SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 25, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8363 The People of the State of New York, Ind. 48933C/05
Respondent,

-against-

Jose Curet,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Mary Jo L. Blanchard of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered May 6, 2010, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree, burglary in the first degree, attempted robbery in the first degree, and criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 43 years to life, unanimously modified, on the law, to the extent of reducing the periods of postrelease supervision for the attempted murder, burglary, attempted robbery

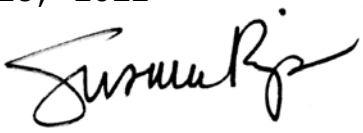
and weapon possession convictions from 10 years to 5 years, and otherwise affirmed.

The court properly declined to charge the affirmative defense to felony murder (Penal Law § 125.25[3]) since there was no reasonable view of the evidence, viewed in the light most favorable to defendant, to support that defense (*see e.g. People v Baity*, 178 AD2d 190 [1st Dept 1991], *lv denied* 79 NY2d 943 [1992]). Defendant bases his argument for charging the affirmative defense on speculative inferences from evidence that tends to negate the affirmative defense more than it supports it. If anything, the evidence cited by defendant suggests that he had reason to believe he was embarking on the kind of robbery that could only be carried out by means of deadly weapons, and that had the potential for lethal violence.

As the People concede, defendant's determinate sentences for the nonhomicide convictions carried five-year rather than ten-year periods of postrelease supervision.

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

ENTERED: OCTOBER 25, 2012



CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8364 In re Josue L.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about March 26, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the third degree, criminal obstruction of breathing, grand larceny in the fourth degree, robbery in the third degree and criminal possession of stolen property in the fifth degree, and placed him on probation for nine months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Bleakley*, 60 NY2d 490, 495 [1987]). There is no basis for

disturbing the court's determinations concerning credibility and identification. The victim was able to make a reliable identification, particularly because he had seen appellant in school hallways several times a week over a period of months.

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8365 Arlene Williams, Index 113648/08
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Arye, Lustig & Sassower, P.C., New York (Mitchell J. Sassower of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered July 6, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that she slipped and fell while descending a stairway in her building and trying to avoid a puddle of urine covering some of the steps. Defendant established prima facie that, although it was aware of an ongoing problem of loiterers in the building's stairwell leaving debris, urine and feces, it lacked actual notice of the specific condition, and that it had in place an adequate janitorial schedule for the cleaning of the stairwells. However, since defendant failed to present competent evidence that the janitorial schedule was followed on the day of

the accident, it did not show that it lacked constructive notice of the complained-of condition (*see Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept 2009]; *compare Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470 [1st Dept 2012]). The affidavit by the supervisor of caretakers concerning cleaning in the building on the day of the accident was insufficient because it was inconsistent with the supervisor's own testimony that he did not recall whether or not he was responsible for the subject building at the time of the accident (*see Arias v Skyline Windows, Inc.*, 89 AD3d 460 [1st Dept 2011]). In view of defendant's failure to tender sufficient evidence to eliminate any material issues of fact from the case, we need not address the sufficiency of plaintiff's papers in

opposition to the motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

We reject defendant's argument that plaintiff was the sole proximate cause of her injuries.

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8366 The People of the State of New York, Ind. 2927/09
Respondent,

-against-

Anthony Powelette,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about February 16, 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: OCTOBER 25, 2012

CLERK

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

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8367 George E. Robb, Jr., Index 650675/11
Plaintiff-Appellant,

-against-

Mitchell Low,
Defendant-Respondent.

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Wolff & Samson PC, New York (Kenneth N. Laptook of counsel), for appellant.

Beys, Stein & Mobargha LLP, New York (Joshua D. Liston of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 2, 2011, which, insofar as appealed from, granted, in part, defendant's motion to dismiss as time-barred the first and second causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, unanimously affirmed, without costs.

In this action arising out of the parties' co-ownership of a residential building jointly owned by them as tenants in common, the motion court properly determined that the statute of limitations for breach of the co-ownership agreement began to run when plaintiff advanced payments to pay for defendant's share of the expenses related to the property. Pursuant to the agreement, the party making such advances is entitled to recover from the

defaulting party upon demand. Thus, plaintiff's claim accrued at the time he could have demanded repayment, i.e., when defendant breached the contract by failing to make his share of the expenses and plaintiff made the necessary advances (*see Sutton v Burdick*, 75 AD3d 884 [3d Dept 2010], *lv dismissed* 15 NY3d 874 [2010]).

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: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8369 Rene Chavez, Index 117921/09
Plaintiff-Respondent,

-against-

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

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Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for appellants.

Drabkin & Margulies, New York (Caitlin Robin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered September 28, 2011, which denied defendants' motion to dismiss the complaint and granted plaintiff's cross motion to amend the complaint and to compel defendants to produce certain documents, unanimously affirmed, without costs.

Plaintiff alleges that his constitutional rights were violated by the use of excessive force during his arrest as a result of the beating administered by the police officers and the attack by the police dog, which resulted in multiple surgeries to repair damage to his arm. The amended pleading sufficiently alleges that the City's purported failure to train or supervise its employees was tantamount to an official policy or custom under the standards of 42 USC § 1983 (*see Johnson v Kings County*

Dist. Attorney's Off., 308 AD2d 278, 293-294 [2d Dept 2003]; *Walker v City of New York*, 974 F2d 293 [2d Cir 1992], *cert denied* 507 US 961 [1993]).

The court also properly declined to dismiss the negligent hiring and retention claim. Although the claim may be dismissed upon a proper evidentiary showing that the officers were acting within the scope of their official duties (*see Karoon v New York City Tr. Auth.*, 241 AD2d 323 [1st Dept 1997]), defendants failed to make such a showing (*see e.g. Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]; *see also Pickering v State of New York*, 30 AD3d 393, 394 [2d Dept 2006]).

The motion court did not err in ordering that defendants produce, for in camera inspection, the subject officers' personnel files, including any prior Civilian Complaint Review Board complaints made against them and any prior disciplinary actions taken against them. These records are discoverable, even

if the officers are acting within the scope of their employment (*see McFarlane v County of Suffolk*, 79 AD2d 706, 708 [2d Dept 2010]; *Blanco v County of Suffolk*, 51 AD3d 700 [2d Dept 2008]).

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta Freedman, Abdus-Salaam, JJ.

8370 The People of the State of New York, Ind. 4078/01
Respondent, 4664/01
6926/01

-against-

Ted Johnson,
Defendant-Appellant.

Edward Land, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

Order, Supreme Court, New York County (Eduardo Padro, J.), entered on or about November 17, 2009, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to risk level two. Defendant has demonstrated an extremely high risk of recidivism, and the type of misconduct in which he habitually engages is sufficiently serious to warrant an upward departure to level three (*see People v Corian*, 77 AD3d 590 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

The court properly classified defendant as a sexually violent offender. Defendant was convicted of persistent sexual

abuse after that crime had been enumerated as a crime requiring classification as a sexually violent offense (*see* Correction Law §§ 168–a[3][a][ii],[7][b]), even though that crime was not classified under the Penal Law as a violent felony for sentencing purposes until 2007. In any event, defendant was still serving his sentence for that crime at the time of its reclassification in the Penal Law (*cf. People v Buss*, 11 NY3d 553 [2008]).

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8371 In re James W. Pendergrast, Index 107537/10
Petitioner,

-against-

The New York City Housing Authority,
Respondent.

A CPLR article 78 proceeding having been transferred to this Court by order of Supreme Court, New York County (Richard F. Braun, J.), entered on or about May 20, 2011),

And said proceeding 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 October 19, 2012,

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8372 In re Ne-Ashia R.,

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

Na-Ashia R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Elisa Barnes, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about February 16, 2012, which, following a fact-finding hearing, inter alia, determined that respondent mother had severely abused her son and derivatively severely abused her daughter, unanimously affirmed, without costs.

The court had the authority under section 1051(b) of the Family Court Act to sua sponte amend the allegations of the petition to conform to the proof presented at the fact-finding hearing (*see Matter of T.D. Children*, 161 AD2d 464, 465 [1st Dept 1990]). The mother's contention that the court violated section 1051(b) by not notifying her that it was amending the petition

until the order under review was issued, thereby depriving her of the opportunity to answer the amended allegations, is refuted by the record. Indeed, approximately two months before the mother commenced her case, the court advised the parties that it was considering the petition "under a clear and convincing standard . . . and therefore, under the severe and repeated abuse statute" (*see* Social Services Law § 384-b[8]). Further, the mother never requested an adjournment to better prepare her defense or moved to dismiss the petition (*see Matter of Kila DD.*, 28 AD3d 805, 806 [3d Dept 2006]).

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8373-
8373A Nassau County,
Plaintiff-Appellant,

-against-

Metropolitan Transportation
Authority, et al.,
Defendants-Respondents.

Index 401279/09

Leahey & Johnson, P.C., New York (Peter James Johnson, Jr. of counsel), for appellant.

Peter Sistrom, New York, for respondents.

Order and judgment (one paper), Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 8, 2011, which granted defendants' motion for summary judgment dismissing the complaint, ordered plaintiff to pay defendants $18,666,692.20 plus interest on their counterclaims, and authorized defendants to undertake additional mass transportation capital projects and submit requisitions for such projects to plaintiff in an amount not to exceed $7.36 million, unanimously affirmed, without costs. Order (same court and Justice), entered December 5, 2011, which, insofar appealed as limited by the briefs, denied plaintiff's motion for renewal, unanimously affirmed, without costs.

Defendants' counterclaims are not barred by the statute of

limitations. Their breach of contract counterclaim is based on plaintiff's (1) failure to pay requisitions that defendant Metropolitan Transportation Authority (MTA) submitted in August, October, November, and December 2001 and (2) use of the MTA Projects Fund in late 2007 to close a gap in plaintiff's budget. Clearly, these counterclaims were not barred in March 2001, when "the claims asserted in the complaint were interposed" (CPLR 203[d]).

Nor are the counterclaims barred by laches. An essential element of laches is "unreasonable and inexcusable delay by the [counterclaim] plaintiff in undertaking to enforce his rights" (*Dante v 310 Assoc.*, 121 AD2d 332, 334 [1st Dept 1986], *lv denied* 68 NY2d 607 [1986]). There was no such delay here – plaintiff's lawyer admitted that "the parties, consensually, sat on their hands for six or eight years before anything was done." The record also contains a stipulation, signed by counsel for both sides, extending defendants' time to answer or move until plaintiff demanded an answer or motion.

Plaintiff's argument that the grant of summary judgment was premature because no discovery had been conducted is unavailing (*see e.g. Thelen LLP v Omni Contr. Co., Inc.*, 79 AD3d 605, 606 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]). In opposition to

defendants' motion, plaintiff did not claim that it needed discovery. On the contrary, it said, "the salient facts are essentially undisputed."

Defendants' initial submissions established a prima facie case for breach of contract (*see National Mkt. Share, Inc. v Sterling Natl. Bank*, 392 F3d 520, 525 [2d Cir 2004]; *see also Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). In violation of CPLR 3015(a), plaintiff's reply to defendants' counterclaims had merely stated, "The defendants have failed to comply with a condition precedent . . ." Therefore, defendants were not required to establish, as part of their prima facie case, that they had complied with the condition precedent mentioned in section 2(a) of the Mass Transportation Funding Agreement (*see 119 Hous. Corp. v International Fid. Ins. Co.*, 14 AD3d 383, 384 [1st Dept 2005]; *contrast 1014 Fifth Ave. Realty Corp. v Manhattan Realty Co.*, 67 NY2d 718, 719 [1986]).

In its opposition to defendants' summary judgment motion, plaintiff specified, for the first time, that section 2(a) (plaintiff "shall not be under any obligation to make Project Contributions unless it has acquired a leasehold or other interest in the Projects to which the Project Contributions relate") was the condition precedent it had in mind. Defendants

properly responded to this argument in reply (*see Merchants Bank of N.Y. v Gold Lane Corp.*, 28 AD3d 266, 267 [1st Dept 2006]; *Sanford v 27-29 W. 181st St. Assn.*, 300 AD2d 250, 251 [1st Dept 2002]). We also note that defendants' initial submissions included the Mass Transportation Funding Agreement, which states, "In connection with [plaintiff]'s leasehold or other interest in any of the Projects to which [defendant Long Island Rail Road Company (LIRR)] holds title, [plaintiff] shall enter into an agreement with the LIRR substantially in the form annexed as Appendix A." Defendants' initial submissions also included the said Appendix A, which is an unexecuted copy of a Lease and Operating Agreement between plaintiff and the LIRR. The unexecuted copy in defendants' initial submissions is substantively the same as the executed copy that defendants submitted with their reply papers.

The court properly denied plaintiff's motion to renew. "Pursuant to CPLR 2221(e)(2) and (3), a motion to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and . . . shall contain reasonable justification for the failure to present such facts on the prior motion'" (*American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476 [1st Dept 2006]). In the case at bar, as

in *Foley v Roche* (68 AD2d 558 [1st Dept 1979]), "no additional material facts are alleged" (*id.* at 568) – County Law § 215(3), on which plaintiff relied in its renewal motion, is not a new *fact*.

It is true that "the court, in its discretion, may . . . grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made" (*Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376 [1st Dept 2001]). However, it was not an improvident exercise of discretion to refuse to grant an interest-of-justice renewal in the instant case. The unexecuted Lease and Operating Agreement, which was included in defendants' moving papers, contains the same provisions about lease duration as the executed contract. Plaintiff was a party to the Lease and Operating Agreement, so the provision about lease duration should not have come as a surprise to it. It could have argued in its opposition to defendants' summary judgment motion that the Lease and Operating Agreement violated County Law § 215(3). Renewal should not "be available where a party has proceeded on one legal theory . . . and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application" (*Foley*, 68 AD2d at 568).

In any event, even if we were to consider plaintiff's argument that the Lease and Operating Agreement violated County Law § 215(3), "a party cannot insist upon a condition precedent, when its nonperformance has been caused by himself" (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 31 [1998] [internal quotation marks omitted]; *see also Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 269 [1st Dept 1995]). Plaintiff's acquisition of a leasehold interest in the mass transportation projects was a condition precedent to its obligation to make Project Contributions. The Lease and Operating Agreement was supposed to give plaintiff such an interest. If the Lease and Operating Agreement is invalid, it is because plaintiff passed an ordinance instead of a local law. Defendants should not be penalized for plaintiff's failure to follow proper procedures.

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8375- Index 116885/05
8375A Jian-Guo Yu, et al.,
Plaintiffs,

–against–

Greenway Mews Realty LLC, et al.,
Defendants,

- - - - -

Greenway Mews Realty LLC,
Third-Party Plaintiff,

Little Rest Twelve, Inc.,
Third-Party Plaintiff-Appellant,

-against-

UAD Group,
Third-Party Defendant-Respondent.

_____

DLA Piper LLP (US), New York (Aidan M. McCormack of counsel), for appellant.

Clausen Miller PC, New York (Melinda S. Kollross of counsel), for respondent.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered September 19, 2011, which denied defendant/third-party plaintiff Little Rest Twelve, Inc.'s motion for summary judgment on its contractual indemnification claim against third-party defendant UAD Group, unanimously reversed, on the law, without costs, and the motion granted. Appeal from order, same court and Justice, entered February 8, 2012, to the extent that, upon

reargument, it adhered to the original determination, unanimously dismissed, without costs, as academic in light of the foregoing.

The contract between Little Rest and UAD Group provided that UAD Group would indemnify Little Rest against claims, damages, losses and expenses to the extent caused by the negligence of UAD Group or anyone directly or indirectly employed by it. Little Rest established prima facie that UAD Group was negligent in connection with the accident in which plaintiff, an employee of UAD Group, was injured, and that Little Rest was completely free from negligence. Plaintiff's testimony, read as a whole, makes clear that only UAD Group personnel ever directed his work and that UAD employees routinely climbed on top of glass skylights, without harnesses, to install glass panels. In opposition, UAD group failed to raise an issue of fact as to how the accident happened. Its contention that plaintiff was arguably negligent in the performance of his work is insufficient to defeat summary judgment, since the contract provided that UAD Group would indemnify Little Rest for losses caused by the negligence of its (UAD Group's) employees (*see e.g. 385 Third Ave. Assoc., L.P. v Metropolitan Metals Corp.*, 81 AD3d 475, 476-477 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]).

UAD Group's argument that Little Rest is not entitled to

contractual indemnification because it has not paid plaintiff any money and therefore has not sustained a loss mistakes the award of summary judgment for the execution of judgment. "[I]t serves the interest of justice and judicial economy [to] afford[] the indemnitee the earliest possible determination as to the extent to which [it] may expect to be reimbursed" (*Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264, 265 [1st Dept 2007] [internal quotation marks omitted], *lv dismissed* 9 NY3d 891 [2007]).

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8376 In re Nixon C.,

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

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

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

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Order, Family Court, Bronx County (Nancy M. Bannon, J. at fact-finding hearing; Jeanette Ruiz, J. at disposition), entered on or about July 11, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the third degree and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Appellant claimed to be interested in buying the victim's jacket, and asked to try it on. Appellant put on the jacket, but refused to return it despite

repeated requests to do so, over an extended period of time. When the victim finally attempted to take back his jacket, appellant began fighting with him. The evidence supported the inferences that appellant intended to permanently deprive the victim of the jacket (*see e.g. Matter of Roshanda D.*, 23 AD3d 155 [1st Dept 2005]), and that appellant used physical force to retain it (*see e.g. People v Nieves*, 37 AD3d 277 [1st Dept 2007], *lv denied* 9 NY3d 848]).

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8377 Mary E. Gibbs, Index 302406/09
Plaintiff-Appellant,

-against-

3220 Netherland Owners Corp,
Defendant-Respondent.

_____

Sim & Record LLP, Bayside (Sang J. Sim of counsel), for appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 8, 2012, which granted landlord-defendant's motion for summary judgment, and denied plaintiff's cross motion for leave to amend her bill of particulars, unanimously affirmed, without costs.

The court correctly held that the stairs on which plaintiff allegedly slipped and fell (leading from the first floor to the lobby) were not "exit" stairs within the meaning of either paragraph 6.4.1.7.1 (g) of section C26-292.0 of the 1938 Building Code (Administrative Code of City of NY § C26-292.0), or the Building Code section which plaintiff had relied on previously, section 27-375 of the 1968 Building Code (Administrative Code of City of NY § 27-375) (*see Remes v 513 W. 26th Realty, LLC*, 73

AD3d 665, 666 [1st Dept 2010]; *Union Bank & Trust Co. Of Los Angeles v Hattie Carnegie, Inc.*, 1 AD2d 199, 199-200 [1st Dept 1956]; *see also Cusumano v City of New York*, 15 NY3d 319, 324 [2010]). Accordingly, the court correctly determined that plaintiff's expert's opinion, that the stairs violated the Building Code's requirements applicable to "exit" stairs, failed to raise an issue of fact.

Similarly, plaintiff's expert's opinion regarding the allegedly slippery condition created by the absence of slip resistant material and/or use of high gloss enamel paint was lacking in probative value because he did not identify any minimum requirement of non-skid material, nor that using such paint deviated from such standard (*see Cietek v Bountiful Bread of Stuyvesant Plaza, Inc.*, 74 AD3d 1628, 1629 [3d Dept 2010]; *Sanders v Morris Hgts. Mews Assoc.*, 69 AD3d 432, 432-433 [1st Dept 2010]; *Jenkins v New York City Hous. Auth.*, 11 AD3d 358, 360 [1st Dept 2004]).

Plaintiff's current argument on appeal that the water *might* have come from a source other than the weather conditions is wholly speculative and insufficient to defeat defendant's showing that it had no actual or constructive knowledge of any wet or slippery condition in the subject stairwell (*see Fallon v Duffy*,

95 AD3d 1416, 1417 [3d Dept 2012]).

The court correctly denied plaintiff's cross motion for leave to amend her bill of particulars, as the proposed amendment failed to state a cause of action (*see Megaris Furs v Gimbel Bros.*, 172 AD2d 209 [1st Dept 1991]).

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8378 The People of the State of New York, Ind. 6316/08
Respondent,

-against-

Simone Morgan,
Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Bobbie Sternheim of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 19, 2010, as amended October 19, 2010, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the fourth degree, and sentencing her to concurrent terms of 2½ years and 1 year, respectively, unanimously modified, on the facts, to the extent of vacating the assault conviction and dismissing that count of the indictment, and otherwise affirmed.

Defendant's assault conviction was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant asserts that she was justified in stabbing the complainant in the cheek because she reasonably believed this was necessary to defend herself against the complainant's use or

imminent use of deadly force, i.e., she reasonably believed that the complainant, although unarmed, was about to seriously injure her (*see* Penal Law § 10.00[11]). Under the particular circumstances, we find that the People did not disprove this self-defense claim beyond a reasonable doubt.

The evidence at trial showed that the complainant attacked defendant, who is the mother of his children, by punching her in the face. He forced her up against a wall, and then repeatedly punched her in the head and neck area while she attempted to fight him off. Despite the attempt of two security guards to restrain the complainant, defendant could not get free until she removed a steak knife from her waistband area and stabbed the complainant in the cheek, which caused him to release her, at which time she fled. Although the complainant momentarily dropped to the ground, he rose immediately, pulled the blade from his face, and chased after defendant down 28 flights of stairs, still holding the knife, until he was eventually physically restrained in the building's lobby by security and police personnel.

The complainant's testimony described defendant as the initial aggressor, who wielded the knife and threatened him with it prior to the security guards' arrival. Even assuming the

veracity of the complainant's version of the events, we note that he admitted that defendant had put the weapon away at the time he struck her. Furthermore, the security guards clearly and consistently testified that when they arrived, the complainant and defendant were separated by a significant distance and were only arguing, whereupon the complainant punched defendant, threw her up against the wall, and continued to assault her. The observations of the guards amply supported defendant's contentions that at the time in question the complainant was the aggressor, and that defendant had no opportunity to retreat.

Although the complainant only used his fists, defendant had reason to believe she was in danger of serious physical injury if she continued to allow him to beat her (*see Matter of Y.K.*, 87 NY2d 430, 434 [1996]). The couple's history included multiple instances where the complainant had choked and beaten defendant, and she was well aware of his ability to inflict serious physical injury. Under these circumstances, it cannot be said that the People disproved the defense of justification beyond a reasonable doubt.

Defendant does not challenge the sufficiency or weight of the evidence supporting the weapon possession conviction. To the extent defendant's claims of trial error relate to that conviction, we find them to be without merit.

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8380 PJA Associates Inc., Index 109254/11
Plaintiff-Appellant,

-against-

India House, Inc.,
Defendant-Respondent.

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The Dweck Law Firm, LLP, New York (H.P. Sean Dweck of counsel), for appellant.

Wolf Haldenstein Adler Freeman & Herz, LLP, New York (Debra M. Schoenberg of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 29, 2012, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

In this action to reform or modify an agreement to conform to the parties' alleged course of dealing and to enjoin termination for an alleged default, the motion court correctly determined that the complaint merely repackaged the allegations of a prior dismissed action (*see Ahead Realty LLC v India House, Inc.*, 92 AD3d 424 [1st Dept 2012]). Res judicata precluded the instant claims, which were not tangential and were actually litigated in the prior action; moreover, even if they had not been litigated, they could have been (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]). While plaintiff is correct that the

preclusive effect of declaratory judgment actions is limited (*see Jefferson Towers, Inc. v Public Serv. Mut. Ins. Co.*, 195 AD2d 311, 313 [1st Dept 1993]), such exception is inapplicable here where the matter was actually litigated and the complaint in the prior action alleged numerous causes of action in addition to the request for declaratory relief (*see Duane Reade, Inc. v St. Paul Fire & Mar. Ins. Co.*, 600 F3d 190, 196 [2d Cir 2010]).

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

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8381 In re Magali Perez, Index 402191/11
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

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Magali Perez, appellant pro se.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondent.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, J.), entered February 23, 2012, denying the petition to annul respondent's determination, which denied petitioner succession rights to the subject apartment as a remaining family member, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination has a rational basis. The evidence shows that petitioner did not become an authorized occupant of her grandmother's apartment prior to the latter's death in February 2007 (*see Matter of Valentin v New York City Hous. Auth.*, 72 AD3d 486 [1st Dept 2010]). Even if the grandmother's Permanent Permission Request to add petitioner and petitioner's daughter to her family composition had not been

denied, petitioner would still have been ineligible for remaining-family-member status, since the request was submitted only weeks before the grandmother died and petitioner would not have satisfied the one-year continuous authorized occupancy requirement (*see Matter of Daniels v New York City Hous. Auth.*, 66 AD3d 579 [1st Dept 2009]).

Contrary to petitioner's contention, respondent did not implicitly approve of her residence in the apartment. A governmental agency cannot be estopped from discharging its statutory duties when a claimant does not meet the eligibility requirements for succession rights to the apartment, even if the managing agent acquiesced in petitioner's occupancy (*see Matter of Schorr v New York City Dept. of Hous. Preserv. and Dev.*, 10 NY3d 776 [2008]; *Taylor v New York State Div. of Hous. & Community Renewal*, 73 AD3d 634 [1st Dept 2010]). Moreover, petitioner's mental health and her status as a single parent whose daughter is asthmatic are mitigating factors and hardships that the hearing officer was not required to consider (*see Matter of Fermin v New York City Hous. Auth.*, 67 AD3d 433 [1st Dept 2009]). Nor did the payment of rent by petitioner confer

succession rights on her (*see Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2011]).

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

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

ENTERED: OCTOBER 25, 2012

CLERK

Gonzalez, P.J., Moskowitz, Acosta, Freedman, Abdus-Salaam, JJ.

8382N In re Fiduciary Insurance Company of America,
Petitioner-Appellant,

Shawnise Tyler, et al.,
Respondents,

-against-

Kelly S. Jackson, et al.,
Respondents,

Government Employees Insurance Company,
Respondent-Respondent.

Index 115405/10

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Thomas Torto, New York, for appellant.

Montfort, Healy, McGuire & Salley, Garden City (Donald S. Neuman, Jr. of counsel), for Government Employees Insurance Company, respondent.

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Order, Supreme Court, New York County (Martin Schoenfeld, J.), entered May 10, 2012, which, after a framed-issue hearing, permanently vacated a stay of arbitration and directed the matter to proceed to arbitration, unanimously affirmed, without costs.

"[P]roof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied" (*Leotta v Plessinger*, 8 NY2d 449, 461 [1960]; *see Bernard v Mumuni*, 22 AD3d 186, 187 [1st Dept 2005], *affd* 6 NY3d 881 [2006]). This presumption was

rebutted by substantial evidence that the subject vehicle was not being operated with the owner's consent. The owner testified that he left the keys on a table in his mother's home with instructions that his mechanic or his cousin would pick it up for repairs. Furthermore, a finding of constructive consent requires a consensual link between the negligent operator and one whose possession of the car was authorized (*see Murdza v Zimmerman*, 99 NY2d 375, 381 [2003]). Here, there was no evidence showing a consensual link between the owner and his mother on the one hand, and the driver on the other. There is no basis to disturb the court's finding that the owner's testimony that he did not give the driver permission to use his car was credible (see *Leotta*, 8 NY2d at 461; *Matter of Eagle Ins. Co. v Lucia*, 33 AD3d 552, 554-555 [1st Dept 2006]).

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

ENTERED: OCTOBER 25, 2012

CLERK

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

7875 Bank of New York Mellon Trust Company, N.A., etc., Plaintiff-Respondent, Index 651914/10

-against-

Merrill Lynch Capital Services Inc., Defendant-Appellant,

AG Financial Products, Inc., et al., Defendants-Respondents,

Taberna Preferred Funding III, LTD., et al., Defendants.

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Cleary Gottlieb Steen & Hamilton LLP, New York (Jeffrey A. Rosenthal of counsel), for appellant.

Seward & Kissel LLP, New York (Bruce G. Paulsen of counsel), for Bank of New York Mellon Trust Company, N.A., respondent.

Wollmuth Maher & Deutsch LLP, New York (William A. Maher of counsel), for AG Financial Products, Inc., and Natizis, respondents.

Allen & Overy LLP, New York (Josephine A. Cheatham of counsel), for Deutsche Bank Trust Company Americas and HSBC Bank USA, N.A., respondents.

Kaye Scholer LLP, New York (H. Peter Haveles, Jr. of counsel), for UBS AG, respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 12, 2011, which, to the extent appealed from, denied defendant Merrill Lynch Capital Services, Inc.'s motion for summary judgment declaring that it is entitled to terminate

the hedge agreements with respect to the Taberna III, IV, and VI transactions, and granted the motions by defendants-respondents AG Financial Products, Inc. and Natixis, Deutsche Bank Trust Co. Americas and HSBC Bank USA, N.A., and UBS AG as attorney-in-fact for SNB StabFund Kommanditgesellshaft fur kollektive Kapitalanlagen for summary judgment declaring in their favor, and declared that Merrill Lynch is not entitled to terminate the said agreements, unanimously reversed, on the law, Merrill Lynch's motion granted, and defendants-respondents' motions denied, and it is declared that Merrill Lynch is entitled to terminate the hedge agreements with respect to the Taberna III, IV, and VI transactions.

Between September 2005 and September 2006, defendants Taberna Preferred Funding III, Ltd., Taberna Preferred Funding IV, Ltd., Taberna Preferred Funding VI, Ltd., and Taberna Preferred Funding VII, Ltd., issued notes pursuant to indentures between themselves and JPMorgan Chase Bank, N.A. Plaintiff Bank of New York Mellon Trust Co., N.A. (BONY) succeeded JPMorgan as trustee under the indentures. Because the rate of interest on the notes was a floating rate, the Taberna entities chose to hedge against the risk that the interest rates would rise too high by entering into hedge agreements with defendant Merrill

Lynch Capital Services, Inc. The hedge agreements for Taberna III, IV, and VI provided that in the event of inconsistency between the indentures and the hedge agreements, the hedge agreements will prevail; the hedge agreement for Taberna VII does not contain this provision. The tiebreaker provisions are crucial because of the conflicting terms in the indentures and the hedge agreements regarding Merrill Lynch's right to terminate the hedge agreements in the event of a default. When Taberna defaulted on its payment obligations under the hedge agreements, Merrill Lynch sought to terminate the agreements and this interpleader action was commenced. We hold that Merrill Lynch has the right to terminate the agreements that contain the tie-breaker provisions, but that a determination of its right to terminate in the event of a default under the remaining agreement cannot be made on this record.

This action has its roots in 2009 and 2010, when interest rates dropped significantly, and the Taberna entities defaulted on hedge payments due to Merrill Lynch. When the Taberna entities failed to cure the defaults, Merrill Lynch designated "Early Termination Dates" for each transaction and notified the Taberna entities that they owed it early termination payments. Defendant noteholders and defendant AG Financial, which had

entered into credit default swaps with the noteholders of the Taberna III, IV, and VI notes instructed BONY not to pay. BONY commenced this action, seeking direction from the court as to how to disburse the amounts it had collected from the Taberna transactions.

The noteholders and AG Financial moved for summary judgment declaring that Merrill Lynch has no right to terminate the hedge agreements upon a default or to receive termination payments. Merrill Lynch moved for summary judgment declaring in its favor as to the Taberna III, IV, and VI transactions.

Each hedge agreement consists of the ISDA Master Agreement, a Schedule, a Credit Support Annex, and Confirmations. Each indenture sets forth a Priority of Payments specifying that Merrill Lynch is entitled to receive payments before the noteholders but after certain other parties (§11.1[a]][I]). Section 11.1(a) (immediately preceding the priority list) states that the trustee's obligation to disburse amounts on each distribution date is "subject to the other clauses of this Section 11." Section 11(j) of the Taberna III, IV and VI indentures and §11.1(1) of the Taberna VIII indenture states that "[i]n the event that the Issuer defaults in the payment of its obligations under any Hedge Agreement, such default shall not

entitle the Hedge Counterparty to terminate such Hedge Agreement. . . ”

However, the Master Agreement gives the non-defaulting party the “Right to Terminate Following Event of Default.” Moreover, the Schedules for Taberna III, IV, and VI provide that “[i]n the event of any inconsistency between the provisions of the Indenture and this Agreement, this Agreement will prevail” (§5[a][ii]).[1] The Schedule for Taberna VII does not contain this provision. The Schedules for Taberna III, IV, and VI state that Merrill Lynch “acknowledges that any amount payable to it pursuant to this Agreement shall be subject to the Priority of Payments” (§5[m]). The Schedule for Taberna VII does not contain this provision.

With respect to Taberna VII, we hold that neither side is entitled to summary judgment. Within the four corners of the contract, there is support for both sides’ positions. “Summary judgment is appropriate only where the intent of the parties can be ascertained from the face of their agreement” (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 197 [1st Dept 1995] [internal quotation marks omitted]; *see also NFL Enters. LLC v*

[1] As defined in the preamble to the Master Agreement, the hedge agreement includes the Master Agreement, the Schedule, and all Confirmations.

Comcast Cable Communications, LLC, 51 AD3d 52, 58, 61 [1st Dept 2008]; *LoFrisco v Winston & Strawn LLP*, 42 AD3d 304, 306-307 [1st Dept 2007]). The intent of the parties as to Merrill Lynch's right to early termination of the hedge agreement in an event of default cannot be ascertained here without resort to extrinsic evidence, and thus the issue is not appropriately resolved on a motion for summary judgment.

With respect to Taberna III, IV and VI, Merrill Lynch is entitled to summary judgment. As discussed above, the Schedules for these three transactions provide that hedge agreements (permitting early termination) prevail over the Indentures (prohibiting early termination).

The motion court incorrectly held that, because part 5(a) of each Schedule is called "Definitions," § 5(a)(ii) (which states that the Schedule trumps the Agreement) only applies to inconsistencies in definitions. Section 5(a)(ii), however, refers explicitly to "inconsistency between the provisions of the Indenture and this Agreement," and § 9(g) of the Master Agreement provides that headings are for convenience's sake and "are not to affect the construction of" the Agreement. Such inconsistency provisions are frequently enforced by courts (*see e.g. Westfield Family Physicians, P.C. v HealthNow N.Y., Inc.*, 59 AD3d 1014,

1015 [4th Dept. 2009] *lv denied* 13 NY3d 703 [2009]; *Alamo Contr. Bldrs. v CTF Hotel Co.*, 242 AD2d 312 [2nd Dept. 1997]; *Matter of JGA Constr. Corp. v Burns Elec. Co.*, 145 AD2d 945 [4th Dept 1988]; *Village of Jordan v Memphis Constr. Co.*, 109 AD2d 1055 +[4th Dept 1985]; *Heilig v Maron-Ames*, 25 Misc 3d 838, 841-842 [Civil Ct. Kings County 2009]), including in cases involving ISDA provisions and definitions (*see CIBC Bank & Trust Co. v Credit Lyonnais*, 270 AD2d 138 [1st Dept. 2000]).

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8383 The People of the State of New York, Ind. 1992/08
Respondent,

-against-

Tyhiem Hodges,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered December 2, 2008, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). Defendant failed to meet his burden of establishing that the prosecutor's facially nondiscriminatory reasons for peremptorily challenging a prospective juror were pretextual (*see People v Payne*, 88 NY2d 172, 181 [1996]).

The record supports the court's rejection of defendant's claim of pretext, and that finding is entitled to great deference

(*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). We do not find any disparate treatment by the prosecutor of similarly situated panelists. The prosecutor consistently exercised peremptory challenges against panelists with incarcerated relatives, with the exception of a panelist whose situation was different in some respects. The latter panelist had a relative with a past incarceration, but this panelist also had a relative who was one of the prosecutor's colleagues in the District Attorney's office. Any incompleteness of the record regarding the prosecutor's reasons for not challenging the latter panelist is attributable to defendant's failure to call that panelist to the court's and prosecutor's attention as an alleged example of disparate treatment.

Defendant failed to preserve his procedural objections to the court's disposition of the application, including his challenge to the court's phrasing of its step-three ruling (*see e.g. People v Rodriguez,* 93 AD3d 595, 595 [1st Dept 2012], *lv denied* 19 NY3d 966 [2012]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (*see id.* at 596).

Defendant's legal sufficiency claim is unpreserved and we

decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The inference is inescapable that defendant was the person who had just been seen secreting a pistol, particularly in light of the very close temporal and spatial proximity between the complainant's observations and defendant's apprehension.

The court properly permitted the People to introduce, on their rebuttal case, medical records showing that defendant had only a minor abrasion when admitted to prison. This properly rebutted testimony by defense witnesses who claimed that defendant was severely beaten by the police. "Evidence is not collateral ... when it is relevant to some issue other than credibility and [wa]s offered for the purpose of disproving facts set forth by a witness for the opposing side on direct

examination" (*People v Beavers*, 127 AD2d 138, 141 [1st Dept 1987], *lv denied* 70 NY2d 642 [1987]). By creating an issue of alleged police brutality, defendant opened the door to rebuttal evidence tending to negate that claim.

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli J.P., Sweeny, Renwick, Richter, Román, JJ.

8384 Courtney McKenney, et al., Index 303315/09
Plaintiffs-Respondents,

-against-

Beth Abraham Family of
Health Services, et al.,
Defendants-Respondents,

Eastchester Rehabilitation and
Health Center,
Defendant,

Morningside Nursing Home,
Defendant-Appellant.

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Ptashnik & Associates, New York (Robert E. Fein of counsel), for appellant.

Alison Y. Brockington, Bronx, for McKenney respondents.

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains (Elizabeth J. Sandonato of counsel), for Beth Abraham Family of Health Services, Flora Tabbudour, M.D., and The Jack D. Weil Hospital of the Albert Einstein College of Medicine A Division of Montefiore Medical Center, respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 9, 2011, which, insofar as appealed from, in this action alleging medical malpractice and wrongful death, denied the motion of defendant Morningside Nursing Home (MNH) to dismiss the complaint pursuant to CPLR 3211(a)(8), and granted plaintiffs' cross motion to extend the time for serving the summons and

complaint on MNH, unanimously affirmed, without costs.

The motion court providently exercised its discretion in extending plaintiffs' time to serve process in the "interest of justice" (*see* CPLR 306-b). The court appropriately considered that the statute of limitations had expired, that MNH was on actual notice of the action within the 120-day period and that it would not be prejudiced by the extension (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]; *Hernandez v Abdul-Salaam*, 93 AD3d 522 [1st Dept 2012]). Moreover, the physician's affidavit submitted by plaintiffs was sufficient, at the pre-discovery stage, to show a meritorious cause of action (*see e.g Hennebery v Borstein,* 91 AD3d 493, 496 [1st Dept 2012]).

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8385 In re Giovanni Maurice D.,

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

Wilner B.,
Respondent-Appellant,

New Alternatives for Children, Inc.,
Petitioner-Respondent.

_____

Julian A. Hertz, Larchmont, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Neal D. Futerfas, White Plains, attorney for the child.

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Order, Family Court, Bronx County (Anne-Marie Jolly, J.), entered on or about April 19, 2011, which denied respondent father's motion to vacate orders of fact-finding and disposition of the same court and Judge, entered on or about January 19, 2011 and January 25, 2011, upon respondent's default, terminating his parental rights to the subject child on the ground of permanent neglect, and committing custody and guardianship of the child to the Commissioner for the Administration of Children's Services of New York City and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Family Court properly exercised its discretion in denying

respondent’s motion to vacate the orders terminating his parental rights and freeing the child for adoption upon his default because his moving papers failed to demonstrate a reasonable excuse for his absence from the court's proceedings on January 19, 2011 and January 25, 2011, and a meritorious defense to the permanent neglect allegation (*see Matter of Octavia Loretta R. [Randy McN.–Keisha W.]*, 93 AD3d 537, 538 [1st Dept 2012]).

Respondent’s assertion that he missed the January 19 hearing because he was confused as to the proper date of the proceeding is not a reasonable excuse for his failure to appear since he was present in court when the date for the hearing was set and he took no steps to clear up any alleged confusion by contacting his counsel (*see e.g. Matter of Dominique Beyonce R. [Marie Isabel R.]*, 82 AD3d 984, 985 [2nd Dept 2011]). As to the January 25 hearing, respondent’s explanation was not credible.

Respondent also failed to establish a meritorious defense to the permanent neglect allegation. His affidavit supporting vacatur of the default provides only generalized conclusory statements that are insufficient to establish a meritorious

defense (*In re Gloria Marie S.*, 55 AD3d 320 [1st Dept 2008], *lv dismissed* 11 NY3d 909 [2009]).

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

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8387 Studio A Showroom, LLC, Index 650806/10
Plaintiff-Appellant,

-against-

David Yoon, et al.,
Defendants-Respondents.

Halperin & Halperin, P.C., New York (Jeffrey Weiskopf of counsel), for appellant.

Law Office of John F. Olsen, LLC, Rye Brook (John F. Olsen of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 18, 2011, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the fourth cause of action in plaintiff's complaint as against defendant Yoony Corp. Holdings d/b/a The Addison Story (Addison), unanimously affirmed, with costs.

Although Addison failed to include the pleadings with its motion, the error was properly overlooked, as the pleadings were filed electronically and thus were available to the parties and the court (*see Welch v Hauck*, 18 AD3d 1096, 1098 [3d Dept 2005], *lv denied* 5 NY3d 708 [2005]).

Regardless of whether the parties agreed to delete the portion of their agreement containing the termination and

integration clauses — a point the parties dispute — the end result was that the agreement did not contain a clause stating that it could be modified only in writing. Further, the record evidence demonstrates that the parties did, in fact, agree to terminate their agreement on 30 days' notice (*see Belknap v Witter & Co.*, 92 AD2d 515, 517 [1st Dept 1983], *affd* 61 NY2d 802 [1984]; *cf. Lansco Corp. v Kampeas*, 87 AD3d 421, 422 [1st Dept 2011]). The evidence does not support plaintiff's contention that it agreed to terminate the agency relationship, but not the agreement.

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8388 Andrew Corrigan, Index 119065/06
Plaintiff-Appellant,

-against-

Stellar Management, LLC, et al.,
Defendants-Respondents.

Michelle S. Russo, Port Washington, for appellant.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Chris Christofides of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered May 27, 2011, which, in this personal injury action, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants made a prima facie showing of their entitlement to judgment as a matter of law with evidence that despite their placement of orange-netted wooden barricades around a construction area, and their provision of unobstructed pathways around the area, plaintiff, after consuming several alcoholic beverages, decided to enter the area, causing him to trip and fall over an open and obvious drain hole (*see Laluna v DGM Partners*, 234 AD2d 519 [2d Dept 1996]; *see also Vought v Hemminger*, 220 AD2d 580 [2d Dept 1995], *lv denied* 88 NY2d 808

[1996]).

In opposition, plaintiff failed to raise a triable issue of fact. His testimony that he thought the barricades were meant to keep only schoolchildren out of the construction area is incredible. Further, his statements in his affidavit regarding available routes around the area conflict with his deposition testimony.

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: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8389 Basil Bailey, et al., Index 306043/10
Plaintiffs-Appellants,

-against-

Shariful M.D. Islam, et al.,
Defendants-Respondents.

_____

Kagan & Gertel, Brooklyn (Irving Gertel of counsel), for appellants.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about April 4, 2012, which granted defendants' motion for summary judgment dismissing the complaint for failure to satisfy the serious injury threshold of Insurance Law § 5102(d), unanimously modified, on the law, to the extent of denying the motion with respect to plaintiffs' claim of serious injury under the "fracture" category of Insurance Law § 5102(d), and otherwise affirmed, without costs.

The conflicting expert opinions as to the existence of a fracture in the injured plaintiff's cervical spine precludes summary dismissal. While defendants established absence of a fracture by submitting the affirmed report of their radiologist, who found no evidence of post-traumatic changes, plaintiff raised

a triable issue of fact by submitting the affirmation of his radiologist averring that he found subchondral fractures at the C3 and C4 levels of the cervical spine upon review of the MRI film (*see Spagnoli-Scheman v Bellew*, 91 AD3d 414 [1st Dept 2012]; *Torain v Bah*, 78 AD3d 588, 588-589 [1st Dept 2010]).

Defendants met their prima facie burden of establishing their entitlement to judgment as a matter of law with respect to plaintiff's claim of serious injury to his right shoulder, by submitting the reports of their orthopedist and neurologist finding full range of motion, resolved strains, and absence of orthopedic and neurological disability (*see Diakite v Soderstrom*, 89 AD3d 607 [1st Dept 2011]; *Thompson v Abbasi*, 15 AD3d 95, 96 [1st Dept 2005]). Plaintiff did not submit any evidence of limitations, contemporaneous or recent, so as to defeat summary judgment as to this claim (*see Winters v Cruz*, 90 AD3d 412 [1st Dept 2011]).

Defendants also met their burden with respect to plaintiffs' 90/180-day claim by submitting plaintiff's deposition testimony showing that, although the injuries prevented him from returning to work, they did not otherwise affect his usual pre-accident activities. That plaintiff missed more than 90 days of work is not determinative of a 90/180–day injury (*see Uddin v Cooper*, 32

AD3d 270, 271 [1st Dept 2006], *lv denied* 8 NY3d 808 [2007]), and plaintiff has offered no evidence showing that he was restricted from performing substantially all of the material acts that constituted his usual and customary daily activities for 90 days during the 180 days following the accident (*see Fernandez v Niamou*, 65 AD3d 935 [1st Dept 2009]).

We note, however, that if the trier of fact determines that a fracture injury was sustained, it may award damages for all injuries causally related to the accident (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [1st Dept 2010]).

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8391 In re David H.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), for appellant.

Michael A. Cardozo, Corporation counsel, New York (Marta Ross of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about April 5, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of menacing in the second degree, and placed him on enhanced supervision probation for a period of 18 months, unanimously affirmed, without costs.

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

appellant threatened the victim by displaying what appeared to be a pistol (*see* Penal Law § 120.14[1]). The inability of the police to recover this object can be readily explained by the fact that appellant had an opportunity to separate himself from it.

The court's dismissal of the weapon possession count does not undermine the sufficiency and weight of the evidence supporting the finding as to menacing. On the contrary, the mixed finding was logical and consistent with the evidence. The weapon charge required proof that the apparent firearm displayed by appellant was actually a weapon, as set forth in Penal Law § 265.01(2).

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8392 The People of the State of New York, Ind. 3618N/08
Respondent,

-against-

Mario Bracero,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about August 4, 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: OCTOBER 25, 2012

CLERK

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

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8397-
8397A In re Giovannie Sincere M., and Another,

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

Dennis M., etc.,
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

_____

Julian A. Hertz, Larchmont, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

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

_____

Orders of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about December 8, 2011, which, to the extent appealed from as limited by the briefs, upon finding that respondent father's consent for the adoption of the subject children was not required, transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs, with respect to the disposition, and the appeal from the orders otherwise dismissed, without costs.

The father failed to appear at the fact-finding hearing,

which considered whether his consent was required for the children's adoption. Accordingly, no appeal lies from that aspect of the orders (*see Matter of Pedro A. v Susan M.*, 95 AD3d 458 [1st Dept 2012]; *Matter of Jayden R.*, 61 AD3d 486, 486 [1st Dept 2009]).

Even if this Court considered the issue on the merits, the father failed to establish that he satisfied the criteria set forth in Domestic Relations Law § 111(1)(d). Indeed, the father admitted that he had not provided consistent child support while the children were in foster care, despite having the means to do so (*see* § 111[1][d][i]; *see Matter of Isis S.C. [Lamont C.]*, 88 AD3d 602, 603 [1st Dept 2011]). The agency's alleged failure to inform the father of his parental obligations did not excuse him from fulfilling those obligations (*see Matter of Cassandra Tammy S. [Babbah S.]*, 89 AD3d 540, 540 [1st Dept 2011]).

The Family Court properly denied the father's application for a suspended judgment, as that disposition was not available to him. As a notice-only father, his rights were limited to notice and an opportunity to be heard at the dispositional

hearing as to the best interests of the children (*see* Domestic Relations Law § 111-a). He could not obtain custody of the children at the hearing, since he did not file a petition under article 6 of the Family Court Act.

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8398 Marguerita Warner, Index 101048/10
Plaintiff-Respondent,

-against

Continuum Health Care
Partners, Inc., et al.,
Defendants-Appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants.

Mallilo & Grossman, Flushing (Francesco Pomara, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about April 19, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff testified that she was employed as a contract travel nurse at defendant St. Luke's Roosevelt Hospital Center (collectively with defendant Continuum Health Care Partners, St. Luke's). On October 16, 2009, she went to the cafeteria at her assigned lunch time, where she slipped and fell while waiting in line to pay one of the cashiers.

A special employee is one who is transferred, for a limited time of whatever duration, to the service of another. When an employee is eligible to receive Workers' Compensation benefits from his general employer, a special employer is shielded from any action at law commenced by the employee (*see* Workers' Compensation Law § 29[6]; *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 555 [1991]). The key to the determination is a fact-intensive inquiry into who controls and directs the manner, details, and ultimate result of the employee's work *(see Bautista v David Frankel Realty, Inc.*, 54 AD3d 549 [1st Dept 2008]; *Bellamy v Columbia Univ.*, 50 AD3d 160 [1st Dept 2008]).

Here, while plaintiff was paid by her general employer Med Staff, St. Luke's, which had interviewed her before selecting her, had the authority to hire her or fire her. Every morning, a St. Luke's staff member issued plaintiff her daily assignment, her supervisor was a St. Luke's employee, and there were no Med Staff supervisors on site at St. Luke's. On those days when she was assigned to be a scrub nurse, she would be present in the operating theater during surgery, handing the surgeon instruments as he or she needed them. Plaintiff worked exclusively for St. Luke's for four years, and received annual performance reviews from its staff. Under such undisputed critical facts, there are

no triable issues of fact, and the determination of special employment status may be made as a matter of law (*see Grilikhes v International Tile & Stone Show Expos*, 90 AD3d 480 [1st Dept 2011]; *Gannon v JWP Forest Elec. Corp.*, 275 AD2d 231 [1st Dept 2000]). Plaintiff's averment that she rarely interacted with her supervisor, because, as an experienced nurse, she knew what to do, does not surmount the fact that St. Luke's had control over her work.

In any event, St. Luke's demonstrated an entitlement to judgment as a matter of law, proffering evidence that it was not on notice of the clear liquid upon which plaintiff fell (*see Arce v 1704 Seddon Realty Corp.*, 89 AD3d 602, 603 [1st Dept 2011]). St. Luke's cafeteria manager testified that she conducted regular inspections that day, saw no liquid on the floor, and was not informed of any spill by her staff, which she would have been, if a spill had occurred (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *see*

also Walters v Collins Bldg. Servs., Inc., 57 AD3d 446 [1st Dept 2008]). Plaintiff, who did not know where the liquid came from or how long it had been there, failed to raise a triable issue of fact (*see Arce*, 89 AD3d 602).

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8399 Soila Lisbey, Index 307047/08
Plaintiff-Appellant,

-against-

Pel Park Realty,
Defendant-Respondent,

2860 Decatur Corporation, et al.,
Defendant.

Simon Lesser PC, New York (Leonard F. Lesser of counsel), for appellant.

Gannon, Rosenfarb & Moskowitz, New York (Lisa L. Gokhulsingh of counsel), for respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 28, 2012, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for certain discovery and sanctions, unanimously modified, on the law, to deny defendants' motion, and, on the facts, to grant plaintiff's cross motion as to certain requested work orders and the deposition of John T. Satriale, Jr., and otherwise affirmed, without costs.

Plaintiff's complaints of the collapse of her bathroom ceiling and portions of her living room ceiling one year and again three months before the collapse of the living room ceiling

in which she allegedly was injured present an issue of fact whether defendants were on constructive notice of a defect in plaintiff's living room ceiling (*see Radnay v 1036 Park Corp.*, 17 AD3d 106, 107-108 [1st Dept 2005]). To the extent the record is ambiguous as to the cause of the ceiling collapse, issues of fact exist as to the issue of defendants' duty to inspect plaintiff's apartment's ceilings and the applicability of the doctrine of res ipsa loquitur (*see Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500 [1st Dept 2007]; *Mejia v New York City Tr. Auth.*, 291 AD2d 225, 227 [1st Dept 2002]).

Since defendants did not disclose the existence of documents previously ordered produced or the identity of a witness with knowledge until their deposition just before the note of issue was filed, plaintiff's last-minute renewed demand for this discovery was justified. Thus, plaintiff may conduct further discovery in connection with her May 14, 2010 notice of inspection.

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8400 Lucinda Bello, et al., Index 105139/09
Plaintiffs-Appellants,

-against-

Campus Realty LLC, et al.,
Defendants-Respondents,

Khan Management, Inc., et al.,
Defendants.

_____

The Taub Law Firm P.C., New York (Matthew A. Taub of counsel), for appellants.

Molod Spitz & De Santis, New York (Marcy Sonneborn of counsel), for respondents.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered July 18, 2011, which, in this premises security action, granted the motion of defendants Campus Realty LLC and Hamid Khan for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to deny the motion insofar as it sought dismissal of the complaint as against Campus Realty, and otherwise affirmed, without costs.

Campus Realty, as the owner of the subject building, owed the plaintiff residents a duty to take minimal security precautions to protect them from foreseeable criminal acts (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 551 [1998]; *Wayburn*

v Madison Land Ltd. Partnership, 282 AD2d 301, 303 [1st Dept 2001]). Questions of fact exist as to whether Campus Realty breached that duty by failing to remedy the allegedly broken lock on the building's front door entrance, despite notice of the dangerous condition (*see Carmen P. v PS&S Realty Corp.*, 259 AD2d 386, 388 [1st Dept 1999]). Plaintiffs testified that the front door lock was broken, that the condition existed for at least two weeks before they were allegedly robbed by intruders, and that they told the superintendent and the property manager's secretary about the broken lock shortly before the robbery (*see id.*). Issues of fact also exist as to whether the robbery of plaintiffs was foreseeable, given the evidence of prior crimes, including robberies, in and around the building (*see Jacqueline S. v City of New York*, 81 NY2d 288, 294-295 [1993]).

As to proximate cause, an issue of fact exists as to whether the assailants were intruders who entered the building through the allegedly defective front door. Plaintiff Bello testified that she had been residing in the building since 1997, that she was familiar with the tenants, and that the intruders, who were impersonating police officers, were not residents (*see Burgos*, 92 NY2d at 551-552; *Esteves v City of New York*, 44 AD3d 538, 539 [1st Dept 2007]). Further, an issue of fact exists as to whether

plaintiff Garcia's act of opening the front door of plaintiffs' apartment constituted an intervening event that severed the causal chain (*see Madera v New York City Hous. Auth.*, 264 AD2d 579, 579-580 [1st Dept 1999]). Indeed, plaintiffs testified that Garcia opened the door to take out the trash and go to the gym, and that the intruders pushed him into the apartment, forced him down to the floor, and handcuffed him (*see id.* at 580). With respect to damages, the evidence defendants submitted was insufficient to make a prima facie showing that plaintiffs did not suffer psychological injuries as a result of the incident.

Supreme Court properly dismissed the complaint as against defendant Khan, Campus Realty's managing member and property manager, since there is no allegation or indication in the record that Khan intentionally perpetrated a wrong or injustice (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]).

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8401 Gerald Lieblich, et al., Index 110023/11
Plaintiffs-Appellants,

-against-

Fron Nahzi, etc.,
Defendant-Respondent.

_____

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

Roy A. McKenzie, New York, for respondent.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered March 1, 2012, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment and dismissed the complaint, unanimously affirmed, with costs.

Plaintiffs' present action, which seeks to recover money for expenses they claimed should have been deducted from the amount awarded to defendant in a prior action (*Nahzi v Lieblich*, 69 AD3d 427 [1st Dept 2010], *lv denied* 15 NY3d 703 [2010]), is barred by res judicata (*see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]) and collateral estoppel (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). In the prior litigation, plaintiffs had the opportunity to raise the issue of additional expenses that they allege should have been deducted

from defendant's award of 25% of the proceeds from the sale of property owned by defendant corporation. The individual plaintiffs, who are shareholders of the corporate defendant, failed either to raise this issue or to do so in a procedurally proper manner.

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

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

ENTERED: OCTOBER 25, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8403N Baje Realty Corp., Index 19205/90
Plaintiff-Appellant,

-against-

Alice Cutler, etc., et al.,
Defendants/Third-Party
Plaintiffs-Respondents,

-against-

Robert C. Bianco, et al.,
Third-Party Defendants,

Walter Sakow, et al.,
Third-Party Defendants-Appellants.

_____

Gordon, Gordon & Schnapp, P.C., New York (Elliot Schnapp of counsel), for appellants.

Deutsch, Metz & Deutsch, LLP, New York (Christian V. Cangiano of counsel), for Alice Cutler, respondent.

Kaplan Landau, LLP, New York (Eugene Neal Kaplan of counsel), for Jeffrey Baynon, respondent.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered December 20, 2010, which, insofar as appealed from, after a nonjury trial, denied the motion of plaintiff and third-party defendants Walter Sakow and Marion Sakow for leave to amend the complaint, unanimously affirmed, with costs.

The trial court's denial of the motion for leave to amend the 20-year-old complaint to allege for the first time that

Walter Sakow was the true beneficial owner of the shares of Baje Realty and that Robert Bianco held them only as his nominee was based upon a fair interpretation of the evidence turning on explicit credibility determinations (*see Hardwick v State of New York*, 90 AD3d 540 [1st Dept 2011]). Evidence of Bianco's conduct and other evidence inconsistent with his claim of ownership do not compel a different finding (*compare Phillips v Katzman*, 90 AD3d 436 [1st Dept 2011]).

Even if appellants are correct that the trial court erroneously applied the statute of frauds with respect to the transfer of shares and should have analyzed their claim as seeking the imposition of a constructive trust, appellants failed to prove the promise required for such relief (*see Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473-474 [1st Dept 2010]).

We have considered appellants' remaining contentions, including that Bianco is estopped from claiming the shares by

failing to claim them as assets in his bankruptcy filing, that Bianco improperly received the shares for unspecified future services, and that the court's evidentiary rulings and conduct deprived appellants of a fair trial, and find them unavailing.

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

ENTERED: OCTOBER 25, 2012

CLERK

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

8532 In re Faith D. A.,

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

Faith D. A.,
Appellant,

Leake & Watts Services Inc.,
Petitioner-Respondent,

Natasha A.,
Respondent-Respondent.

Joseph V. Moliterno, Scarsdale, for appellant.

Law Offices of James M. Abramson, New York (James M. Abramson of counsel), for Leake & Watts Services, Inc., respondent.

Steven N. Feinman, White Plains, for Natasha A., respondent.

Order, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about December 19, 2011, which, after a hearing, dismissed the petition to terminate the parental rights of respondent mother on the ground of mental illness, unanimously reversed, on the law, without costs, the petition granted, and the custody and guardianship of the subject child transferred to petitioner agency and the Commissioner of Social Services for the purpose of adoption.

Petitioner met its burden of proving by clear and convincing

evidence that respondent is mentally ill within the meaning of Social Services Law § 384-b(4)(c) and (6)(a) (*see Matter of Joyce T.*, 65 NY2d 39, 50 [1985]; *Matter of Genesis S. [Irene Elizabeth S.]*, 70 AD3d 570 [1st Dept 2010]). The report and testimony from a psychologist who reviewed respondent's medical records and conducted a clinical interview and found that respondent suffers from a personality disorder supports the determination that she is incapable of caring for the child presently and for the foreseeable future.

A separate dispositional hearing was not required since this is a case of termination for mental illness (*see Matter of Joyce T.*, 65 NY2d at 47-50; *Matter of Ashanti A.*, 56 AD3d 373, 373-374 [1st Dept 2008]).

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

ENTERED: OCTOBER 25, 2012

CLERK

The Following Order Was Entered And Filed On October 25, 2012

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8551 In re Maximino Rivera, Index 260763/12
Petitioner-Appellant,

-against-

The Board of Elections of the
City of New York, et al.,
Respondents-Respondents,

Charles Serrano,
Respondent.

Maximino Rivera, appellant pro se.

Law Offices of Donald R. Dunn, Jr., Bronx (Donald R. Dunn of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Stephen Kitzinger of counsel), for Board of Elections, respondent.

Stanley Kalmon Schlein, Bronx, for Carmen Arroyo, respondent.

Judgment, Supreme Court, Bronx County (John W. Carter, J.), entered on or about October 2, 2012, unanimously affirmed for the reasons stated by Carter, J., without costs or disbursements.

No opinion. Order filed.

ENTERED: OCTOBER 25, 2012

CLERK

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

7433 Stephan Villanueva Medina, Index 27626/03
Plaintiff-Respondent,

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for appellants.

Law Office of Jay H. Tanenbaum, New York (Laurence S. Warshaw of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 14, 2011, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David B. Saxe
John W. Sweeny, Jr.
Rolando T. Acosta
Dianne T. Renwick, JJ.

7433
Index 27626/03

_____x

Stephan Villanueva Medina,
Plaintiff-Respondent,

-against-

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

_____x

Defendants appeal from the order of the Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 14, 2011, which, denied their motion for summary judgment dismissing the complaint.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt and Pamela Seider Dolgow of counsel), for appellants.

Law Office of Jay H. Tanenbaum, New York (Laurence S. Warshaw of counsel), for respondents.

SAXE, J.

Plaintiff Stephan Villanueva Medina commenced this action against the City of New York, the New York City Police Department, and arresting officer Sgt. Matthew Reilly, claiming false arrest, false imprisonment, and related causes of action, following his acquittal on charges of sexual abuse in the second degree and endangering the welfare of a child. Plaintiff was arrested based on his 11-year-old niece's assertions to the police that on the night of September 21, 2002, while she was sleeping next to her cousin, plaintiff's daughter, in plaintiff's home, she awoke to find plaintiff lifting up her shirt and touching her breast.

The 11-year-old complainant was taken to the 45th precinct of the NYPD by her mother, plaintiff's sister-in-law, on September 22, 2002, and gave an officer on duty her description of what had happened. Because plaintiff was employed by the Police Department as an auto mechanic, the Internal Affairs Bureau was called into the investigation. Lieutenant Thomas Maldon, Sergeant Matthew Reilly and Sergeant Carmen Martinez, all from IAB, reported to the precinct and took over the questioning of the complainant. Based on the information they obtained from her, with the authorization of IAB executive officer Raymond King, they arrested plaintiff at his home that night. He was

suspended from his job without pay, and his name was placed on a watch list.

Plaintiff was acquitted of the criminal charges after a nonjury trial. The judge explained that while he could see no reason that the child, who seemed to be normal and well adjusted, would make up this story, he could see no reason for a married uncle with two children of his own to want to touch the breast of an 11-year old who was his god-daughter and who had slept over hundreds of times before. He concluded that the charges were not proved beyond a reasonable doubt.

Plaintiff then commenced this action, alleging false arrest, false imprisonment, and malicious prosecution, as well as negligence, violation of his civil rights, and defamation.

Defendants' motion for summary judgment was based on the contention that the undisputed submitted evidence established as a matter of law that the police had probable cause to arrest plaintiff, and that therefore his false arrest, false imprisonment, malicious prosecution, and related claims must be dismissed. In opposition, plaintiff offered an expert's assertion that the manner in which the police handled the investigation was improper, and argued that therefore an issue of fact was presented as to whether probable cause was established. The motion court denied summary judgment, finding an issue of

fact as to whether the police had probable cause for plaintiff's arrest.

Where, as here, an arrest is made without a warrant, "a presumption arises that it was unlawful, and [defendants have] the burden of proving that ... the arrest was based on probable cause" (*Williams v Moore*, 197 AD2d 511, 513-514 [2d Dept 1993]). To establish as a matter of law that the police in the present matter had probable cause, the People rely on the general rule that "an eyewitness-victim of a crime can provide probable cause for the arrest of his assailant despite the fact that his reliability has not been previously established or his information corroborated [citation omitted]. In fact, an accusation against a specific individual from an identified citizen is presumed reliable" (*People v Nichols*, 156 AD2d 129, 130 [1st Dept 1989] [internal quotation marks omitted], *lv denied* 76 NY2d 740 [1990]; *see also Shapiro v County of Nassau*, 202 AD2d 358 [1st Dept 1994], *lv denied* 83 NY2d 760 [1994]; *Kramer v City of New York*, 173 AD2d 155 [1st Dept 1991], *lv denied* 78 NY2d 857 [1991]).

However, the fact that an identified citizen accused an individual who was known to her of a specific crime, while generally sufficient to establish probable cause, does not necessarily establish it. The rule is actually somewhat less

absolute: “Probable cause is established *absent materially impeaching circumstances*, where, as here, the victim of an offense communicates to the arresting officer information affording a *credible* ground for believing the offense was committed and identifies the accused as the perpetrator” (*People v Gonzalez*, 138 AD2d 622, 623 [2d Dept 1988] [emphasis added], *lv denied* 71 NY2d 1027 [1988]). The question is whether the police are aware of “materially impeaching circumstances” or grounds for questioning the complainant’s credibility.

In *Sital v City of New York* (60 AD3d 465 [1st Dept 2009], *lv dismissed* 13 NY3d 903 [2009]), the arresting officer had doubts about the credibility of the identified citizen complainant who had accused the plaintiff of a fatal shooting, and moreover, the identification by the complainant was arguably contradicted by physical evidence at the crime scene that was consistent with the conflicting statement of an independent eyewitness. This Court held that “a rational jury could have determined that the officer's failure to make further inquiry of potential eyewitnesses was unreasonable under the circumstances, and evidenced a lack of probable cause” (*id.* at 466).

In *Stile v City of New York* (172 AD2d 743 [2d Dept 1991]), the false arrest claim was upheld where the plaintiff was arrested without a warrant by a New York City police detective,

based on a claim by friends of the detective that the plaintiff had stolen a ring while visiting their home. The Court observed that the detective had ignored not only the plaintiff's protestations of innocence, but also his attorney's insistence that the detective should investigate an earlier incident in which his friends had similarly accused another man of stealing a ring and later dropped the charges.

Issues of fact were also found in *Carlton v Nassau County Police Dept.* (306 AD2d 365, 365-366 [2d Dept 2003]) regarding whether the police had probable cause to arrest the plaintiff at his home without a warrant for theft of services. Although the restaurant owner had provided an affidavit stating that the plaintiff left the restaurant without paying the bill, the arresting officers knew that the bill was disputed and that the plaintiff had provided his business card to the restaurant owner, facts that the court said would have prompted a reasonable person to make further inquiry.

But mere denial by the accused of the complainant's claims will not constitute "materially impeaching circumstances" or grounds for questioning the complainant's credibility so as to raise a question of fact as to probable cause. In *Kramer v City of New York* (173 AD2d 155 [1st Dept 1991], *lv denied* 78 NY2d 857 [1991]), the complainant, who appeared to the police officer to

have fallen to the sidewalk as if she had been thrown from a car, told the officer that the occupants of the car (the plaintiffs) had stolen her purse. The officer stopped the vehicle and, upon finding the complainant's purse therein, arrested the plaintiffs. Although the charges were eventually dismissed when the complainant refused to proceed, and although the plaintiffs explained that they asked her to leave the car because she was unruly and said that they had no idea she had left her purse behind, the order setting aside the jury verdict in the plaintiffs' favor on the false arrest claim was affirmed. This Court reasoned that "[t]he information given to the officer by the identified citizen, accusing plaintiffs of a specific crime, was legally sufficient to provide the officer with probable cause to arrest" (*id.* at 156).

Here, the police had no information about the complainant, no knowledge of facts relating to her or to her accusations that would justify doubt as to her reliability. Neither her age nor the sexual nature of the charges presents grounds to call her credibility into question.

> "[T]he requirement for corroboration in sex crimes was largely abandoned when Penal Law § 130.15 was repealed in 1974 (L 1974, ch 14, § 1) and the remaining requirement for corroboration of sex offenses with respect to child victims was eliminated in 1984 (L 1984, ch 89). These changes were made in the belief that defendants are sufficiently protected from false

> charges by other safeguards and that in child abuse cases the difficulty of obtaining corroborative evidence, the need to protect child victims and the unfairness of treating those victims differently from victims of crime in general, warranted repeal of the statute (see, Governor's Mem approving L 1984, ch 89, 1984 NY Legis Ann, at 73; see also, Governor's Mem approving L 1974, ch 14, 1974 NY Legis Ann, at 371-372)" (*People v Geoff*, 71 NY2d 101, 109 [1987]).

Of course, for non-sex offenses, too, the sole testimony of a minor is sufficient to establish probable cause. For example, in *People v Walker* (278 AD2d 852 [4th Dept 2000], *lv denied* 96 NY2d 869 [2001]), probable cause was based on the statement of a 14-year-old "identified citizen informant who witnessed the crime [who] is presumed to be reliable[,] and her basis of knowledge was her observation of the crime she described" (at 452; *see* **Kamins**, New York Search & Seizure § 1.02[2][c] at 1-90 [2012 ed] ["Probable cause can even be predicated on information supplied by a young child"]).

Plaintiff raises the possibility that the complainant's accusations were prompted by her mother, Mightily R., in response to threats made by plaintiff's wife that she (and plaintiff) would seek custody of their niece because Mightily R. was endangering the child with her excessive drinking. However, while plaintiff made this suggestion at his examination before trial in this civil action, there is no showing that this theory was presented to the police at or around the time of his arrest.

Consequently, he has failed to establish that the police had reason to doubt the complainant's credibility, necessitating further investigation before an arrest.

Plaintiff emphasizes the rule that "where it can be shown that the conduct of the police deviated so egregiously from acceptable police activity as to demonstrate an intentional or reckless disregard for proper procedures, the presumption of probable cause may be overcome" (*Hernandez v State of New York*, 228 AD2d 902, 904 [3d Dept 1996]). However, he has not shown that the conduct of the police deviated egregiously in this case. In *Hernandez*, the police "failed to carry out the most rudimentary investigation before charging claimant with a serious felony" (228 AD2d at 905). Here, where there was no reason for the police to doubt the complainant's credibility, the mere possibility "that not all procedures that could have been followed were followed in fact ... does not establish that the omissions were improper, much less egregious" (*see Lee v City of Mount Vernon*, 49 NY2d 1041, 1043 [1980]).

Plaintiff's expert asserts that the lack of probable cause is also demonstrated by the officers' failures to comply with IAB and ordinary police procedures required in such circumstances. Specifically, he points out the failure to question plaintiff's wife and daughter regarding their observations, if any, on the

night of September 21, 2002, and the failure to investigate the scene of the alleged crime and search for evidence before arresting him.

However, these alleged failures of the police investigation are not the type of failures that tend to establish improper reliance on insufficient information, such as occurred in the *Hernandez* case. Nothing in the record before us indicates that those additional steps would have uncovered enough -- or any –- conflicting evidence to undermine the complainant's accusation and rebut the presumption of probable cause. For one thing, the trial testimony of plaintiff's wife and daughter indicating that they did not see anything to support the complainant's claims does nothing to undermine her accusation, and the testimony of plaintiff's wife that she is a light sleeper provides some support for plaintiff's denial of the accusation, but does not undercut the complainant's claim in a way that would cause the police to reassess whether her accusation was enough to establish probable cause to arrest.

Nor does the failure to cordon off the crime scene in accordance with regulation undermine the probable cause supplied by the complainant's accusation. Given the nature of the accusation, there was no logical reason to think anything exonerating plaintiff or negating the complainant's claims could

have been found. The only result of searching and photographing the crime scene that could have helped plaintiff is an absence of any indications of the crime, but that would do nothing to negate the complainant's claim. Photographs showing the slept-in bed and the doorway defendant entered through would not have disproved the complainant's allegations. Even plaintiff's implication that his morbid obesity at the time made it difficult for him to squeeze through the door does not suggest that he was actually unable to enter the room. Thus, the officers' decision to arrest based on the complainant's accusations alone, with no investigation of the room or questioning of plaintiff's remaining family members, was not an egregious failure that overcame the presumption of probable cause.

Even assuming that the steps that plaintiff's expert asserts were necessary could somehow have uncovered evidence that conflicted with the complainant's statement, that evidence would have been relevant to the issue of reasonable doubt at the criminal trial, but there is nothing to suggest that it would have altered the determination that the complainant's accusation supplied the police with probable cause to arrest him (*see Agront v City of New York*, 294 AD2d 189, 190 [1st Dept 2002]).

The unrebutted showing of probable cause requires the dismissal of plaintiff's false arrest, false imprisonment and

malicious prosecution claims. The cause of action alleging negligence, including negligent hiring, retention, and training, must be dismissed because no cause of action for negligent investigation lies in New York (*Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 284 [2d Dept 2003]; *Santiago v City of Rochester*, 19 AD3d 1061 [4th Dept 2005], *lv denied* 5 NY3d 710 [2005]; *Hernandez v State of New York*, 228 AD2d 902, 904 [3d Dept 1996]). In addition, the negligent hiring, retention, and training claims must be dismissed because it is undisputed that the officer was acting within the scope of his employment, and plaintiff does not seek punitive damages based on gross negligence in the hiring or retention of the officer (*see Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]).

The cause of action for violation of civil rights must be dismissed based on the dismissal of the antecedent tort claims of false arrest/false imprisonment, malicious prosecution, and negligence (*see Grant v Barnes & Noble*, 284 AD2d 238 [1st Dept 2001]). As to the defamation claim, the complaint fails to set forth "the particular words complained of" (CPLR 3016[a]; *see LoFaso v City of New York*, 66 AD3d 425 [1st Dept 2009], *lv denied* 14 NY3d 711 [2010]), and defendants' conduct in merely taking and acting on a criminal complaint is not a viable basis for a defamation claim.

Accordingly, the order of the Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 14, 2011, which denied defendants' motion for summary judgment dismissing the complaint, should be reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

All concur.

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

ENTERED: OCTOBER 25, 2012

CLERK