SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 22, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6968 Elizabeth Biascochea, Index 13853/07
Plaintiff-Appellant,

-against-

Grisel Boves, et al.,
Defendants-Respondents,

J.V. Service, Inc., et al.,
Defendants.

Annette G. Hasapidis, South Salem, for appellant.

Hardin, Kundla, McKeon & Poletto, P.A., New York (Stephen P. Murray of counsel), for Grisel Boves, D-J Ambulette Service, Inc., and D&J Service, Inc., respondents.

Law Offices of Composto & Composto, Brooklyn (Andrea F. Composto of counsel), for David W. Ramsey, respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered August 26, 2010, which, to the extent appealed from as limited by the briefs, granted the motion of defendants D&J Service, Inc., D-J Ambulette Service, Inc., and Grisel Boves, and the cross motion of defendant David W. Ramsey, for summary judgment dismissing the complaint based on the failure to

establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion and cross motion denied, and the complaint reinstated with respect to plaintiff's allegations of permanent consequential limitation of use of a body organ or member and/or significant limitation of use of a body function or system.

Defendants met their burden on summary judgment by tendering the affirmed reports of their orthopedist and neurologist (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [2011]). Defendants' radiologist's opinions, however, were too equivocal to satisfy defendants' burden with respect to showing degeneration in an effort to disprove causation (*see Reyes v Diaz*, 82 AD3d 484 [2011]).

In opposition, plaintiff raised a triable issue of fact with respect to her knee injuries. Defendant's radiologist, after reviewing an MRI of plaintiff's knee, made findings which she described as due to either "a tear or prior surgery." However, plaintiff testified that prior to this accident, she never suffered injuries to her left knee. In addition, her treating physician found limitations of motion in her left knee, findings which conflicted with the reports from defendant's physicians, and raised a triable issue of fact (*see Jacobs v Rolon*, 76 AD3d

905 [2010]).

While plaintiff did not undergo contemporaneous range of motion measurements, they are not necessary, in light of her visit to Dr. Eliav, two days after her accident, which established the requisite causation (*see Perl v Meher*, 18 NY3d 208 [2011]). Although Dr. Rose did not expressly address defendants' expert's conclusion that the injuries were degenerative in origin, he relied on the same MRI report as Dr. Berkowitz, and attributed plaintiff's injuries to a "different, yet altogether equally plausible, cause" (*see Yuen v Arka Memory Cab Corp.,* 80 AD3d 481, 482 [2011]), thus raising a triable issue of fact with regard to her left knee injuries (*see Linton v Nawaz*, 62 AD3d 434, 439-440 [2009], *affd* 14 NY3d 821 [2010]).

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

ENTERED: MARCH 22, 2012

CLERK

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

6093- Index 600237/08
6094-
6095-
6096 Dr. Howard Kudler,
Petitioner-Respondent,

-against-

Dr. Barry Truffelman, et al.,
Respondents-Appellants.

- - - - -

Dr. Howard Kudler,
Petitioner-Appellant,

-against-

Dr. Barry Truffelman, et al.,
Respondents-Respondents.

Kasowitz, Benson, Torres & Friedman LLP, New York (Aaron H. Marks of counsel), for appellants/respondents.

Silverman Sclar Shin & Byrne, PLLC, New York (Vincent Chirico of counsel), for respondent/appellant.

Order and judgment, Supreme Court, New York County (Eileen Rakower, J.), entered March 3, 2010, which granted petitioner's motion to confirm and amend an arbitration award, and denied respondents' cross motion to vacate the award, unanimously modified, on the law, to the extent of vacating the award of punitive damages assessed against respondents, vacating the award of attorneys fees, vacating the arbitrator's order that

respondents assign certain life insurance policies to petitioner and directing that the policies be reassigned to respondents, and otherwise affirmed, without costs. Appeals from orders, same court and Justice, entered September 21, 2010, September 27, 2010, and January 7, 2011, which, respectively, directed respondents to pay any and all loans taken out by them on the subject life insurance policies, modified certain Income Executions to exclude the face value of the assigned life insurance policies, and denied petitioner's request for an order directing respondents to repay all outstanding loans on the life insurance policies, unanimously dismissed, without costs, as moot.

As the partnership agreement between the parties did not involve interstate commerce, and was not covered by the Federal Arbitration Act, the award of punitive damages was improper under the rule in *Garrity v Lyle Stuart, Inc.* (40 NY2d 354 [1976]), which, unless preempted, prohibits arbitrators from awarding punitive damages under New York public policy.

The court erred in confirming the arbitrator's decision to award petitioner the assignment of the insurance policies taken out on his life by the partnership. The arbitrator exceeded her powers and gave a completely irrational construction to the

provisions of the partnership agreement, thereby effectively rewriting it in a manner that was unjust and in violation of the spirit of the agreement (*see Matter of Turner [Booth Mem. Med. Ctr.]*), 63 NY2d 633 [1984]; *Fishman v Roxanne Mgt.*, 24 AD3d 365, 366 [2005]); *Integrated Sales v Maxell Corp. of Am.*, 94 AD2d 221, 225 [1983]). The arbitrator also exceeded her powers in this matter by ordering respondents to pay any and all loans taken out by them on those assigned life insurance policies. The court otherwise properly declined to vacate the arbitration award in part or in its entirety, and, contrary to petitioner's claim, properly excluded the face value of the assigned policies from the income executions. In this regard, since there was no clearly prevailing party, the award of attorney's fees was unwarranted (*see Nestor v McDowell*, 81 NY2d 410, 415-416 [1993]; *Village of Hempstead v Taliercio*, 8 AD3d 476 [2004]).

In light of the fact that the arbitration award was completely irrational to the extent it ordered respondents to assign the life insurance policies to petitioner and to the extent it further ordered respondents to pay back the loans taken out by them on those assigned policies, and must be modified to the extent of reassigning those policies to respondents, the

appeals from the subsequent orders with respect to respondents' obligation to pay the loans on the policies are moot.

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

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6554-
6555 Tamara Stalker, et al., Index 102442/10
Plaintiffs-Respondents-Appellants,

-against-

Stewart Tenants Corporation,
Defendant-Appellant-Respondent,

Mark Wallace, et al.,
Defendants.

D'Amato & Lynch, LLP, New York (Stephen F. Willig of counsel), for appellant-respondent.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered November 30, 2010, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the second cause of action and all claims against defendant board members in their individual capacities, and denied the motion to dismiss the first and third causes of action and the claims for punitive damages thereon, unanimously modified, on the law, to deny the motion as to the second cause of action, and to grant the motion as to the third cause of action as against defendant Stewart Tenants Corporation, and otherwise affirmed, without costs.

Plaintiff Stalker is married to plaintiff Maia, who is of Brazilian origin. Plaintiffs allege that, in September 2008, they entered into a contract to sell their cooperative unit to Herman and Barbara Lederberg, senior citizens residing primarily in Florida. Plaintiffs claim that defendants denied the Lederbergs' application for approval of the contract on the stated ground that the Lederbergs did not meet a requirement in the bylaws that purchasers use their units as their primary residences. Plaintiffs further contend that the bylaws have never contained any primary residence requirement and that defendants' ground for rejecting the application was a pretext for discriminating against the Lederbergs on account of their age and against Maia on account of his national origin.

The complaint states a cause of action for housing discrimination under New York State's Human Rights Law (Executive Law § 296[5]), which makes it an unlawful discriminatory practice to refuse to sell a housing accommodation to any person on the basis of, inter alia, national origin or age (*see* § 296[5][a][1]). Defendants argue that plaintiffs lack standing to assert the claim, because they are the sellers, not the purchasers, and they are not members of the class allegedly being discriminated against (the elderly). However, in contrast to

Executive Law § 296(5)(a)(1), § 296(5)(a)(2) makes it an unlawful discriminatory practice to "discriminate against *any person*" on the basis of, inter alia, national origin or age in the sale of a housing accommodation. We find that this more expansive language provides a remedy for any person "adversely affected by reason of discrimination" in the provision of housing in New York (*Axelrod v 400 Owners Corp.*, 189 Misc 2d 461, 465-66 [2001], citing *Bernstein v 1995 Assoc.*, 185 AD2d 160, 163 [1992] [alleged refusal to grant the plaintiffs a lease because of the medical services they provided "state(s) a valid cause of action (for discrimination against women, ethnic minorities and the disabled) despite the fact that (the plaintiff doctor) was not the actual victim of discrimination"]). This construction is appropriate in light of the remedial purpose of the Human Rights Law, which embodies "the strong antidiscrimination policy of this State" (*National Org. for Women v State Div. of Human Rights*, 34 NY2d 416, 419 n 2 [1974]).

Given the substantial identity between the language and purposes of Executive Law § 296(5) and those of the federal Fair Housing Act (42 USC § 3601 *et seq.*) (*see Sayeh v 66 Madison Ave. Apt. Corp.*, 73 AD3d 459, 461 [2010]; *Mitchell v Shane*, 350 F3d 39, 47 n 4 [2d Cir 2003]), plaintiffs have also stated a claim

for housing discrimination under the Fair Housing Act (*see Morton v 303 W. 122nd St. H.D.F.C.*, 2011 NY Slip Op 31888[U], *12 and n 3 [2002]). Indeed, the Fair Housing Act defines an "[a]ggrieved person" as "any person who – (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur" (42 USC § 3602[i]; *see* § 3613[a]).

It is black letter law that "a corporation does not owe fiduciary duties to its members or shareholders" (*Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [2007]). Thus, plaintiffs' third cause of action alleging breach of fiduciary duty should be dismissed as against defendant corporation (*see Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [2009]). Plaintiffs' allegations that not every board member convened to review the application of the prospective purchases, and that the board improperly rejected the application, do not allege that the directors acted outside their official capacities, and are insufficient to state claims against the directors in their individual capacities (*see Peacock*, 67 AD3d at 442). Although allegations of unequal treatment of shareholders may be sufficient to overcome the protection afforded directors under

the business judgment rule, individual directors may not be subject to liability absent allegations that they committed separate tortious acts (*see Konrad v 136 E. 64th St. Corp.*, 246 AD2d 324, 326 [1998]).

We reject defendants' argument that plaintiffs have not alleged sufficiently reprehensible behavior on defendants' part to support an award of punitive damages (*see U.S. Trust Corp. v Newbridge Partners*, 278 AD2d 172 [2000]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1996]). They were not required to allege behavior directed at the public generally (*see Sherry Assoc. v Sherry-Netherland, Inc.*, 273 AD2d 14, 15 [2000]). We note, however, that any punitive damages award to plaintiffs for violation of Executive Law § 296 is statutorily limited to $10,000 (*see* Executive Law § 297[4][c][iv],[9]; *Thoreson v Penthouse Intl.*, 80 NY2d 490, 498 [1992]).

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

ENTERED: MARCH 22, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus Salaam, Manzanet Daniels, JJ.

6891N Shelby Mumford, Index 15787/04
Plaintiff-Respondent,

-against-

854 Gerard Ave. Corp., etc.,
et al.,
Defendants,

Theodore Carelock,
Defendant-Appellant.

[And a Third Party Action]

Steven J. Mines, Long Beach, for appellant.

Law Offices of Michael S. Lamonsoff, PLLC, New York (Craig Phemister of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered July 23, 2010, which, to the extent appealed from as limited by the briefs, denied defendant-appellant's motion to vacate his default, unanimously reversed, on the law and the facts, with costs.

The "default" should have been vacated because there was never any judgment of default entered against defendants. In this personal injury action commenced in 2004, defendants 845 Gerard Ave. Corp., individually, and d/b/a New Room Jazz Club/Sports Bar, and Theodore Carelock were initially represented

by counsel until June 2005, when counsel was relieved. Defendants did not retain new counsel. Defendant-appellant Carelock, a principal of the corporation, who is also sued here individually, appeared pro se at court conferences. According to plaintiff's counsel, when an attorney from his office appeared at a conference in May 2009 at which defendant Carelock did not appear, a law clerk indicated that "enough was enough" and that he would talk to the judge about setting this matter down for an inquest. The case was then transferred to an inquest part. This transfer does not equate with the entry of a default judgment.

Furthermore, while the motion court denied the motion to vacate the "default" on the ground that defendant Carelock had failed to demonstrate a meritorious defense to the complaint, the complaint, which purports to allege negligence and a violation of the Dram Shop Act, is woefully deficient in that it alleges that the single incident occurred on three different dates -- that plaintiff was a patron of defendant's bar on or about March 27, 1999; that on or about October 4, 2003, certain patrons were sold alcoholic beverages subsequent to being intoxicated; and that on or about December 12, 2002, defendants should have known that certain patrons in their establishment carried knives, switchblades, etc. Therefore, even if the court had entered a

default judgment, the complaint, verified by counsel, was insufficient to support the entry of a default judgment (*see Utak v Commerce Bank Inc.*, 88 AD3d 522 [2011]).

Accordingly, for all of these reasons, the motion should have been granted.

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6942 Folio House Incorporated, Index 118068/09
Plaintiff-Appellant,

-against-

Barrister Realty Partners,
Defendant-Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Judith J. Gische, J.), entered on or about March 22, 2011,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 2, 2012,

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

ENTERED: MARCH 22, 2012

CLERK

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

7015 BLT Steak, LLC, Index 112271/09
Plaintiff-Respondent-Appellant,

-against-

The 57th Street Dorchester, Inc.,
Defendant-Appellant-Respondent.

Cyruli Shanks Hart & Zizmor, LLP, New York (James E. Schwartz of counsel), for appellant-respondent.

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered October 15, 2010, which, to the extent appealed from, granted the branch of plaintiff-tenant's motion for summary judgment that sought dismissal of defendant-landlord's counterclaim for legal fees, denied as moot the branch of plaintiff's motion that sought summary judgment on its causes of action for injunctive relief and a declaratory judgment as to the validity of the notice to cure, denied the branch of plaintiff's motion that sought summary judgment on its third cause of action and for a declaration that it is not in breach of the parties' lease, and granted defendant's cross motion for summary judgment to the extent of dismissing plaintiff's third cause of action, unanimously affirmed, without costs.

Defendant's withdrawal of the notice to cure rendered moot that branch of plaintiff's motion for declaratory relief as to the validity of the notice to cure, as there was no longer any controversy with respect to the notice (*see* CPLR 3001). Plaintiff's request for injunctive relief was also rendered moot by the withdrawal of the notice, because there was no longer any threat that plaintiff's leasehold would be terminated as a result of its alleged breach of the lease (*see Mannis v Jillandrea Realty Co.*, 94 AD2d 676, 677 [1983]).

Plaintiff is not entitled to summary judgment declaring that it did not breach the parties' lease; the conflicting expert affidavits have raised issues of fact with respect to the damage to the steel and slab underlying plaintiff's kitchen. Contrary to plaintiff's contention, defendant's withdrawal of the notice to cure does not constitute an "adjudication on the merits," as it is undisputed that defendant never filed an action based on the allegations in the notice in a court of any state or the United States (CPLR 3217[c]).

The court properly dismissed plaintiff's third cause of action, for breach of the implied covenant of good faith and fair dealing and/or breach of contract. The "American rule" precludes plaintiff from recovering its attorney's fees as damages in the

event it prevails on its cause of action, and plaintiff has failed to show that any exception is applicable (*see Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 204 [2010], *lv denied* 17 NY3d 713 [2011]). Moreover, plaintiff has failed to plead any damages other than attorney's fees (*see Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1988]).

The court properly determined that the relied-upon lease provisions do not support defendant's claim for an award of attorney's fees for defending this action (*see Duane Reade v Highpoint Assoc. IX, LLC*, 36 AD3d 496, 497 [2007]).

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

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7164 The People of the State of New York, Ind. 63736C/07
Respondent,

-against-

Steve Nyarko,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Steven Paynter, J.), rendered October 22, 2008, convicting defendant, upon his plea of guilty, of harassment in the second degree, and sentencing him to a conditional discharge for a period of one year, unanimously affirmed.

Defendant did not move to withdraw his guilty plea, and this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]). Accordingly, defendant's challenge to the plea is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. The record establishes that, under all the relevant

circumstances, defendant entered a knowing, intelligent and voluntary plea to a violation, and there was nothing in the plea allocution that cast significant doubt on defendant's guilt or the voluntariness of his plea.

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

ENTERED: MARCH 22, 2012

CLERK

Tom J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7165 In re Madison Park Owner LLC, Index 105399/11
Petitioner-Appellant,

-against-

Eric T. Schneiderman, etc., et al.,
Respondents-Respondents.

Mintz & Gold LLP, New York (Scott A. Klein of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan of counsel), for State respondent.

Rosen Livingston & Cholst LLP, New York (Deborah B. Koplovitz of counsel), for Alan Krouk, respondent.

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered August 9, 2011, which denied the petition and dismissed the proceeding to set aside the determination of respondent Attorney General of the State of New York, dated March 23, 2011, directing the return of a down payment made by respondent Alan Krouk in connection with a purchase agreement for condominium unit 9E at 15 East 26th Street, NY, NY, unanimously affirmed, without costs.

Petitioner's threshold assertion that the court should review the Attorney General's interpretation of the purchase agreement de novo is incorrect. Courts review determinations of

the Attorney General concerning down payments, which frequently turn on contract interpretation questions, using the "rational basis" standard (*see Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180 [2006]).

The article 78 court correctly held that the Attorney General's determination was not arbitrary or capricious. The result reached by the Attorney General was that, since neither relied-upon contractual provision was applicable to the facts presented, a common law analysis was warranted, and pursuant thereto, Krouk was entitled to return of the down payment. Such result was correct under the common law. Where, as here, the original contract does not make the designated closing date "time of the essence," either party may set a reasonable closing date after the initially scheduled closing date has passed, and declare that the newly scheduled date is "time of the essence," and that failure to perform on such date will be considered a default (*see Liba Estates v Edryn Corp.*, 178 AD2d 152 [1991]).

As the Attorney General properly applied the common law (since neither of the two cited contractual provisions was applicable), his determination was not clearly erroneous or arbitrary and capricious.

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7166 In re Kylani R., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Kyreem B.,
Respondent-Appellant,

Administration for Children Services,
Petitioner-Respondent.

Randall S. Carmel, Syosset, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about September 22, 2010, which, upon fact-findings that respondent father sexually abused and neglected his stepdaughter and derivatively abused and neglected his two biological children, released the children to the custody of their mother, with supervision by petitioner Administration for Children's Services and, inter alia, limited respondent to supervised visitation with his two children, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that

respondent sexually abused and neglected his stepdaughter (*see* Family Court Act § 1012[e][iii]; § 1046[b][I]) and the derivative finding as to the two biological children (*see* Family Court Act § 1046[a][I]; *Matter of Marino S.*, 100 NY2d 361, 373-374 [2003], *cert denied* 540 US 1059 [2003]). The stepdaughter's testimony amply corroborated her out-of-court descriptions of the abuse (*see Matter of Christina F.*, 74 NY2d 532, 536-537 [1989]). Contrary to respondent's contention, the testimony contained only peripheral inconsistencies relating to dates and times, and the court did not err in crediting it.

The finding of derivative abuse and neglect is not undermined by the fact that, at the time of the abuse of the stepdaughter, one of the biological children was an infant and the other had not yet been born. The evidence of the abuse demonstrates that respondent's parental judgment and impulse

control are so defective as to create a substantial risk of harm to any child in his care (*see Marino S.*, 100 NY2d at 374; *Matter of Vincent M.*, 193 AD2d 398, 404 [1993]; *Matter of Nyjaiah M. [Herbert M.]*, 72 AD3d 567 [2010]).

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, JJ.

7167 Jennifer A. Patricka, Index 303888/09
Plaintiff-Respondent,

-against-

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

Montefiore Medical Center,
Defendant-Appellant.

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

Abraham & Abraham, LLC, South Ozone Park (Irwin D. Abraham of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 12, 2011, which, insofar as appealed from, denied the motion of defendant Montefiore Medical Center for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Montefiore's motion should have been granted because plaintiff's exclusive remedy in this action is under the Workers' Compensation Law. The record shows that plaintiff, an employee of Montefiore, was injured when she tripped on a sidewalk adjacent to the emergency room, on her way back from Montefiore's

human resources department to her own office, during working hours; it is uncontested that Montefiore was charged with the duty of maintaining in a safe condition the sidewalk on which plaintiff tripped. Although plaintiff contends that she was on a "purely personal mission" at the human resources department, inquiring about Montefiore holiday party tickets, this was, at least, a dual-purpose activity not unrelated to her job (*see Matter of Neacosia v New York Power Auth.*, 85 NY2d 471, 475 [1995]). Moreover, even accepting that this was a purely personal task, the record shows that plaintiff was returning to her office, during working hours, for the purpose of resuming work, and was injured on property which her employer was responsible to maintain (*see Sulecki v City of New York,* 74 AD3d 454 [2010]).

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7168 Robert Gumenick, et al., Index 651427/10
Plaintiffs-Appellants,

-against-

Christopher Arvidson,
Defendant-Respondent,

Darrin Krumpus, et al.,
Defendants.

Law Office of Robert J. Gumenick, P.C., New York (Robert J. Gumenick of counsel), for appellants.

John M. Wilson, Brooklyn, for respondent.

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered October 25, 2011, dismissing the complaint pursuant to an order, same court and Justice, entered October 14, 2011, which denied plaintiffs' motion for summary judgment in their favor and granted defendant Arvidson's cross motion for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, without costs, and the judgment vacated.

Plaintiffs' claims under the "Punch List" attached to the contract do not survive the closing on the property because the contract provided that none of its provisions survived the closing unless otherwise stated, and the contract did not exempt

the Punch List from the no-survival provision (*see Rothstein v Equity Ventures*, 299 AD2d 472, 475 [2002]).

However, the complaint states valid claims pursuant to General Business Law article 36-B and tort claims as to work performed subsequent to the closing. The housing merchant implied warranty, expressly incorporated into the contract, survived the closing (*see* General Business Law § 777-a[1]). The subject property was a "new home" for purposes of the statute because it was undisputedly a single-family house not lived in by the builder or leased for three continuous years (General Business Law § 777[5]).

Triable issues of fact exist as to whether defendant breached the implied warranty in that the home contained "material defects" within the meaning of General Business Law §§ 777(4) and 777-a(2). Further, triable issues of fact exist as to

whether defendant's agents negligently repaired the premises subsequent to the closing, resulting in damage.

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7169 The People of the State of New York, Ind. 1137/07
Respondent,

-against-

Earl Fowler,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lindsey J. Ramistella of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert K. Holdman, J. at plea; John P. Collins, J. at sentencing), rendered on or about August 27, 2010,

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

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

ENTERED: MARCH 22, 2012

CLERK

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

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7170 In re Aminata Sowe-Stevenson,
Petitioner-Respondent,

-against-

Musa Touray,
Respondent-Appellant.

Julie Hyman, P.C., Bronx (Julie Hyman of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (David G. Skillman of counsel), for respondent.

Order, Family Court, Bronx County (James E. d'Auguste, J.), entered on or about June 20, 2011, which denied appellant's objection to an order of support (Alicea Elloras, S.M.), dated October 13, 2010, unanimously affirmed, without costs.

The Support Magistrate was not required to rely on appellant's contradictory testimony regarding his income and expenses where he failed to complete the requisite financial disclosure affidavit and provided two conflicting sets of tax returns for 2008 and 2009 (*see* Family Court Act § 413[1][k]; *Matter of Saladin v Vicari*, 23 AD3d 215 [2005]). Appellant provided no documents which reliably supported his claimed income or business expenses, so a needs-based determination was appropriate (see *Matter of Darren F. v Marie-Amina T.*, 58 AD3d

493 [2009], *lv denied* 12 NY3d 879 [2009]).

We have considered and rejected appellant's other arguments, as well as petitioner's argument that the appeal should be dismissed.

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7171-
7172 Index 100826/08

American International Insurance Company, etc.,
Plaintiff-Appellant,

-against-

A. Steinman Plumbing & Heating Corp.,
Defendant,

950 Fifth Avenue Corporation,
Defendant-Respondent.

Gwertzman Lefkowitz Burman Smith & Marcus, New York (David Smith of counsel), for appellant.

Fixler & LaGattuta, LLP, New York (Paul F. LaGattuta III of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 7, 2011, in this subrogation action, dismissing the complaint as against defendant 950 Fifth Avenue Corporation (950 Fifth) pursuant to an order, same court and Justice, entered April 18, 2011, which granted 950 Fifth's motion for summary judgment, unanimously affirmed, without costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff's insured sustained water damage to his apartment when the float device regulating the flow of water into the water

tank on top of 950 Fifth's building failed, causing the tank to overflow. At the same time, the overflow alarm designed to warn those responsible for maintaining the building failed. Plaintiff paid the insured's claims for property damage and commenced this action seeking reimbursement.

950 Fifth established its entitlement to judgment as a matter of law. It submitted evidence showing that it did not have actual or constructive notice of a defective condition in the water tank and that both the float device and alarm system spontaneously and simultaneously failed. The record shows that the water tank was inspected and cleaned annually and that there were no prior problems with the float or alarm prior to the subject occurrence.

In opposition, plaintiff failed to raise a triable issue of fact. Its argument that 950 Fifth had been inadequately staffed on the day of the flood and that the water tank alarm actually worked, but nobody was there to hear it, was not supported by the evidence. Nor does the report of plaintiff's expert raise a triable issue. The expert's conclusion that 950 Fifth's doorman would not have heard the overflow alarm when it was activated is based on speculation (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *Zvinys v Richfield Ins. Co.*, 25 AD3d 358 [2006]).

Plaintiff's request for sanctions against 950 Fifth for spoliation of evidence, namely, the disposal of the alarm system and water float that failed, was properly denied. The float and alarm system were replaced on an emergency basis, and plaintiff had made no request that they be retained. Moreover, plaintiff's theory is not based on the failure of the systems, but on the failure of the people responsible for maintaining the premises. Plaintiff makes no showing as to how the discarded evidence would have allowed it to prove its case (*see e.g. Cameron v Nissan 112 Sales Corp.*, 10 AD3d 591 [2004]).

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

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7173 In re Ali C.,

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

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

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

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about March 7, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously reversed, on the law, without costs, and the petition dismissed.

As the presentment agency concedes, there is no indication in the record that a "reasonable and substantial effort" was made to notify appellant's mother of the juvenile delinquency proceeding (*see* Family Ct Act §§ 320.3, 341.2[3]). Because

appellant's placement has expired, the proper remedy is to dismiss the petition (*see Matter of James T.*, 304 Ad2d 864 [2003]; *Matter of Felicia C.*, 178 AD2d 530 [1991]).

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7174 Maureen Webb, Index 108864/08
Plaintiff-Appellant,

-against-

Greater New York Automobile Dealers Association, Inc., et al.,
Defendants-Respondents.

Law Offices of Nicholas A. Penkovsky, P.C., Riverdale (Nicholas A. Penkovsky of counsel), for appellant.

Putney, Twombly, Hall & Hirson LLP, New York (James E. McGrath, III of counsel), for respondents.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 21, 2011, which, in this action for sexual harassment and fraud, granted defendants' motion to dismiss the complaint for failure to serve a summons and complaint pursuant to CPLR 306-b, and denied plaintiff's cross motion for leave to extend the time for serving a summons and complaint, unanimously affirmed, without costs.

Plaintiff's counsel's failure to maintain an in-state office at the time she commenced the action was a violation of Judiciary Law § 470, which requires dismissal of the action (*see Kinder Morgan Energy Partners, LP v Ace Am. Ins. Co.*, 51 AD3d 580 [2008]; *Neal v Energy Transp. Group*, 296 AD2d 339 [2002];

Lichtenstein v Emerson, 251 AD2d 64, 64-65 [1998]).

The court also properly granted defendants' motion to dismiss plaintiff's action pursuant to CPLR 306-b, since defendants were not served within 120 days of the filing of the summons with notice. Plaintiff's cross motion for an extension of time to serve the summons with notice was properly denied, since she failed to demonstrate good cause for her failure to serve defendants for almost three years, and failed to show that the interests of justice would warrant granting of the motion (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]). Plaintiff established only that the decision to withhold service was part of a litigation strategy to first pursue one of the named defendants in a separate action.

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7175-
7175A Index 600359/10

Security Police and Fire Professionals of America Retirement Fund,
Plaintiff,

Arthur Murphy, Jr., etc., et al.,
Plaintiffs-Appellants,

-against-

John J. Mack, et al.,
Defendants-Respondents,

Morgan Stanley,
Nominal Defendant-Respondent,

Klaus Zumwinkel,
Defendant.

Grant & Eisenhofer P.A., New York (Jay W. Eisenhofer of counsel), for appellants.

Cravath, Swaine & Moore LLP, New York (Daniel Slifkin of counsel), for John J. Mack, James P. Gorman, Walid A. Chammah, Zoe Cruz, Jerker Johansson, Colm Kelleher, Gary G. Lynch, Thomas R. Nides, Robert W. Scully, Neal A. Shear, David H. Sidwell and Morgan Stanley, respondents.

Simpson Thacher & Bartlett LLP, New York (Bruce D. Angiolillo of counsel), for Roy J. Bostock, Erskine B. Bowles, Howard J. Davies, James H. Hance, Jr., Nobuyuki Hirano, C. Robert Kidder, Donald T. Nicolaisen, Charles H. Noski, Hutham S. Olayan, Charles E. Phillips, Jr., O. Griffith Sexton and Laura D. Tyson, respondents.

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 6, 2011, dismissing the complaint

with prejudice, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 10, 2010, which granted the motion of defendants Roy J. Bostock, Erskine B. Bowles, Sir Howard J. Davies, James H. Hance, Jr., Nobuyuki Hirano, C. Robert Kidder, Donald T. Nicolaisen, Charles H. Noski, Hutham S. Olayan, Charles E. Phillips, Jr., O. Griffith Sexton, and Dr. Laura D. Tyson (the outside or non-executive directors) to dismiss the complaint with prejudice pursuant to CPLR 3211(a)(7), unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs are shareholders of nominal defendant Morgan Stanley, a Delaware corporation; the other defendants are Morgan Stanley's directors and officers. Plaintiffs allege waste, breach of the duty of loyalty, and unjust enrichment, based on the board's alleged decisions in 2006, 2007, and 2009 regarding compensation for all of Morgan Stanley's tens of thousands of employees. They did not make a demand on the board before bringing this derivative action.

The motion court correctly dismissed this case for failure to show that a prelitigation demand would have been futile (*see e.g. Wilson v Tully*, 243 AD2d 229, 231 [1998]).

Under Delaware law, to show demand futility where the

underlying contested transaction is the result of a board decision, the complaint must allege "particularized facts creating a reason to doubt that '(1) the directors are disinterested and independent [or that] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment'" (*Wood v Baum*, 953 A2d 136, 140 [Del 2008], quoting *Aronson v Lewis*, 473 A2d 805, 814 [Del 1984], *overruled in part on other grounds by Brehm v Eisner*, 746 A2d 244, 253-254 [Del 2000] [emendation by *Wood*]). The motion court correctly found that defendant Mack was interested because, as a director, he approved his own compensation as CEO (*see Rales v Blasband*, 634 A2d 927, 936 [Del 1993]). Although defendant James P. Gorman (Morgan Stanley's CEO since January 2010) did not join the board until 2010 and, hence, did not take part as a director in the challenged decisions, we can assume that as an official of Morgan Stanley he would be found to be interested or lack independence (*In re Goldman Sachs Group, Inc. Shareholder Litig.*, 2011 WL 4826104, *7, 2011 Del Ch LEXIS 151, *24 [Oct. 12, 2011]). The issue whether the remaining directors (who are all outside directors) are interested will be addressed later.

To show a director's lack of independence, the complaint must create a reasonable doubt as to whether the outside director

was beholden to an interested director or so much under the latter's influence that his or her "'discretion would be sterilized'" (*Beam ex rel. Martha Stewart Living Omnimedia, Inc. v Stewart*, 845 A2d 1040, 1050 [Del 2004], quoting *Rales*, 634 A2d at 936]; *Orman v Cullman*, 794 A2d 5, 25 n 50 [Del Ch 2002]). The allegation that each of the outside directors receives more than $300,000 per year in director fees from Morgan Stanley is insufficient to create that doubt (*see e.g. In re Morgan Stanley & Co., Inc. Auction Rate Sec. Derivative Litig.*, 2009 WL 2195928, *1, 2009 US Dist LEXIS 65166, *4 [SD NY, July 29, 2009]). The majority of Morgan Stanley's board is composed of non-employee directors who cannot be fired by the interested inside directors (*see In re J.P. Morgan Chase & Co. Shareholder Litig.*, 906 A2d 808, 821 [Del Ch 2005], *affd* 906 A2d 766 [Del 2006]). The inside directors are not controlling shareholders of Morgan Stanley and therefore cannot oust the outside directors through a stockholder vote (*see id.*). Neither do the inside directors control the process by which outside directors are nominated to the board (*see Jacobs v Yang*, 2004 WL 1728521, *4, 2004 Del Ch LEXIS 117, *14-15 [Aug. 2, 2004], *affd* 867 A2d 902 [Del 2005]). Furthermore, the bulk of the outside directors' fees is paid in Morgan Stanley stock, not cash, which fact supports the

presumption that the directors "objectively considered the merits of the proposed corporate transaction" in deciding how to vote on it (*see Orman*, 794 A2d at 27 n 56).

Plaintiffs' allegation that outside director Sexton was a banker at Morgan Stanley from 1973 to 1995 does not suffice to raise a reasonable doubt that Sexton is not independent (*see e.g. In re Walt Disney Co. Derivative Litig.*, 731 A2d 342, 358 & n 30 [Del Ch 1998], *affd in part, revd in part on other grounds sub nom. Brehm v Eisner*, 746 A2d 244 [Del 2000]). Their allegation that Morgan Stanley conducts a significant amount of business with outside director Olayan's company does not suffice because "significant amount" is conclusory (*see e.g. Wilson*, 243 AD2d at 234; *Jacobs*, 2004 WL 1728521 at *6, 2004 Del Ch LEXIS 117 at *24). While plaintiffs allege that Morgan Stanley, Olayan's company, and unnamed others own Bracor, a company that has invested $500 million in Brazilian real estate, they do not specify the importance of Bracor to Olayan's company (*see J.P. Morgan*, 906 A2d at 822; *see also Kaplan v Wyatt*, 499 A2d 1184, 1187 & 1189 [Del 1985]).

In light of the fact that plaintiffs have not established that at least 7 members of Morgan Stanley's 14-member board were interested or lacked independence, we need not consider their

arguments about outside directors Bostock, Noski, and Phillips.

Plaintiffs contend that they alleged particularized facts creating a reason to doubt that the directors' compensation awards were the product of a valid exercise of business judgment (*see Aronson*, 473 A2d at 814), because waste does not constitute a valid exercise of business judgment and because the director defendants breached their duty of loyalty to Morgan Stanley by failing to exercise oversight over compensation. The complaint does not adequately plead waste. It lacks the "specific allegations of unconscionable transactions and details regarding who was paid and for what reasons they were paid" that are necessary for a determination whether the work done by Morgan Stanley's employees "was of such limited value to the corporation that no reasonable person in the directors' position would have approved their levels of compensation" (*see Goldman Sachs*, 2011 WL 4826104 at *17, 2011 Del Ch LEXIS 151 at *57, *56; *In re Walt Disney Co. Derivative Litig.*, 906 A2d 27, 74 [Del 2006]; *White v Panic*, 783 A2d 543, 554 [Del 2001]).

As to the duty of loyalty and oversight liability, assuming, arguendo, that the duty of oversight includes the duty to monitor business risk (*but see In re Citigroup Inc. Shareholder Derivative Litig.*, 964 A2d 106, 126, 131 [Del Ch 2009]), the

complaint fails to allege that "the board *consciously* failed to implement any sort of risk monitoring system or, having implemented such a system, *consciously* disregarded red flags signaling that the company's employees were taking facially improper, and not just ex-post ill-advised or even bone-headed, business risks" (*see Goldman Sachs*, 2011 WL 4826104 at *22 n 217, 2011 Del Ch LEXIS 151 at *73-74 n 217; *Stone ex rel. AmSouth Bancorporation v Ritter*, 911 A2d 362, 370 [Del 2006]; *Citigroup*, 964 A2d at 128).

We turn now to the issue whether the outside directors were interested. The "substantial likelihood" of personal liability for approving a contested transaction may render directors personally interested in the decision whether to pursue the demanded litigation (*Stone*, 911 A2d at 367). Here, the likelihood of liability is significantly less because the corporate charter provides that directors are exculpated from liability to the extent authorized by 8 Del C § 102(b)(7), i.e., except for claims based on fraudulent, illegal or bad faith conduct (*see Goldman Sachs*, 2011 WL 4826104 at *18, 2011 Del Ch LEXIS 151 at *59). Therefore, the complaint must allege particularized facts that would show "that the directors acted with scienter, i.e., that they had 'actual or constructive

knowledge' that their conduct was legally improper" (*see Wood*, 953 A2d at 141; *Citigroup*, 964 A2d at 132). The complaint does not allege such facts.

Because demand was not shown to be excused, we need not reach Morgan Stanley and the executive defendants' motion to dismiss for failure to state a cause of action (*see e.g. Jacobs*, 2004 WL 1728521 at *1, 2004 Del Ch LEXIS 117 at *2).

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7177-
7177A Joel Vig,
Plaintiff-Appellant,

-against-

The New York Hairspray Co., L.P.,
Defendant-Respondent.

Index 114613/07

Spizz & Cooper, LLP, Mineola (Harvey W. Spizz of counsel), for appellant.

Proskauer Rose LLP, New York (Neil H. Abramson of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered September 7, 2011, in an action alleging employment discrimination based on a disability, dismissing the complaint pursuant to an order, same court and Justice, entered August 1, 2011, which granted defendant's motion for summary judgment, unanimously affirmed, without costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The record demonstrates that plaintiff's claims accrued on August 14, 2004, when defendant informed him that his employment would be terminated as of August 17, 2004 (*see Pinder v City of New York*, 49 AD3d 280 [2008]; *Cordone v Wilens & Baker*, 286 AD2d

597, 598 [2001]). Plaintiff did not commence this action, however, until October 24, 2007, more than three years later. Accordingly, the action was properly dismissed as time-barred (*see* CPLR 214[2]; Administrative Code of City of NY § 8-502[d]).

Plaintiff's contention that his claims did not accrue until November 16, 2004, when he reported back to the theater after being medically approved to return to work, is unavailing (*see Matter of Patel v New York State Div. of Human Rights*, 216 AD2d 469, 470 [1995], *appeal dismissed* 87 NY2d 893 [1995]). Moreover, contrary to plaintiff's argument, the doctrine of equitable estoppel did not toll the running of the statute of limitations until the conclusion of the Musicians Union arbitration (*see Pinder* at 281; *Cordone* at 598).

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7178 Mac Truong, Index 102895/09
Plaintiff-Appellant,

Maryse Mac-Truong,
Plaintiff,

-against-

Jack Litman, et al.,
Defendants-Respondents.

Mac Truong, appellant pro se.

Litman, Asche & Gioiella, LLP, New York (Richard M. Asche of counsel), for respondents.

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered March 26, 2010, dismissing the complaint, and bringing up for review an order, same court and Justice, entered July 6, 2009, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Dismissal of this action was proper as it is barred by the doctrine of res judicata (*see generally O'Brien v City of Syracuse*, 54 NY2d 353 [1981]). The transactions upon which this action is premised were the subject of prior claims brought by and concluded against plaintiffs in both state and federal court (*see id.* at 357; *Elias v Rothschild*, 29 AD3d 448 [2006]). Contrary to plaintiffs' argument, the claims alleging violations

of plaintiffs' civil rights under 42 USC § 1983 and § 1985 were decided against plaintiffs on the merits and the breach of contract claim was fully litigated and decided against plaintiffs in Civil Court, New York County.

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7179 Claudia Duran, Index 304856/09
Plaintiff-Respondent,

-against-

Humayun Kabir,
Defendant-Appellant.

The Sullivan Law Firm, New York (James A. Domini of counsel), for appellant.

The Noll Law Firm, P.C., Syosset (Richard E. Noll of counsel), for respondent.

Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered August 26, 2011, which, in this action for personal injuries sustained in a motor vehicle accident, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing of his entitlement to judgment as a matter of law. Defendant submitted expert medical reports of a neurologist, who found normal ranges of motion, and of a radiologist who opined that changes shown in MRIs of the lumbar spine of the then 30-year-old plaintiff were degenerative, and that the MRI of the cervical spine showed no injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [2011]).

In opposition, plaintiff submitted the affirmed reports of

her physicians, who found limitations in the range of motion of plaintiff's cervical and lumbar spine shortly after the accident and approximately two years later. Plaintiff also submitted the MRI reports of a radiologist, who noted disc bulges in both the cervical and lumbar spine. This evidence raises triable issues of fact as to whether plaintiff sustained a "significant limitation of use" and "permanent consequential limitation of use" of the cervical and lumbar spine (Insurance Law § 5102[d]; *see Fuentes v Sanchez*, 91 AD3d 418 [2012]). While the MRI reports are unsworn, they are admissible, as the reports and MRI films were reviewed by one of plaintiff's physicians and were incorporated into the findings of plaintiff's doctors (*see Peluso v Janice Taxi Co., Inc.*, 77 AD3d 491, 492 [2010]). Plaintiff adequately explained the gap in treatment by submitting the affirmed report of a doctor, who opined that plaintiff had "reached an endpoint" in her physical therapy, and that there was no evidence that she was actively improving therefrom (*see Mitchell v Calle*, 90 AD3d 584, 585 [2011]).

Plaintiff's physicians also addressed defendant's findings of degeneration by opining that the injuries were causally related to the accident and that the accident aggravated a previously asymptomatic condition (*see Yuen v Arka Memory Cab*

Corp., 80 AD3d 481, 482 [2011]).

Factual issues as to liability are raised by the parties' conflicting deposition testimony. Such issues include whether plaintiff had a green arrow in her favor; whether defendant had the green light in his favor; and whether defendant's taxicab was stopped or moving prior to plaintiff's vehicle turn into the intersection (*see e.g. Shepperson v Salas*, 216 AD2d 199 [1995]).

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7181 Everett McArthur, Index 302339/07
Plaintiff-Respondent,

Donald Smith,
Plaintiff,

-against-

Act Limo, Inc., et al.,
Defendants-Appellants.

Marjorie E. Bornes, New York, for appellants.

Silbowitz, Garafola, Silbowitz, Schatz & Frederick, L.L.P., New York (Howard E. Frederick of counsel), for respondent.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered August 29, 2011, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the claims asserted by plaintiff Everett McArthur, unanimously modified, on the law, to the extent of granting the motion as to plaintiff McArthur's claims for injuries to his cervical and lumbar spine, 90/180-day injury, and permanent loss of use claim, and otherwise affirmed, without costs.

Plaintiff McArthur, who was involved in four accidents prior to the accident that is the subject of this litigation, asserts that he sustained a serious injury pursuant to Insurance Law § 5102(d). He claims that as a result of this most recent

accident, he suffered injuries to, inter alia, his cervical and lumbar spine, right shoulder, neck and right hip. MRIs taken before this accident showed cervical and lumbar herniations and bulges for which plaintiff was treated.

Defendants met their initial burden with respect to plaintiff's claims of injury to his neck, back and shoulder by submitting affirmed reports of a radiologist and orthopedist, which asserted that plaintiff's neck and back injuries pre-existed the accident and were degenerative in nature. The reports further asserted that any injury to plaintiff's shoulder had resolved (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350-352 [2002]; *Grant v United Pavers Co., Inc.*, 91 AD3d 499 [2012]).

In opposition, plaintiff failed to raise an issue of fact as to his claimed cervical and lumbar spine injuries, since his doctors ignored the effect of his prior accidents, and did not present any evidence that those claimed injuries were different from the injuries that predated the subject accident (*see Mitrotti v Elia*, 91 AD3d 449 [2012]; *compare, Fuentes v Sanchez*, 91 AD3d 418 [2012]). However, plaintiff raised an issue of fact as to his right shoulder injury by relying on the sworn reports of the orthopedic surgeon who performed arthroscopic surgery to

repair a tear. The reports explained how the injury was caused by the accident and quantified continuing limitations in the right shoulder, some two years after the surgery (*see Perl v Meher*, 18 NY3d 208, 219 [2011]; *Jang Hwan An v Parra*, 90 AD3d 574 [2011]).

Plaintiff does not dispute that he did not meet the requirements for establishing a 90/180-day claim and that he has not suffered a permanent loss of use of any body organ or function.

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7182 Amy Salman, Index 103706/08
Plaintiff-Appellant,

-against-

L-Ray LLC, doing business as
Alta Restaurant, et al.,
Defendants-Respondents.

Bisogno & Meyerson, Brooklyn (Elizabeth Mark Meyerson of counsel), for appellant.

White and McSpedon, P.C., New York (Wayne S. Leibert of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 13, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she was injured in defendants' restaurant when she fell on a step as she was returning from the restroom because it was too dark for her to see. Plaintiff testified that small candles in glass containers were set on each of the three steps leading down to the bar area, and that she did not see any debris, water, or defect on the steps at the time of her fall. She stated she did not know "[e]xactly what happened," except "my left leg being in the air missing the step and falling

on the middle step."

Defendants established their entitlement to judgment as a matter of law. Defendants submitted evidence, including testimony and photographs, demonstrating that the condition of the steps was not inherently dangerous, and that there was recessed lighting in the area, as well as the small candles on each step (*see Broodie v Gibco Enters., Ltd*., 67 AD3d 418 [2009]; *Burke v Canyon Rd. Rest*., 60 AD3d 558 [2009]; *Reyes v La Ronda Cocktail Lounge*, 27 AD3d 397 [2006]). Defendants also submitted the affidavit of an expert who measured the lighting at the three steps and opined that it complied with applicable standards, and testimony from the restaurant's general manager that the lighting fixtures in the area of plaintiff's accident remained unchanged after the accident (*cf. Gilson v Metropolitan Opera*, 15 AD3d 55, 59 [2005], *affd* 5 NY3d 574 [2005]).

In opposition, plaintiff failed to raise a triable issue of fact. She submitted the affidavit of an expert who never inspected or measured the steps, which was lacking in any foundation and therefore insufficient to raise an issue of fact as to the adequacy of the lighting or any other defect in the

steps (*see Zvinys v Richfield Inv. Co.*, 25 AD3d 358, 359-360 [2006]).

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

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

ENTERED: MARCH 22, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7183N George Kralik, et al., Index 107822/98
Plaintiffs-Appellants,

-against-

239 East 79th Street Owners Corp.,
Defendant-Respondent.

Finder Novick Kerrigan LLP, New York (Thomas P. Kerrigan of counsel), for appellants.

Rosenberg & Pittinsky, LLP, New York (Laurence D. Pittinsky of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered December 17, 2011, which denied plaintiffs' motion for an award of attorneys' fees, unanimously affirmed, without costs.

The motion court did not abuse its discretion in denying the prevailing plaintiffs attorneys' fees pursuant to Real Property Law § 234 because the cooperative's position was justified by the state of the law when the action was commenced (*see Wells v East 10th St. Assoc.,* 205 AD2d 431 [1994], *lv denied* 84 NY2d 813 [1995]). Contrary to plaintiffs' contention, courts have

discretion to deny such fees based on equitable considerations and fairness (*see Solow Mgt. Corp. v Lowe*, 1 AD3d 135 [2003]; *Jacreg Realty Corp. v Barnes*, 284 AD2d 280 [2001]).

In view of the foregoing, it is unnecessary to address the other grounds urged in support of affirmance.

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

ENTERED: MARCH 22, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, Román, JJ.

7307N-
7308N Index 651710/10

Gama Aviation Inc., et al.,
Plaintiffs-Appellants,

-against-

Sandton Capital Partners, L.P.,
et al.,
Defendants-Respondents.

- - - - -

KB Acquisition, LLC,
Counterclaim Plaintiff-Respondent,

-against-

Gama Aviation Inc., et al.,
Counterclaim Defendants-Appellants.

Boies, Schiller & Flexner LLP, Armonk (Courtney R. Rockett of counsel), for appellants.

Day Pitney LLP, New York (Alfred W.J. Marks of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 16, 2010, which, insofar as appealed from, denied plaintiffs' motion for a preliminary injunction, unanimously affirmed, without costs. Order, same court and Justice, entered March 11, 2011, which, insofar as appealed from as limited by the briefs, granted defendant-counterclaim plaintiff KB Acquisition, LLC's motion for a preliminary injunction ordering plaintiffs and additional counterclaim

defendant Gama Holdings Limited (collectively, Gama) not to use a certain airplane and to make monthly payments to KB, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, the motion denied, and the injunction vacated.

Plaintiffs failed to show a likelihood of success on the merits, as required for the issuance of a preliminary injunction (*see e.g. Doe v Axelrod*, 73 NY2d 748, 751 [1988]). In the underlying lawsuit, they seek to reform a 24-month note to a 60-month note based on mutual mistake. However, given the contradiction between the affidavits submitted by plaintiffs and the affiants' own e-mails around the time of the transaction, plaintiffs failed to satisfy the heavy burden of overcoming the presumption that the executed note reflected the parties' true intention (*see George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]).

There was no reason to issue an injunction directing Gama to make monthly payments to KB, since KB can recover the money at law (*see Corris v 129 Front Co.*, 85 AD2d 176, 178 [1982]). Indeed, to the extent it sought the payment of money, KB could not show it would suffer irreparable injury if the requested injunction were not granted (*see Matter of J.O.M. Corp. v*

Department of Health of State of N.Y., 173 AD2d 153, 154 [1991]; *Louis Lasky Mem. Med. & Dental Ctr. LLC v 63 W. 38th LLC*, 84 AD3d 528 [2011]).

KB also failed to show irreparable injury in the absence of an injunction against Gama's using the plane. If the plane loses value by being flown or by being in an accident, that damage is calculable (*see e.g. OraSure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348, 348 [2007]). In addition, the balance of the equities weighs in Gama's favor (*see id.* at 349; *see also Battenkill Veterinary Equine v Cangelosi*, 1 AD3d 856, 859 [2003]; *Wilf v Halpern*, 194 AD2d 508 [1993], *lv dismissed* 82 NY2d 846 [1993]). Before the parties resorted to the courts, Gama could use the plane. The court order prohibiting Gama from using the plane "dramatically altered, rather than maintained, the status quo" pending resolution on the merits (*see New York Auto. Ins. Plan v New York Schools Ins. Reciprocal*, 241 AD2d 313, 315 [1997]).

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

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

ENTERED: MARCH 22, 2012

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6407 In re Marcus B.,

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

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Robert R. Reed, J. at fact-finding hearing; Monica Drinane, J. at mistrial declaration; Nancy M. Bannon, J. at dismissal motion and disposition), entered on or about January 26, 2011, reversed, on the law, without costs, and the petition dismissed.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
Karla Moskowitz
Rolando T. Acosta
Dianne T. Renwick, JJ.

6407

x

In re Marcus B.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

x

Marcus B. appeals from an order of disposition, Family Court, Bronx County (Robert R. Reed, J. at fact-finding hearing; Monica Drinane, J. at mistrial declaration; Nancy M. Bannon, J. at dismissal motion and disposition), entered on or about January 26, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute possession or sale of a toy or imitation firearm (Administrative Code of City of NY § 10-131[g]), and placed him with the Office of Children and Family Services for a period of 12 months.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein and Leonard Koerner of counsel), for presentment agency.

CATTERSON, J.

In this case arising from the adjudication of a petition for juvenile delinquency, the declaration of a mistrial due to the presiding Judge's transfer from Family Court to Civil Court was a matter of administrative convenience rather than "manifest necessity." Therefore, the commencement of a new fact-finding hearing violated the appellant's constitutional protection from double jeopardy.

The record reflects that on November 6, 2009, at 5:00 p.m., the appellant was apprehended and arrested for carrying what several detectives allegedly observed was a black semi-automatic firearm. The gun was later discovered to be a BB gun. This case was commenced by the filing of a juvenile delinquency petition against the appellant on November 20, 2009, alleging unlawful possession of weapons by persons under sixteen pursuant to Penal Law § 265.05, and an act that, if committed by an adult, would constitute unlawful possession or sale of a toy or imitation firearm pursuant to Administrative Code of City of NY § 10-131(g). On the date the petition was filed, the Family Court assigned the appellant counsel and remanded him to the Commissioner of Juvenile Justice for detention.

A fact-finding hearing commenced on December 2, 2009. At some point in early January 2010, the Judge presiding over the hearing advised the parties that he would soon be transferred to

the Civil Court. On January 26, 2010, when the presentment agency rested its case, the trial transcript reflects that the appellant made a prima facie motion to dismiss the petition which was denied. The appellant then requested a continuance that was also denied. The court informed counsel that she risked a mistrial if she did not finish the case the next day.

The following day, the appellant moved to dismiss on the ground that the Judge was forcing the completion of the trial at the expense of the appellant's right to adequately prepare his defense. The appellant's counsel argued that the witnesses could not be produced that day, and that forcing her to proceed without proper records or preparation was overreaching on the part of the court. The appellant's counsel also argued that the relocation of the Judge for administrative reasons did not constitute "manifest necessity" warranting a mistrial. The motion was denied, and the appellant's attorney objected, but the court adhered to its decision and adjourned the matter to January 29, 2010 for the appellant's counsel to complete presentation of the case.

However, on January 29th, attorneys who served on the 18-b panel with the appellant's counsel advised the court that the appellant's counsel had been hospitalized for a sudden illness. In the absence of the appellant's counsel, the Judge informed the parties that he was advised by the Supervising Judge of the Bronx

Family Court to adjourn the matter for a general call on February 3.

On February 3, 2010, while the appellant's counsel was still hospitalized, the Supervising Judge declared a mistrial and adjourned the matter for a new fact-finding hearing. On the day of the hearing, the appellant moved, before a new judge, to dismiss the proceeding on the ground that a new fact-finding hearing subjected him to double jeopardy. The appellant argued that the transfer of the Judge who originally heard the matter to the Civil Court was not a proper ground to declare a mistrial. The court denied the appellant's motion, concluding that the transfer of a judge from one court to a new court established "manifest necessity," assuming that everything possible was done to complete the trial while the Judge was still presiding over the matter.

After further adjournments, on March 26, 2010, the appellant admitted to having an imitation gun in his possession in satisfaction of the petition. On January 26, 2011, after a series of hearings, the appellant was adjudicated a juvenile delinquent. The court found that the least restrictive alternative was placement with Office of Children and Family Services for a period of 12 months, with no credit for time served.

On appeal, the appellant argues that the court erred in

finding that there was "manifest necessity" for the declaration of a mistrial at the appellant's first fact-finding hearing. Accordingly, the appellant argues that further prosecution violated his constitutional protection from double jeopardy and the petition should have been dismissed. For the reasons set forth below, we agree.

The Double Jeopardy Clauses in the Fifth Amendment to the United States Constitution and in article I, § 6 of the New York Constitution protect an accused against multiple prosecutions for the same offense. People v. Ferguson, 67 N.Y.2d 383, 387, 494 N.E.2d 77, 80, 502 N.Y.S.2d 972, 975 (1986). This protection applies to respondents in juvenile delinquency cases. See Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779 (1975). The Double Jeopardy Clause limits the instances in which a mistrial can be declared without a criminal defendant's consent because the defendant possesses a "valued right to have his trial completed by a particular tribunal." Hall v. Potoker, 49 N.Y.2d 501, 505, 427 N.Y.S.2d 211, 214, 403 N.E.2d 1210, 1212 (1980) (internal quotation marks omitted).

Thus, when a mistrial is declared without the consent of the accused, the prohibition against double jeopardy precludes retrial for the same offense unless there is a "'manifest necessity'" for the mistrial or "'the ends of public justice would otherwise be defeated.'" Matter of Enright v. Siedlecki,

59 N.Y.2d 195, 199, 464 N.Y.S.2d 418, 421, 451 N.E.2d 176, 179 (1983), quoting United States v. Perez, 9 Wheat. (22 U.S.) 579, 580, 6 L.Ed. 165 (1824). Indeed, New York Criminal Procedure Law § 280.10(3) allows a court to declare a mistrial only when it is "physically impossible to proceed with the trial in conformity with law." Such instances include when the judge or other essential court personnel are unavailable due to death or serious illness. People v. Goldfarb, 152 App. Div. 870, 874, 138 N.Y.S. 62, 65 (1st Dept. 1912), aff'd, 213 N.Y. 664, 107 N.E. 1083 (1914); see e.g. People v. Mason, 233 A.D.2d 271, 650 N.Y.S.2d 131 (1st Dept. 1996), lv. denied, 89 N.Y.2d 944, 655 N.Y.S.2d 895, 678 N.E.2d 508 (1997) (a mistrial was correctly declared when a juror was disqualified due to illness and no alternate juror was available).

Although great deference is accorded a trial court's declaration of a mistrial, a trial court abuses its discretion when the declaration of a mistrial is based solely upon the convenience of the court. People v. Michael, 48 N.Y.2d 1, 9, 420 N.Y.S.2d 371, 375, 394 N.E.2d 1134, 1138 (1979). Furthermore, the declaration of a mistrial based upon the mere reassignment of a judge for administrative purposes, without more, is an abuse of discretion. See e.g. Matter of Kim v. Criminal Ct. Of City of N.Y., 77 Misc. 2d 740, 354 N.Y.S.2d 833 (Sup Ct., New York County 1974), aff'd, 47 A.D.2d 715, 366 N.Y.S.2d 608 (1st Dept 1975)

(trial judge abused his discretion in declaring a mistrial on the ground that the case could not be concluded that day and that the judge was to be assigned to another court part the following week).

In this case, the Supervising Judge declared a mistrial due to the presiding Judge's reassignment from Family Court to Civil Court. The Supervising Judge stated that "the matter cannot be continued either because the judge who was hearing the matter is no longer in Family Court and additionally at this time Part 4, [the judge who was hearing the matter], was trying to finish the matter but [appellant's counsel] was hospitalized." However, the court failed to explain how the transfer was an impediment to the original presiding Judge's completion of the case. The appellant accurately points out that the hearing was virtually completed and the Civil Court to which the Judge was reassigned is located only a few blocks away from the Family Court. Moreover, there is nothing in the record to suggest that it was "physically impossible" for the Judge to finish the case due to death or illness. Because there is no evidence that the declaration of a mistrial in this case was manifestly necessary rather than merely convenient for the court, the declaration of mistrial was an abuse of discretion.

Contrary to the presentment agency's argument, the Judge who originally presided in the matter retained jurisdiction to hear

the case after his transfer. New York Constitution, article VI, § 26(k), provides that "[a]fter the expiration of any temporary assignment, ... the judge or justice assigned shall have all the powers, duties and jurisdiction of a judge or justice of the court to which he or she was assigned with respect to matters pending before him or her during the term of such temporary assignment." Courts have interpreted this section to authorize judges who were temporarily assigned to other courts to adjudicate matters that were pending before them during their temporary assignments, even after the temporary assignment had terminated. See e.g. People v. Yannicelli, 40 A.D.2d 564, 565, 334 N.Y.S.2d 550, 551 (2d Dept. 1972), aff'd, 33 N.Y.2d 621, 347 N.Y.S.2d 580, 301 N.E.2d 549 (1973) (judge retained jurisdiction to impose sentences on defendants after the expiration of his temporary assignment "by virtue of the provisions of [§ 26(k)]").

We also reject the presentment agency's argument that appellant's admission waived or forfeited his double jeopardy claim. An admission to a juvenile delinquency petition corresponds to a guilty plea in an adult criminal proceeding. Matter of Daniel Richard D., 27 N.Y.2d 90, 97, 313 N.Y.S.2d 704, 710, 261 N.E.2d 627, 631 (1970), cert. denied sub nom., Daniel Richard D. v. County of Onondaga, 403 U.S. 926, 91 S.Ct. 2244 (1971). While a guilty plea may waive a statutory double jeopardy claim, a constitutional claim of double jeopardy

survives a guilty plea. See People v. Prescott, 66 N.Y.2d 216, 220, 495 N.Y.S.2d 955, 957-958, 486 N.E.2d 813, 815-816 (1985), cert. denied, 475 U.S. 1150, 106 S.Ct. 1804 (1986), citing Menna v. New York, 423 U.S. 61, 96 S.Ct. 241 (1975). Moreover, although a constitutional double jeopardy claim may be expressly waived in a plea agreement (see People v. Allen, 86 N.Y.2d 599, 635 N.Y.S.2d 139, 658 N.E.2d 1012 (1995)), nothing in the record indicates that the appellant expressly waived that claim when he admitted to the petition.

Accordingly, the order of disposition, Family Court, Bronx County (Robert R. Reed, J. at fact-finding hearing; Monica Drinane, J. at mistrial declaration; Nancy M. Bannon, J. at dismissal motion and disposition), entered on or about January 26, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute possession or sale of a toy or imitation firearm (Administrative Code of City of NY § 10-131[g]), and placed him with the Office of Children and Family Services for a

period of 12 months, should be reversed, on the law, without costs, and the petition dismissed.

All concur.

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

ENTERED: MARCH 22, 2012

CLERK

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6511 Kendra Cividanes, Index 308141/08
Plaintiff-Respondent,

-against-

City of New York,
Defendant,

Manhattan and Bronx Surface Transit
Operating Authority, et al.,
Defendants-Appellants.

Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for appellants.

Burns & Harris, New York (Blake G. Goldfarb of counsel), for respondent.

Order, Supreme Court, Bronx County (Faviola A. Soto, J.), entered May 26, 2010, affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Dianne T. Renwick
Sheila Abdus-Salaam, JJ.

6511
Index 308141/08

x

Kendra Cividanes,
Plaintiff-Respondent,

-against-

City of New York,
Defendant,

Manhattan and Bronx Surface Transit
Operating Authority, et al.,
Defendants-Appellants.

x

Defendants Manhattan and Bronx Surface Transit Operating Authority and New York City Transit Authority appeal from an order of the Supreme Court, Bronx County (Faviola A. Soto, J.), entered May 26, 2010, which, to the extent appealed from as limited by the briefs, denied their cross motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d).

Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for appellants.

Burns & Harris, New York (Blake G. Goldfarb and Judith F. Stempler of counsel), for respondent.

RENWICK, J.

In this action to recover damages for personal injuries, plaintiff alleges that she was injured when she stepped into a hole and fell after alighting from a bus owned and operated by defendants. The court below properly rejected defendants' allegations that the No-Fault Insurance Law, which would have required plaintiff to establish that she sustained a serious injury as a result of the accident, applies to this matter. The controlling precedent is *Walton v Lumbermens Mut. Cas. Co. (*88 NY2d 211 [1996]), which holds that for the No-Fault Law to apply, the vehicle must be the proximate cause of the plaintiff's injuries.

This dispute arises from an accident that occurred on the morning of May 28, 2008. Plaintiff was allegedly injured as she exited a bus owned and operated by defendants Manhattan and Bronx Surface Transit Operating Authority and New York City Transit Authority (defendants). Plaintiff testified at a General Municipal Law § 50-h hearing that as she exited the rear of the bus, she "stepped off the last step into a hole and fell." She stated that the bus did not pull completely into the bus stop; she was let out "in front of the bus stop." The bus continued on its route. She described the hole into which she stepped and fell as being "pretty far away from the curb;" while the front of

the bus “pulled about a foot away from the curb,” the “back of the bus was on an angle, so it was further away from the curb.”

At the scene, plaintiff’s left ankle started to swell. An ambulance arrived, and took her to Jacobi Medical Center’s emergency room, where the staff took x-rays of her left ankle, but found no break or fracture. They wrapped the ankle with a bandage, gave her crutches and told her to visit her primary care doctor. Plaintiff was released the same day. The following day, plaintiff went to the emergency room of Montefiore Medical Center by taxi, because the pain in her ankle was “too much with the Ibuprofen.” At Montefiore, they prescribed a higher dose of Ibuprofen, rewrapped her ankle with an air cast and discharged her. She returned to Montefiore the same day, and was prescribed Percocet. Her primary care physician referred her to an orthopedist, who prescribed a new type of pain medicine and physical therapy, and sent her for an MRI. Plaintiff testified that she was confined to her home “[m]ostly the first week” and confined to her bed the “first few days, about two or three days.”

Afer plaintiff commenced this action, alleging that defendants were negligent in failing to provide a safe and adequate place for her to enter and exit the bus, defendants Manhattan and Bronx Surface Transit Operating Authority and New

York City Transit Authority (defendants) moved for summary judgment, arguing that plaintiff did not sustain a serious injury under Insurance Law § 5102(d). In support of their motion, defendants submitted affidavits from an orthopedist and a neurologist who each conducted an independent physical examination of plaintiff. Their individual examination of the left knee similarly revealed normal range of motion. The MRI of plaintiff's left ankle, as reviewed by defendants' radiologist, did not reveal tendinopathy, ligamentous injury or fracture. Because both the orthopedist and neurologist diagnosed plaintiff as having suffered a resolved sprained left ankle, they similarly opined that plaintiff had not suffered a serious injury as a result of the accident.

In opposition, plaintiff argued that she was injured after she exited the bus and therefore was not a "covered person" pursuant to the No-Fault who has to satisfy the "serious injury" threshold. Plaintiff further argued that defendants' liability did not arise from its "use and operation" of the bus, but "rather from its duty to provide plaintiff with a safe place" to alight from the bus. Alternatively, plaintiff argued that if the threshold statute were to apply, defendants failed to meet their burden on summary judgment. Finally, plaintiff argued that, if defendants were found to have met their burden, she raised a

triable issue of fact by the submission of objective medical evidence. Essentially, plaintiff submitted the affirmed report of an orthopedist who examined her twelve days after the fall and an MRI of her left knee, dated June 17, 2008, which revealed some swelling. The orthopedist's examination revealed moderate limitations in the range of motion of plaintiff's left ankle.

The court rejected defendants' argument that plaintiff's accident arose from the use or operation of the bus so as to implicate the No-Fault Law. The court reasoned that "[t]he accident did not occur because of the inherent nature of the bus, it occurred outside the bus; the bus itself did not produce the injury." The court further noted that defendants did not address whether, as a common carrier, they breached their duty to stop the bus at a place where plaintiff could safely disembark. Accordingly, the court denied defendants' motion, prompting this appeal.

One of the main features of the No-Fault Insurance Law is that it limits the right to bring a personal injury action for damages arising out of an automobile accident (Insurance Law § 5104[a]). On the one hand, "first-party benefits," also referred to as basic economic loss coverage, are available to a "covered

person" regardless of fault (*id.*).[1] On the other hand, in exchange for receiving such no-fault benefits, a person injured in an automobile accident may bring a plenary action in tort to recover for noneconomic loss but only if he or she has suffered a "serious injury" within the meaning of the No-Fault Law (*Oberly v Bangs Ambulance*, 96 NY2d 296, 296-297 [2001]).

In this case, where plaintiff alleges only non-economic loss, it cannot be seriously disputed that she did not suffer a serious injury as defined by Insurance Law § 5102(d). Defendants established lack of serious injury by submitting, inter alia, the affirmed reports of an orthopedist and a neurologist, who both examined plaintiff, found normal ranges of motion on her left ankle, and reached the same conclusion that she sustained a resolved ankle sprain (*see Beatty v Miah*, 83 AD3d 610 [2011]). In response, plaintiff failed to present any objective findings that she sustained any serious injury. While she submitted an MRI report, that report did not indicate that anything was wrong with her ankle, other than some swelling, which is not a serious

[1] "First-party benefits" are payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle (Insurance Law § 5102[b]). The first $50,000 in medical expenses and lost earnings constitute basic economic loss (Insurance Law § 5102[a]).

injury. In addition, plaintiff failed to submit a recent examination finding limitations in range of motion, after defendants' expert found none *(see Shu Chi Lam v Wang Dong*, 84 AD3d 515 [2011]). Finally, plaintiff's testimony refuted any 90/180-day claim, since she testified that she was confined to her home "[m]ostly the first week" and confined to her bed the "first few days, about two or three days" (*see Lopez v Eades*, 84 AD3d 523 [2011]).

Accordingly, the question before us is whether the motion court properly found that the serious injury threshold was not at issue because plaintiff's personal injuries did not arise out of an automobile accident within the meaning of the No-Fault Law. The seminal case on this issue is *Walton v Lumbermens Mut. Cas. Co.(*88 NY2d 211 [1996]). In *Walton,* the Court of Appeals made clear that, under the plain language of the statute, the essential question in determining whether a given injury is covered by the No-Fault Law is whether the plaintiff's injury arises out of the "use or operation" of the automobile (*id.* at 213). The statute, however, did not define "use or operation." In *Walton*, the issue arose within the context of No-Fault, basic economic benefits. Such benefits under No-Fault Insurance Law, the Court held, are premised on the happening of an automobile accident. That is, the vehicle must be the proximate cause of

the plaintiff's injury (*id*. at 214-215).

The *Walton* Court explained that the proximate clause limitation was needed to circumscribe the benefits of the No-Fault Law in line with that law's purposes. "Its purposes were to remove the vast majority of claims arising from vehicular accidents from the sphere of common-law tort litigation, and to establish a quick, sure and efficient system for obtaining compensation for economic loss suffered as a result of such accidents" (*id.* at 214). The No-Fault Law assures that every auto accident victim would be compensated promptly without regard to fault, that "the vast majority of auto accident negligence suits" would be eliminated, "freeing our courts for more important tasks," and that "substantial premium savings [would accrue] to all New York motorists" *(Argentina v Emery World Wide Delivery Corp*, 93 NY2d 554, 562 [1999] [internal quotation marks and citations omitted]). Similarly, the No-Fault Law avoids litigation costs including the burden of attorneys' fees that cut into the amounts ultimately received by accident victims (*see* Prosser and Keeton, Torts § 84, at 600-607 [5th ed]).

The No-Fault Law works to ameliorate these problems, but "not all injuries in and among motor vehicles were meant to benefit from the expediency provided by the No-Fault Law" *(Argentina,* 93 NY2d at 562). Thus, the proximate cause

limitation was necessary to avoid an overbroad application of the No-Fault Law (*id.*). "Any other rule would permit recovery for claims based on back strains, slip-and-fall injuries, and other similar injuries occurring while the vehicle is being used but which are wholly unrelated to its use" (*Walton,* 88 NY2d at 215).

In *Walton,* the Court found that the accident fell outside the ambit of the No-Fault Law. The facts in *Walton* are instructive. The plaintiff, a truck driver, was injured while delivering goods to a supermarket. He backed his employer's tractor trailer up to the supermarket's loading dock, got out of the truck, and opened the rear cargo door (*id.* at 213). The supermarket provided an apparatus called a "levelator" to facilitate delivery and, after the plaintiff raised the levelator to the same height as the truck bed and attached plates from the levelator to the truck, a ramp was created that enabled him to transfer goods from the truck to the levelator. After placing the goods onto the levelator, he could then lower the levelator to the height of the loading dock and transport the goods to the loading dock. While using the levelator and standing on it with a load of products, the levelator tipped over and threw him to the ground, causing him injuries (*id.*). The Court found that the truck was not the proximate cause of Walton's injuries; they arose out of the operation of the levelator (*id.* at 214-215).

As *Walton* and its progeny make abundantly clear, the proximate cause requirement of the No-Fault Law is not established merely because injuries occurred during the occupancy of or while entering or exiting a vehicle. Adopting this approach would be tantamount to equating proximate cause with the term "occupying" a vehicle. However, more than occupancy is required to establish a causal link between a motor vehicle and a claimant's injuries. Instead, what *Walton* requires for the No-Fault Law to apply is that the motor vehicle itself be the instrumentality which produces the injuries (*compare Zaccari v Progessive Northwestern Ins. Co.*, 35 AD3d 597 [2006] *and Sullivan v Barry Scott Agency, Inc.*, 23 AD3d 889 [2005], *with Mazzarella v Paolangeli*, 63 AD3d 1420 [2009], *lv denied* 13 NY3d 708 [2009]).

For example, in *Sochinski v Bankers & Shippers Ins. Co.* (221 AD2d 889 [1995]), the Third Department held that the claimant did not qualify for first-party, no-fault benefits even though the injury occurred while the claimant was occupying a motor vehicle. Specifically, the insured was allegedly injured when airborne particles caused by sandblasting at a highway construction site entered the car's open window and lodged in his eyes. The court held that the claimant did not qualify for first-party, no-fault benefits because the motor vehicle was wholly incidental to the event which produced the injury; it was not the instrumentality,

i.e. proximate cause, of the injury (*id.*).

Conversely, in *Matter of Farm Family Cas. Ins. Co. (Trapani)* (301 AD2d 740 [2003]), the claimant's injuries, which occurred while alighting from a motor vehicle, were deemed to fall within the ambit of the No-Fault Law where the vehicle itself was the instrumentality that caused the claimant's injuries. In *Trapani*, the driver lost control of her car and struck a utility pole, pole, causing the power lines to short out and rain sparks and hot pieces of wire down onto the 75-year-old claimant, who was standing in the garden of her home along the roadway. In attempting to run from this hazard, claimant fell and sustained injuries to her head and left knee. The court found that the vehicle proximately caused the claimant's injuries since the hazard that caused the fall was triggered by the impact of the car on the pole (*id.*).

In this case, under any fair interpretation of the evidence, it cannot be said that the vehicle in question was the instrumentality that caused plaintiff’s fall. First, her accident did not arise out of the "inherent nature" of the bus; she stepped into a hole and fell. Second, the accident did not arise within the "natural territorial limits" of the bus; she fell on the street. And third, while the bus may have positioned plaintiff near the condition which ultimately produced the

injury, by letting her off in front of the hole, the bus itself was not the instrumentality that produced the alleged injury. Instead, the act of stepping into the hole and twisting her ankle produced plaintiff's sprained ankle (*cf. Matter of Travelers Property Cas. Co. [Landau]* 27 AD3d 477 [2006] [no-fault does not apply where claimant was struck while preparing to enter a parked car]; *Matter of New York Cent. Mut. Fire Ins. Co. [Hayden-Allstate Ins. Co.]*, 209 AD2d 929 [1994] [no-fault does not apply to personal injuries suffered by a passenger who got out of a vehicle and fell through a hole in a railroad trestle]). As the Court of Appeals stated, "Where, as here, the plaintiff's injury was caused by an instrumentality other than the insured vehicle, liability for the losses sustained are more properly addressed outside the area of no-fault motor vehicle insurance" (*Walton*, 88 NY2d at 214).

Defendants rely on a recent decision from the Second Department, with a seemingly similar fact pattern. In *Manuel v New York City Tr. Auth.* (82 AD3d 1059 [2011]), the plaintiff alleged that he was injured when he fell in a hole in the street while alighting from a bus. After a trial on the issue of liability, the jury found that the defendant was negligent, and that its negligence was a substantial factor in causing the plaintiff's accident, and that the plaintiff was not negligent.

The Second Department, however, ordered a new trial, because the issue of whether the plaintiff sustained a serious injury within the meaning of the No-Fault Law should have been submitted to jury. In the court's view, the No-Fault Law applied because the negligent operation of the bus was the proximate cause of plaintiff's injuries, where, like here, the plaintiff's theory of liability was that the accident resulted from the bus driver's positioning of the bus next to a hole in the street when he pulled into the bus stop. The Court also found it significant that the plaintiff was not completely outside of the bus when the accident occurred.

Although is unclear what the Court meant when it stated that the plaintiff was not completely outside of the bus when the accident occurred, to the extent the decision in *Manuel* reaches a contrary conclusion under seemingly similar circumstances to this case, we decline to follow it as inconsistent with *Walton*. In *Manuel*, the Court seems to be conflating negligence during the use of a vehicle with the additional requirement of the No-Fault Law that the vehicle itself be the proximate cause of the victims's injuries. The terms, however, are not synonymous. Indeed, in *Argentina v Emery World Wide Delivery Corp*. (93 NY2d 554 [1999]), the Court of Appeals highlighted the differences, in distinguishing Vehicle and Traffic Law § 388(1), which imposes

liability on all vehicle owners for accidents resulting from negligence in the permissive "use or operation" of their vehicles, with the No-Fault Law. In *Argentina*, the Court held that under Vehicle and Traffic Law § 388(1) the vehicle need not be the proximate cause of the victim's injury before the vehicle's owner may be held liable, thereby distinguishing *Walton*, which requires that the vehicle be the proximate cause of the victim's injuries to trigger the No-Fault Law.

In *Argentina,* the plaintiff suffered injuries when a steel plate fell on him while he was unloading cargo from a truck owned by the defendants. He and his spouse sued the defendants in the United States District Court for the Southern District of New York, claiming that the defendant vehicle owner was liable for their damages under Vehicle and Traffic Law § 388(1), which, as noted above, imposes liability on all vehicle owners for accidents resulting from negligence in the permissive "use or operation" of their vehicles (*id.* at 558). Relying on *Walton,* the District Court granted the defendants' motions for summary judgment on the ground that the vehicle itself was not a proximate cause of the injury (*id.*). After plaintiffs appealed, the United States Court of Appeals for the Second Circuit certified several questions to the New York State Court of

Appeals, including whether, under Vehicle and Traffic Law § 388(1), the vehicle must have been the proximate cause of the injury before the vehicle's owner could be held vicariously liable (*id.*).

As to this question -- whether liability under Vehicle and Traffic Law 388(1) is predicated upon the vehicle being a proximate cause of the injury -- the *Argentina* Court held in the negative (*Argentina, supra*, 93 NY2d at 554).[2] The Court held that the district court had erroneously relied upon *Walton* when it interpreted "use or operation" pursuant to Insurance Law 5103(a)(1) synonymous to the standard under VTL § 388(1). The Court explained that the two laws are distinct, with different purposes. The Court therefore held that in light of the differing purposes, the No-Fault Law (section 5103[a][1] of the Insurance Law) and section 388(1) of the Vehicle and Traffic Law should not be interpreted identically" (*id.* at 561-563). Accordingly, the Court concluded:

> "The touchstone of no-fault liability is loss from the use or operation of a vehicle regardless of fault. It

[2] The Second Circuit also certified the question to the NY Court of Appeals of whether, under Vehicle and Traffic Law § 388(1), loading and unloading constituted "use or operation" of a vehicle. As to this question, the New York Court of Appeals held in *Argentina* that loading and unloading constituted "use or operation" under the definition of Vehicle and Traffic Law § 388(1).

> was enacted to compensate for injuries without proving negligence. On the other hand, the touchstone of section 388 (1) is injury resulting from the negligence in the use or operation of a vehicle . . . To read an additional limitation into section 388 (1) and require that the vehicle itself be the instrumentality or a proximate cause of plaintiff's injury would tend to circumvent the statute's negligence requirement and unduly limit its intended beneficial purpose" (*id.* at 562).

Thus, in *Argentina*, the Court of Appeals held that the liability of an owner pursuant to section 388(1) does not require that "the vehicle" be a proximate cause of the injury (*id*. at 563). Rather, the Court stated that the standard under which vicarious liability attaches under the statute is narrower: "Negligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury" (*id.* at 562).

In *Manuel,* however, the Second Department considered the bus driver's positioning of the bus next to a hole in the street, when he pulled over at the bus stop, to be a sufficient predicate to trigger the No-Fault Insurance Law. Of course, that conduct would be sufficient to trigger section 388(1), which imposes liability on all vehicle owners for accidents resulting from negligence in the permissive use of their vehicles. But under *Walton*, this is not sufficient to trigger the No-Fault Law, which contains the additional requirement that the vehicle be the proximate cause of the injury (cf. *Travelers Property Cas. Co. v*

Landau, 27 AD3d at 477-478); *Matter of New York Cent. Mut. Fire Ins. Co. (Hayden*), *supra*, 209 AD2d 929). We thus hold, that liability for the injuries sustained from a fall in a hole after alighting from a bus are more properly addressed outside the area of the No-Fault Law (*see Toolsie v New York City Transit Authority*, 55 AD3d 476 [2008] [triable issue of fact existed regarding whether, by stopping the bus several feet from the curb, defendant breached its duty to plaintiff to stop the bus at a place from which she could safely disembark]; *see also Malawer v New York City Transit Authority*, 6 NY3d 800 [2006]).

Accordingly, the order of the Supreme Court, Bronx County (Faviola A. Soto, J.), entered May 26, 2010, which, to the extent appealed from as limited by the briefs, denied defendants Manhattan and Bronx Surface Transit Operating Authority and New York City Transit Authority's cross motion for summary judgment dismissing the complaint based on the failure to establish a

serious injury within the meaning of Insurance Law § 5102(d), should be affirmed, without costs.

All concur.

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

ENTERED: MARCH 22, 2012

CLERK