did not include "heavy metal poisoning" among the cited injuries in his application for WTC-ADR, it is undisputed that he was diagnosed with heavy metal poisoning, that he submitted medical reports to respondents documenting heavy medical poisoning, and that the Medical Board considered that evidence in making its determination.

A court may set aside the Board of Trustees' denial of ADR benefits where it can conclude, as a matter of law, that a petitioner's disability is the natural and proximate result of a service-related accident (*see Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 352 [1983]). Since the evidence here demonstrates, as a matter of law, that petitioner suffered a WTC-related injury, we hereby reverse the order on appeal, set aside the board's denial of ADR benefits, and remand for entry of an award of a WTC-ADR pension.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Carol R. Edmead, J.), entered February 9, 2010, which denied the petition seeking, inter alia, to annul

respondents' determination denying petitioner's application for accident disability retirement benefits, and dismissed the proceeding brought pursuant to CPLR article 78, should be reversed, on the law, without costs, the petition reinstated and the matter remanded for further proceedings.

All concur except Friedman, J. who concurs in a separate Opinion.

FRIEDMAN, J. (concurring)

It is undisputed that petitioner, a retired police lieutenant, responded to the World Trade Center site after the attacks of September 11, 2001. While petitioner's application for accident disability retirement (ADR) benefits alleged that he suffered from a number of upper-respiratory and esophageal conditions included within the statutory definition of a "[q]ualifying World Trade Center condition" (Retirement and Social Security Law § 2[36]), the application did not allege that he suffered from heavy metal poisoning, another qualifying World Trade Center condition. In the course of the administrative proceedings on his application, however, petitioner submitted for the Medical Board's consideration his physicians' opinions to the effect that he had high levels of aluminum and lead that are causally related to his undisputed cognitive and psychological deficits. In addition, petitioner established that he has received chelation therapy for this heavy metal poisoning. While the Medical Board claimed to have considered this evidence in its ultimate recommendation that petitioner not be upgraded to ADR status, the board did not identify any evidence contradicting the claim of heavy metal poisoning and did not address the evidence of heavy metal poisoning in concluding that the ADR application should be denied. Neither have respondents in this proceeding

identified any evidence in the record contradicting petitioner's contentions concerning heavy metal poisoning. Accordingly, on this record, it is undisputed that petitioner suffered from heavy metal poisoning and that this condition is causally related to his disabling deficits.

Section 13-252.1(1)(a) of the Administrative Code of the City of New York provides in pertinent part:

> "[I]f any condition or impairment of health is caused by a qualifying World Trade Center condition . . . , it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence."

Here, uncontroverted medical evidence shows that petitioner, a responder to the World Trade Center site, suffers from heavy metal poisoning. Although heavy metal poisoning was not mentioned in the ADR application, petitioner properly submitted evidence of the condition to the Medical Board as it became available to him, as the board recognized in considering such evidence (*see Matter of Mulheren v Board of Trustees of Police Pension Fund, Art. II*, 307 AD2d 129 [2003], *lv denied* 100 NY2d 515 [2003]). Since heavy mental poisoning is a qualifying World Trade Center condition under Retirement and Social Security Law § 2(36), we are required by Administrative Code § 13-252.1(1)(a) to presume that petitioner incurred the heavy metal poisoning in the

course of discharging his duties at the World Trade Center site. The evidence showing that petitioner suffers from heavy metal poisoning, and that this condition is the cause of his disabling cognitive and psychological symptoms, is entirely uncontroverted, and, although acknowledged, was not substantively addressed in any of the Medical Board's opinions. It follows that the Medical Board's determination that petitioner's disability is not service-related is lacking in a rational basis, since it has no basis in credible evidence. Accordingly, I concur in the reversal of the order appealed from and in the granting of the petition to annul the denial of ADR benefits.

Because I believe that the evidence of petitioner's heavy metal poisoning is dispositive, I see no need to discuss whether the Medical Board could rationally conclude either that he did not suffer from the other qualifying World Trade Center conditions that he alleged or that those conditions, if they existed, were not the cause of his disability.

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

ENTERED: JUNE 19, 2012

DEPUTY CLERK