SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 3, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10731 Loraine Wright, Index 305109/08
Plaintiff-Respondent,

-against-

Emigrant Savings Bank, formerly
known as Dollar Savings Bank
of New York,
Defendant,

2051 GMA Restaurant Corp., doing
Business as Seven Seas Restaurant,
Defendant-Respondent,

Riverbay Corporation,
Defendant-Appellant.

____

Armienti, DeBellis, Gugliemo & Rhoden, LLP, New York (Harriet Wong of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for Loraine Wright respondent.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for 2051 GMA Restaurant Corp., respondent.

____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about February 29, 2012, which, insofar as appealed from as limited by the briefs, denied

defendant-respondent Riverbay Corporation's (Riverbay) motion for summary judgment dismissing plaintiff's complaint, and denied Riverbay's cross motion to amend the answer to assert a cross claim against defendant 2051 GMA Restaurant Corp. d/b/a Seven Seas Restaurant (Seven Seas) alleging breach of contract for failure to procure insurance, unanimously affirmed, without costs.

The court properly denied Riverbay's motion for summary judgment dismissing the complaint. Riverbay has not established prima facie that it did not create or have notice of the black ice that allegedly caused plaintiff to slip and fall, as it failed to submit any evidence concerning its snow/ice removal and inspections efforts taken on the day of the accident with respect to the area where plaintiff fell(*see Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]; *De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566, 566 [1st Dept 2010]; *Santiago v New York City Health & Hosps. Corp.*, 66 AD3d 435, 435 [1st Dept 2009]). In any event, plaintiff's description of the black ice as "black grayish" "dirty snow" that was circular and measured about 1½ foot wide provided at least some indication that the condition had existed for some time, raising an issue of

fact as to constructive notice (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

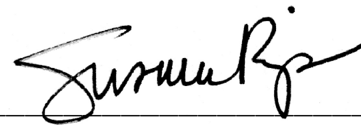
The court also properly denied Riverbay's motion to amend the answer to add the breach of contract cross claim against Seven Seas due to Seven Seas' failure to procure insurance for Rivebay's benefit, as the breach of contract claim is barred by the six-year statute of limitations (CPLR 213[2]). Seven Seas' failure to obtain insurance was discoverable at any time. Because the lease was assigned to Seven Seas on August 31, 1994 and renewed beginning September 1, 2004, the breach of contract claim accrued at the latest on September 1, 2004 (*see Sears, Roebuck & Co. v Patchogue Assoc., LLC*, 87 AD3d 629 [2d Dept 2011]). Riverbay did not seek to assert the breach of contract claim until October 2011. The "relation back" doctrine is inapplicable, as Riverbay's original cross claims for common law indemnification/contribution alleging that Seven Seas' negligence caused plaintiff's accident "does not give notice of the transactions, occurrences, or series of transactions or occurrences" to be proved on the breach of contract claim (CPLR 203[f]). Also, under the lease agreement here, the procurement of insurance is not a "recurring obligation," but a single obligation to be performed at the beginning of the lease term

(*cf. Bulova Watch Co. v Celotex Corp.*, 46 NY2d 606, 610-611 [1979]; *Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 140-142 [1993]; *Knobel v Shaw*, 90 AD3d 493, 494 [1st Dept 2011]; *Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 431, 435 [1st Dept 2010]; *Kerr v Brown*, 283 AD2d 343, 345 [1st Dept 2001]).

We have reviewed Riverbay's remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 3, 2013



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Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10753 David Moyal, both individually and derivatively on behalf of Group IX, Inc. doing business as Dotcom Hotel of NY,
Plaintiff-Appellant,

-against-

Group IX, Inc., doing business as Dot Com Hotel of NYC, et al.,
Defendants-Respondents.

Index 601973/07

Morrison Cohen LLP, New York (David A. Piedra of counsel), for appellant.

Sadis & Goldberg, LLP, New York (Douglas R. Hirsch of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered May 30, 2012, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the fourth cause of action against the individual defendants, the seventh cause of action as against Telecom Switching, Inc., and the ninth cause of action against the individual defendants, unanimously modified, on the law, to deny the motion to the extent it sought dismissal of so much of the fourth cause of action as alleges breach of fiduciary duty against defendants Teeman and Sleppin based on the transactions between defendants Group IX, Inc. and Telecom Switching, and the

seventh cause of action as against Telecom Switching, and otherwise affirmed, without costs.

Defendants failed to make a prima facie showing that the transactions between Group IX and Telecom Switching were fair. In their moving papers, they merely established that Telecom Switching paid Group IX a certain amount; one cannot tell from the evidence defendants initially submitted whether Telecom Switching received a "sweetheart" deal. Accordingly, regardless of the sufficiency of plaintiff's opposition papers, the court should not have dismissed so much of the fourth cause of action as alleges that Teeman (an officer of Group IX who also owns Telecom Switching) and Sleppin (who signed the Group IX-Telecom Switching contract on behalf of Group IX, and whose company is a customer of Telecom Switching) breached their fiduciary duty by engaging in the Group IX-Telecom Switching transactions (*Kramer v Danalis*, 92 AD3d 513 [1st Dept 2012]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The court properly granted summary judgment to Teeman, Sleppin, and Golomb (the individual defendants) dismissing so much of the fourth cause of action as alleges that they breached their fiduciary duty by usurping corporate opportunities for themselves at the expense of Group IX. Plaintiff broadly defines

the corporate opportunity as Group IX's exploitation of a burgeoning market for voice over internet protocol (VoIP). However, Golomb's deposition testimony shows that Group IX was thinking of exploiting the corporate opportunity of providing internet bandwidth to VoIP users. Even plaintiff's expert opined that colocation facilities such as Group IX should have considered providing "colocation services (space, [electric] power, network connectivity) to VoIP telecom companies." There is no evidence that the individual defendants usurped this corporate opportunity by providing internet bandwidth or colocation services to VoIP users.

For the same reason, the court properly granted summary judgment to the individual defendants dismissing the ninth cause of action alleging breach of a noncompete agreement. Although the subject shareholders' agreement prohibits the individual defendants from "[d]irectly or indirectly, engag[ing] in the telecom collocation business," there is no evidence that these defendants engaged in that business. Instead, the record shows that Teeman engaged in the switch partitioning business through Telecom Switching and the prepaid phone card business through nonparty Hispanic Distribution LLC. Sleppin (through nonparty Global Rock Networks Inc.) sells prepaid phone cards on a

wholesale basis, and Golomb sells prepaid phone time through nonparty EZ Call Inc. and distributes prepaid phone cards through Hispanic Distribution.

The seventh cause of action alleging unjust enrichment should not have been dismissed as against Telecom Switching. There are triable issues of fact as to whether that defendant paid below-market rates for racks and cross-connects, and whether it used more than the 24 cross-connects for which it paid Group IX.

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

ENTERED: DECEMBER 3, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11021 Albana Rugova, as Administratrix of the Estate of Dardan Binakaj, deceased, Index 303161/10
Plaintiff-Respondent,

-against-

Shawn D. Davis,
Defendant-Appellant.

____

Thomas M. Bona, P.C., White Plains (Michael Flake of counsel), for appellant.

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

____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 5, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The motion court improvidently exercised its discretion by not considering defendant's reply papers, and we review them in determining the appeal (*see* CPLR 2004).

Defendant demonstrated his prima facie entitlement to judgment as a matter of law by showing that his car was struck in the rear by plaintiff's decedent's car, and in response, plaintiff failed to provide a nonnegligent explanation, in

evidentiary form, for the collision (*see Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]).

The transcripts of the deposition testimony of two police officers who testified in a related action are hearsay as to defendant, since he was not notified about this deposition, nor present for the testimony given by the officers (*see* CPLR 3117[a][3]; *Rivera v New York City Tr. Auth.*, 54 AD3d 545, 547 [1st Dept 2008]; *Weinberg v City of New York*, 3 AD3d 489 [2nd Dept 2004]; *Claypool v City of New York*, 267 AD2d 33 [1st Dept 1999]). Although the transcripts are hearsay, hearsay may be used to defeat summary judgment as long as it is not the only evidence submitted in opposition (*see O'Halloran v City of New York*, 78 AD3d 536 [1st Dept 2010]; *Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525 [2010]). However, plaintiff failed to raise a triable issue of fact, since she submitted no other admissible evidence as to the happening of the accident in opposition to defendant's motion for summary judgment.

Plaintiff may not avail herself of the *Noseworthy* doctrine (*Noseworthy v City of New York*, 298 NY 76, 80 [1948]), so as not

to be held to as high a degree of proof, since plaintiff failed to make a showing of facts from which negligence can be inferred (*see Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927 [1st Dept 2010]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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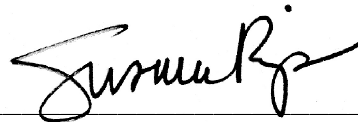


CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11197 The People of the State of New York, Ind. 2467N/07
Respondent,

-against-

Dean Pacquette,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered June 11, 2008, as amended March 6, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of five years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, the evidence was overwhelming. There is no basis for disturbing the jury's determinations concerning credibility and identification. Among other things, the evidence included the recovery of prerecorded buy money from defendant, notwithstanding defendant's implausible explanation for that fact.

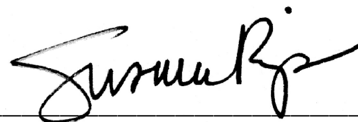
The court properly determined that an identification made by

an officer other than the purchasing undercover officer was confirmatory and thus did not require CPL 710.30(1)(b) notice (*see People v Wharton*, 74 NY2d 921 [1989]). The requirements of a police confirmatory identification were met, in that the officer at issue carefully observed defendant at close range throughout the drug transaction and made a prompt identification as part of a planned procedure (*see People v Houston*, 47 AD3d 424 [1st Dept 2008], *lv denied* 10 NY3d 841 [2008]; *compare People v Boyer*, 6 NY3d 427 [2006]). The officer also transmitted a detailed and accurate description of defendant. In any event, any error was harmless because this officer's identification of defendant was cumulative to that of the undercover officer, and it added little to the People's otherwise overwhelming case (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 3, 2013



CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11199 Juliette Carbonnier, by Her Mother and Natural Guardian, Stephanie Salzman, et al., Plaintiffs-Respondents, Index 100637/09

-against-

Board of Education of the City of New York, Defendant-Appellant.

____

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for appellant.

Kuharski, Levitz & Giovinazzo, Staten Island (Lonny R. Levitz of counsel), for respondents.

____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered December 18, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this action for personal injuries allegedly suffered by the infant plaintiff when she fell, after being pushed by another student, while playing on the monkey bars in the school playground, defendant demonstrated its entitlement to summary judgment by demonstrating that there was adequate instruction and supervision with respect to the playground and its equipment.

The evidence establishes that the infant plaintiff had used monkey bars at least 50 times before the accident and had used the monkey bars in the school playground twice before, there were a minimum of 2 adults in the playground for every class of 25 children at the time of the accident, both the teacher and the assistant teacher were walking around the playground assisting and monitoring student play, and it was "the impulsive, unanticipated act of a fellow student" that caused the accident (*see Mirand v City of New York*, 84 NY2d 44, 49 [1994]).

In opposition, plaintiffs failed to demonstrate that the level of supervision provided by defendants was inadequate, or that the alleged lack of supervision or training of the staff and the students was the proximate cause of the accident (*see Martinez v City of New York,* 85 AD3d 586 [1st Dept 2011]; *Charles v City of Yonkers,* 103 AD3d 765, 766 [2d Dept 2013] [monkey bars]; *Troiani v White Plains City Sch Dist,* 64 AD3d 701, 702 [2d Dept 2009] [monkey bars]).

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

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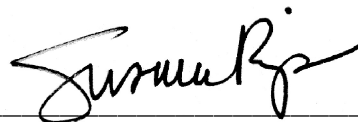

CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11200 In re Sha Born H.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about February 1, 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 arson in the fourth degree and reckless endangerment in the second degree, and placed him on 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 credibility determinations. Viewed as a whole, the surveillance video, appellant's videotaped statement and the testimony of witnesses concerning the condition of the

building after the fire established the elements of fourth-degree arson (*see* Penal Law § 150.05). The evidence supports inferences that, notwithstanding his lack of intent to cause any harm, and his hope of avoiding any harm (*see e.g. Matter of Koron B.*, 303 AD2d 314 [2003], *lv denied* 100 NY2d 507 [2003]), appellant intentionally started a fire, perceived and disregarded a substantial, unjustifiable risk of damaging the building, and caused some damage to the building. The evidence similarly established second-degree reckless endangerment.

To the extent that appellant is also challenging evidentiary rulings made by the court, we find those arguments to be unavailing.

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

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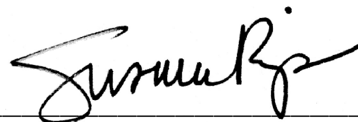

CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11201 Edison Rodriguez, Index 301793/11
Plaintiff-Appellant,

-against-

Coalition for Father Duffy, LLC,
Defendant,

Theatre Development Fund, Inc.,
Defendant-Respondent.

The Garcia Law Firm, New York (Nicholas E. Tishler of counsel), for appellant.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for respondent.

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered March 28, 2012, which granted defendant Theatre Development Fund, Inc.'s motion for summary judgment dismissing the common law negligence and Labor Law §§ 200 and 240(1) claims against it, unanimously reversed, on the law, without costs, and the motion denied.

A license agreement between defendant and the owner of the subject premises, the City of New York, acting through the Department of Parks and Recreation, permitted defendant to operate the premises as a ticket stand, and gave defendant the responsibility for supervising the work of all personnel

necessary for the operation of this license. It is premature to decide whether defendant was a statutory agent of the City and thus may be held liable under Labor Law § 240(1) (*see Tuccillo v Bovis Lend Lease, Inc.*, 101 AD3d 625 [1st Dept 2012]; *Weber v Baccarat, Inc.*, 70 AD3d 487 [1st Dept 2010]), regardless of whether plaintiff's employer was hired directly by the City rather than by defendant. We do not reach defendant's unpreserved contention that the dismissal of the section 240(1) claim should be affirmed on the alternative ground that plaintiff's cleaning work was not a covered activity under the statute, "since the issue is not a purely legal issue apparent on the face of the record but requires for resolution facts not brought to plaintiff's attention on the motion" (*Botfeld v Wong*, 104 AD3d 433, 434 [1st Dept 2013]; *see Soto v J. Crew Inc.*, 21 NY3d 562, [2013]).

Plaintiff's common law negligence and Labor Law § 200 claims were prematurely dismissed before depositions were taken. The contractual provisions requiring defendant to supervise and control the work, though "not in themselves sufficient to justify holding [defendant] liable for the alleged inadequacy" of the ladder, "do furnish cause to believe that further discovery may lead to evidence that [defendant's] employees *did* exercise actual

supervision or control over plaintiff's worksite" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 506 [1993]). Defendant's submission of affidavits broadly disclaiming any supervisory control over plaintiff's work were insufficient to establish defendant's entitlement to judgment as a matter of law on these claims (*see id.*).

We also note that conflicting affidavits raise an issue of fact as to whether a bailment was created by defendant's loan of the allegedly defective ladder to plaintiff. Such a bailment could give rise to liability for common-law negligence if defendant provided plaintiff with dangerous equipment even if its defect was patent (*see Beazer v New York City Health and Hosps. Corp.*, 76 AD3d 405 [1st Dept 2010], *affd* 18 NY3d 833 [2011]).

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

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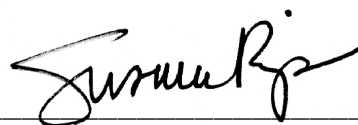

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Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11204 530 West 28th Street LP., Index 651709/10
Plaintiff-Appellant,

-against-

RN Realty, L.L.C., et al.,
Defendants-Respondents.

____

Vandenberg & Feliu, LLP, New York (John C. Ohman of counsel), for appellant.

Emily Jane Goodman, New York, for respondents.

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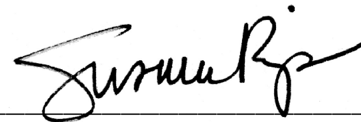
Appeal from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 23, 2012, which set use and occupancy at the rent in the lease, and denied, without prejudice, plaintiff's motion to unseal an affidavit and directed that plaintiff address the unsealing motion to the prior Justice in the case who had recused himself, unanimously dismissed, with costs, as moot.

Given that plaintiff never paid any use and occupancy and is now out of the premises, pursuant to a stipulation between the parties that also addressed the issue of use and occupancy, this appeal, as to use and occupancy is moot (*see Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 728-729 [2004]). So too

is the portion of the appeal that seeks the unsealing of an affidavit in the evidentiary proceedings relating to the setting of use and occupancy.

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

ENTERED: DECEMBER 3, 2013



CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11205 The People of the State of New York, Ind. 907/11
Respondent,

-against-

Camron Erby,
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 (Andrew E. Seewald 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 (Edward J. McLaughlin, J.), rendered on or about June 23, 2011,

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: DECEMBER 3, 2013

CLERK

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

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11207-
11208-
11209 Town Sports International, LLC,
Plaintiff-Appellant-Respondent,

-against-

Ajilon Solutions, etc.,
Defendant-Respondent-Appellant.

Index 602911/09

Becker, Glynn, Muffly, Chassin & Hosinski LLP, New York (Zeb Landsman of counsel), for appellant-respondent.

Smith, Gambrell & Russell, LLP, New York (John G. McCarthy of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J., and a jury), entered March 22, 2013, awarding damages to both plaintiff and defendant, and bringing up for review orders, same court and Justice, entered June 11, 2012, which granted defendant's motion to dismiss the causes of action for fraudulent inducement, negligent misrepresentation and breach of the implied covenant of good faith and fair dealing, denied plaintiff's motion for summary judgment on the sixth cause of action for breach of contract, and granted defendant's cross motion for summary judgment dismissing that cause of action, unanimously modified, on the law, to vacate the award of damages to plaintiff, to deny defendant's motion to set aside the jury's

verdict on its counterclaim and vacate the damages award to defendant to the extent it is attributable to the counterclaims, and the matter remanded for a new trial on the issue of plaintiff's damages, and otherwise affirmed, without costs.

Plaintiff, an operator of health and fitness clubs, hired defendant to develop a custom-made computer software system to run its daily operations. Concerned that the project was going over the estimated budget and time schedule, plaintiff refused to pay outstanding invoices of approximately $3 million, whereupon defendant suspended work on the project and refused to turn over its preexisting software, including its source code, which had been licensed to plaintiff as part of the agreement.

Plaintiff commenced this action, asserting, inter alia, causes of action for fraudulent inducement and negligent misrepresentation in connection with defendant's initial cost and time estimates, breach of contract with respect to defendant's obligation to provide reports on the status and progress of the software development project, breach of the implied covenant of good faith and fair dealing, and breach of defendant's obligation not to suspend the preexisting software license. Defendant asserted counterclaims for breach of contract in connection with plaintiff's failure to pay the outstanding invoices.

On defendant’s motion, the court dismissed the claims for fraudulent inducement, negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing. It also denied plaintiff’s motion for partial summary judgment on its cause of action for breach of the obligation not to suspend the software license (the sixth cause of action), and granted defendant’s motion for summary judgment dismissing that cause of action.

Following a trial, the jury found that defendant provided one or more reports to plaintiff that contained materially false statements of fact and that plaintiff relied to its detriment on those statements and suffered damages as a result. The jury found that defendant did not materially perform its obligations under the agreement, and awarded defendant no damages on its counterclaim for unpaid invoices.

Defendant moved pursuant to CPLR 4404 to set aside the jury verdicts that it breached the contract by providing false reports and that it did not perform its obligations under the contract. The court denied the motion as to plaintiff’s breach of contract claim, but granted the motion as to defendant’s counterclaim, finding that defendant had materially performed its contractual duties and was entitled to damages in the full stipulated amount

of the outstanding invoices.

We find that it was not utterly irrational, or against the weight of the evidence, for the jury to conclude that defendant breached the contract by making false statements of fact in the status and progress reports and, accordingly, that defendant failed to materially perform its obligations under the contracts. However, we find that the award of damages to plaintiff must be set aside as speculative and not supported by the evidence (*see Diversified Fuel Carriers Corp. v Coastal Oil NY, Inc.*, 280 AD2d 448 [2d Dept 2001]; *Peak v Northway Travel Trailers, Inc.*, 27 AD3d 927, 929 [3d Dept 2006]). Although the evidence is sufficient to show that defendant's deception as to the true status of the project limited plaintiff's ability to control costs by exercising its power to terminate or modify the project, given plaintiff's scant evidence as to its damages, combined with the inadequate jury charge on damages, the jury was not given a reasonable way to calculate the amount by which plaintiff was damaged.

The fraudulent inducement and negligent misrepresentation claims were not pleaded with the requisite particularity (*see Silver Oak Capital L.L.C. v UBS AG*, 82 AD3d 666, 668 [1st Dept 2011]; *Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478 [1st Dept

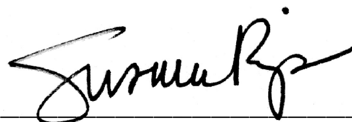
2010]). The breach of the implied covenant of good faith and fair dealing claim was duplicative of the breach of contract claim.

The court correctly dismissed the sixth cause of action for breach of contract, which alleged that defendant breached its obligation not to suspend the preexisting software license. Although the contract provided that this license was "irrevocable," it also provided that defendant would not suspend any licenses if plaintiff was not in breach of its payment obligation. Plaintiff does not dispute that it breached its payment obligation, and concedes that a fair reading of the contract implies that, given the breach, defendant could suspend licenses. Instead, it argues that this right to suspend would apply only to licenses other than the irrevocable license. However, the only one of the licenses referred to in the contract

that is subject to suspension by defendant is the irrevocable license for the preexisting software. Thus, defendant had the contractual right to suspend that license upon plaintiff's breach of its payment obligation.

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

ENTERED: DECEMBER 3, 2013



CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11210 The People of the State of New York, Ind. 4678/07
Respondent,

-against-

Jaime Quinones,
Defendant-Appellant.

____

Richard M. Greenberg, Office of The Appellate Defender, New York (Thomas M. Nosewicz of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Rena K. Uviller, J. on suppression motion; Richard Carruthers, J. at plea, sentencing and resentencing), rendered July 30, 2008, as amended February 29, 2012, convicting defendant of attempted robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

The court properly denied that portion of appellant's suppression motion that sought a hearing under *Dunaway v New York* (442 US 200 [1979]) concerning the legality of the arrest that resulted in defendant’s confession. The information provided to defendant explained how he came to be arrested for a robbery. In his suppression motion, defendant made only a vague challenge to

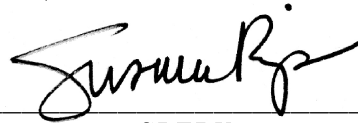
the stated factual predicate for his arrest, and he did not assert any basis for suppression, or raise a factual dispute requiring a hearing (*see People v Jones*, 95 NY2d 721, 728-729 [2001]). To the extent that, on appeal, defendant asserts a ground for suppression, that is an issue that should have been raised in his moving papers.

In adjudicating defendant a persistent violent felony offender, the court properly relied upon an otherwise qualifying 1991 conviction for which no plea or sentencing minutes are available. Defendant failed to overcome the presumption of regularity regarding his prior conviction, or provide any reason to believe that he would have been able to meet his burden of establishing that the prior conviction had been unconstitutionally obtained (*see* CPL 400.21[7][b]). "The presumption of regularity is particularly significant in guilty plea cases because plea situations are ordinarily marked by the absence of controverted issues, and in the plea situation the defendant tacitly indicates that no further judicial inquiry is

required (*People v Hofler*, 2 AD3d 176, 176 [1st Dept 2003] [internal quotation marks and citations omitted], *affd* 4 NY3d 41 [2004]). There is no merit to defendant's constitutional claims, including his assertion that governmental fault contributed to the unavailability of the minutes.

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

ENTERED: DECEMBER 3, 2013



CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11211 In re Robert Shapiro, Index 103361/12
Petitioner,

-against-

The Commissioner of Labor, et al.,
Respondents.

____

The Law Office of Borrelli & Associates, P.L.L.C., Great Neck (Alexander T. Coleman of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (C. Michael Higgins of counsel), for respondents.

____

Determination of respondent State of New York Industrial Board of Appeals (IBA), dated May 30, 2012, which, after a hearing, determined that respondent New York State Department of Labor (DOL) acted reasonably in concluding that the New York City Board of Education (BOE) did not terminate petitioner's employment in retaliation for his complaints about health and safety pursuant to the Public Employee Safety and Health Act, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Eileen A. Rakower, J.], entered on or about September 21, 2012), dismissed, without costs.

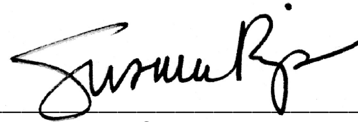
Substantial evidence in the record supports IBA's determination that DOL acted reasonably in concluding that petitioner's complaints regarding health and safety were not a motivating factor in petitioner's dismissal from his position as a teacher in the Homebound Program (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). This is so whether the matter is analyzed pursuant to the traditional framework set forth in *McDonnell Douglas Corp. v Green* (411 US 792 [1977]), or under a "mixed motive" analysis (*see e.g. Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127-128 [1st Dept 2012]). There exists no basis to disturb the credibility determinations made by the Hearing Officer (*see Matter of Nelke v Department of Motor Vehs. of the State of N.Y.*, 79 AD3d 433 [1st Dept 2011]).

Although there is evidence that petitioner's supervisor purportedly told a DOL investigator in 1993 that petitioner was terminated from his position because he made health and safety complaints, the evidence underlying DOL's conclusion included extensive evidence of deficient performance by petitioner. Moreover, the supervisor who allegedly indicated a discriminatory

motive was not the ultimate decision-maker, and the record shows that BOE immediately offered petitioner another tenured track position after terminating his employment in the Homebound Program.

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

ENTERED: DECEMBER 3, 2013



CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11213 The People of the State of New York, Dkt. 10018C/11
Respondent,

-against-

Frank Rudge, also known
as Frank Ridge,
Defendant-Appellant.

____

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

____

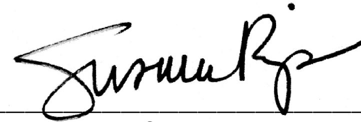
Judgment, Supreme Court, Bronx County (Harold Adler, J.), rendered March 21, 2011, convicting defendant, upon his plea of guilty, of menacing in the second degree, and sentencing him to a term of four months, unanimously affirmed.

Since defendant never moved to withdraw his guilty plea or to vacate the judgment of conviction, his challenge to the voluntariness of his plea is unpreserved, and we decline to review it in the interest of justice (see *People v Lopez*, 71 NY2d 662, 666 [1988]). The narrow exception to the preservation rule

is not applicable because nothing in the plea allocution casts doubt on defendant's guilt (*see id.*). In any event, nothing in the record shows the plea was not voluntarily made or that defendant did not understand the consequences of the plea.

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

ENTERED: DECEMBER 3, 2013



CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11214 Ferdie Millin, et al., Index 305528/10
Plaintiffs-Respondents,

-against-

Polivio Rodriguez, et al.,
Defendants-Appellants.

____

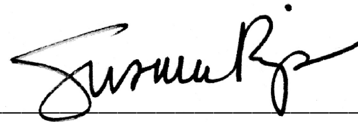
An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about December 24, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 13, 2013,

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

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

ENTERED: DECEMBER 3, 2013



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CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11215 The People of the State of New York, Ind. 352/08
Respondent,

-against-

Arthur Christian,
Defendant-Appellant.

____

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

____

Appeal from judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered May 4, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a forged instrument in the third degree, and sentencing him to a term of one year, held in abeyance, and the matter remitted for further proceedings with new counsel assigned to defendant's request to withdraw his plea.

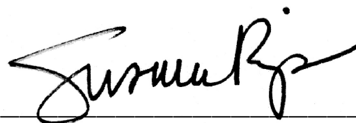
At sentencing, defendant moved to withdraw his guilty plea, and made accusations against his attorney. The attorney made a lengthy factual recitation that refuted defendant's claims. The attorney's recitation, which went beyond a mere explanation of his performance, was clearly adverse to his client's position, and the court denied the motion only after this recitation was

completed. This situation created a conflict of interest requiring the assignment of new counsel to represent defendant on the motion (*see People v Mitchell*, 21 NY3d 964, 967 [2013]; *People v Rozzell*, 20 NY2d 712 [1967]). Although the attorney suggested that assignment of new counsel would be appropriate, the court directed the attorney to continue.

Accordingly, defendant is entitled to a new opportunity to move to withdraw his plea, with representation by new counsel.

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

ENTERED: DECEMBER 3, 2013



CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11216 Tim F. Kinsella, Index 651201/12
Plaintiff-Respondent-Appellant,

-against-

Powerguard Specialty Insurance
Services, LLC, et al.,
Defendants-Appellants-Respondents.

____

Vedder Price P.C., New York (Jonathan A. Wexler of counsel), and Meckler Bulger Tilson Marick & Pearson LLP, Chicago, IL (Chad W. Main of the bar of the States of California, Illinois and Ohio, admitted pro hac vice, of counsel), for appellants-respondents.

William H. Roth, New York, for respondent-appellant.

____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 24, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the first cause of action as against defendant Powerguard Specialty Insurance Services, LLC, (PowerGuard) and denied defendants' motion to dismiss the first cause of action as against Edgewood Partners Insurance Center (EPIC), unanimously modified, on the law, to dismiss plaintiff's first cause of action as against EPIC, and otherwise affirmed, without costs.

Plaintiff, Tim F. Kinsella, an insurance producer, left his previous employment, allegedly in reliance on statements made by

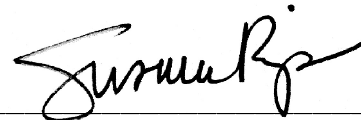
representatives of PowerGuard, that, inter alia, PowerGuard had the ability to issue certain property and warranty insurance, and based on these representations, accepted employment with PowerGuard. Plaintiff and PowerGuard entered into a contract, agreeing, inter alia, that plaintiff would work for PowerGuard as an "at will" employee, at a large decrease in his former salary. Plaintiff learned that these representations were false, and that he could not sell the subject insurance policies, and he thereafter received written termination from employment under a letterhead of defendant EPIC.

Plaintiff brought an action alleging, inter alia, fraud in the inducement against PowerGuard and EPIC. Plaintiff failed to sufficiently allege reasonable reliance and damages separate from his termination from PowerGuard, his at-will employer, so as to state a claim for fraud in the inducement against it (*see Smalley v Dreyfus Corp.*, 10 NY3d 55, 59 [2008]; *Arias v Women in Need*, 274 AD2d 353 [1st Dept 2000]). Nor did plaintiff plead such a claim against EPIC, since there is no showing in plaintiff's complaint that EPIC had anything to do with plaintiff's employment with PowerGuard (*see M Entertainment, Inc. v Leydier*, 71 AD3d 517, 519-520 [1st Dept 2010]). Assuming, arguendo, that

EPIC acted as plaintiff's employer when the Human Resources Department shared by PowerGuard and EPIC sent plaintiff a termination letter on EPIC's letterhead, then plaintiff's fraud in the inducement claim would still be barred (*see Smalley*, 10 NY3d at 59).

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

ENTERED: DECEMBER 3, 2013



CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11217 The People of the State of New York, Ind. 4457N/10
Respondent,

-against-

Kamal Abdallah,
Defendant-Appellant.

____

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

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

____

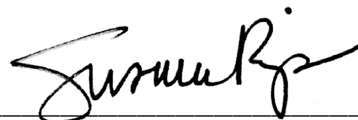
Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered March 21, 2012, as amended May 16, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, criminal sale of a controlled substance near school grounds and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of six years, unanimously affirmed.

To the extent defendant is making a legal sufficiency claim, it 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]). The evidence supports the jury's rejection of defendant's agency defense. There is no basis for disturbing the jury's credibility determinations. To be the buyer's agent, a person "must be a mere extension of the buyer," who procures drugs "because the buyer has asked him to do so, but not out of any independent desire or inclination to promote the transaction" (*People v Argibay*, 45 NY2d 45, 53-54 [1978]). A person who acts as a middleman or a broker between a seller and a buyer, "aiming to satisfy both, but largely for his own benefit, cannot properly be termed an agent of either" (*Argibay*, 45 NY2d at 53). Although "the receipt of an incidental benefit does not in itself negate an agency defense" (*People v Echevarria*, 21 NY3d 1, 21 [2013]), defendant's demand for a $10 "transportation fee," without which he refused to complete the $20 transaction, was more than an incidental benefit or tip (*see People v Lam Lek Chong*, 45 NY2d 64, 74-76 [1978], *cert denied* 439 US 935 [1978]).

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

ENTERED: DECEMBER 3, 2013



CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11218 National Continental Insurance Company, Plaintiff-Respondent, Index 308916/10

-against-

Countrywide Insurance, Defendant-Appellant,

Disano Demolition Co., Inc., et al., Defendants.

Thomas Torto, New York, for appellant.

Carman, Callahan & Ingham, LLP, Farmingdale (Tracy S. Reifer of counsel), for respondent.

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered June 20, 2013, which granted plaintiff National Continental Insurance Company's motion for a declaratory judgment that defendant Countrywide Insurance was obligated to provide primary coverage to defendant Disano Construction Co. in an underlying personal injury action commenced by defendant Mary Reyes, and denied Countrywide's cross motion for summary judgment to declare that National was required to provide primary coverage for Disano Construction or, in the alternative, that the parties herein were coinsurers for the loss, unanimously affirmed, with costs.

On or May 6, 2008, defendant Paulino Faustino was operating a 2004 Peterbilt tractor (the Peterbilt) owned by defendant Disano Trucking. Faustino was towing a 2001 Talbert trailer (the Talbert) owned by defendant Disano Construction. The Peterbilt was insured by plaintiff National, the Talbert by defendant Countrywide. National sought a declaration that its coverage was secondary, or excess, to the coverage of Countrywide, which was to be primary vis a vis any accident resulting in personal injury arising from the operation of the Peterbilt and the Talbert. The motion court correctly granted National the declaratory judgment it sought.

The policy language at issue is succinct, and "[a]n insurer is entitled to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to its express terms" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 131 [1st Dept 2006]).

National's policy provides primary coverage for a trailer if it is owned by the insured, Disano Construction, and both the tractor and trailer involved in the accident are listed on the policy's declarations page. If not, coverage is excess. Neither of the two conditions for primary coverage was present here. The Countrywide policy, by contrast, provides primary coverage for

the tractor and any trailer connected to it. Based on this clear language, Countrywide's policy was primary, with National's coverage to be excess.

Countrywide's arguments to the contrary are unavailing (*see e.g. Aetna Cas.& Sur. Co. v Merchant's Mut. Ins. Co.*, 100 AD2d 318 [3d Dept 1984], *affd* 64 NY2d 840 [1985]).

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

ENTERED: DECEMBER 3, 2013

CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11219N Sushil K. Mehra, et al., Index 260666/11
Petitioners-Respondents,

-against-

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

The New York City School
Construction Authority,
Respondent-Appellant.

____

Cerussi & Spring, P.C., White Plains (Richard W. Ashnault of counsel), for appellant.

Fortunato & Fortunato, PLLC, Brooklyn (Camille A. Fortunato of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered November 26, 2012, which, insofar as appealed from, granted petitioners' motion to deem the notice of claim to be timely served upon respondent New York City School Construction Authority (NYCSCA), unanimously reversed, on the law, without costs, and the motion denied.

On January 4, 2011, petitioner Sushil Mehra was allegedly injured when he fell from a scaffold during the course of a construction project at a New York City public school. At the time of the accident, petitioner was employed by nonparty Vardaris Tech, Inc. (Vardaris). On August 5, 2011, petitioners

served a notice of claim upon, inter alia, NYCSCA.

When presented with an application for leave to file a late notice of claim, the court considers "whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense" (*Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept 2003]).

Here, Supreme Court improvidently exercised its discretion in granting petitioners' application. Regarding the first factor to consider, petitioner's stated ignorance of the requirements of General Municipal Law § 50-e is not a reasonable excuse for his failure to timely file a notice of claim (*see Rodriguez v New York City Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 78 AD3d 538 [1st Dept 2010], *lv denied* 17 NY3d 718 [2011]). Petitioner's contention that he failed to file a notice of claim because he was not aware of the extent of his injuries is also unavailing, because the record demonstrates he stopped working the day he sustained his injury and subsequently filed a claim for Workers' Compensation. Moreover, even accepting petitioner's assertion

that he did not know that he required surgery until May 19, 2011, he failed to explain why he waited until August 5, 2011, to serve the notice of claim (*see Matter of Schifano v City of New York*, 6 AD3d 259, 260 [1st Dept 2004], *lv denied* 4 NY3d 703 [2005]).

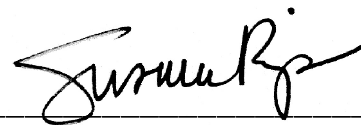
The record also shows that petitioners did not demonstrate that the NYCSCA acquired actual notice of the essential facts within 90 days after the claim arose or a reasonable time thereafter. Contrary to petitioners' contention, the report prepared by Vardaris shortly after the accident does not give NYCSCA actual knowledge of the essential facts constituting the claim alleging liability under the Labor Law. There is no evidence that Vardaris was an agent of NYCSCA when it filed the report form with its workers' compensation insurance carrier (*see Matter of Casale v City of New York*, 95 AD3d 744 [1st Dept 2012]). Moreover, even if Vardaris was an agent and NYCSCA received the report, it fails to connect the incident to any claim against NYCSCA because it only states that petitioner was injured while lifting plywood at the school. Indeed, the report makes no mention of petitioners' present allegation that NYCSCA caused petitioner's injury because the scaffolding and the flooring he was standing on were not properly secured, he was not equipped with proper safety devices, and its personnel present at

the accident location were inadequately trained (*see Delgado v City of New York*, 39 AD3d 387 [1st Dept 2007]; *Pineda v City of New York*, 305 AD2d 294 [1st Dept 2003]).

Furthermore, petitioners failed to show that NYCSCA has not been prejudiced by the delay. NYCSCA has been denied the opportunity to search for witnesses, the workers who assembled the scaffolding, or those knowledgeable about what safety procedures were in place when the accident occurred, while their memories were still fresh (*see Harris v City of New York*, 297 AD2d 473, 474 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]). The fact that petitioner never identified which NYCSCA employees were present when the incident occurred also renders the delay in serving the notice of claim prejudicial (*see Ifejika-Obukwelu v New York City Dept. of Educ.*, 47 AD3d 447 [1st Dept 2008]).

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

ENTERED: DECEMBER 3, 2013



CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11220N Hudson-Spring Partnership, L.P., Index 652229/10
Plaintiff-Respondent,

-against-

P+M Design Consultants, Inc.,
Defendant-Appellant,

Poulin+Morris, Inc., et al.,
Defendants.

____

Edward Weissman, New York, for appellant.

Allan J. Berlowitz, New York, for respondent.

____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 8, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for leave to amend its complaint, unanimously affirmed, without costs.

Defendant P+M Design Consultants, Inc.'s (P+M) argument that the second through fourth causes of action in the amended complaint are barred by res judicata is without merit. Res judicata requires a final judgment in a prior action (*see e.g. People v Evans*, 94 NY2d 499, 502 [2000]; *UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 473-474 [1st Dept 2011]). In the case at bar, there has been only one action. Furthermore, the April 23, 2012 order which granted P+M and defendant

Poulin+Morris, Inc.'s motion for summary judgment dismissing the second cause of action (fraudulent conveyance) in the original complaint is marked "non-final disposition." Finally, the fraudulent conveyance claim arose out of a different set of facts from those alleged in the second through fourth causes of action in the amended complaint.

Poulin+Morris, the John Doe defendants, and/or the John Doe Company defendants may be liable for use and occupancy, even though the lease was between plaintiff and P+M (*see Getty Props. Corp. v Getty Petroleum Mktg. Inc.*, 106 AD3d 429, 430 [1st Dept 2013]). If Poulin+Morris, the John Does, and/or the John Doe Companies were occupying the space leased by P+M, they were, in effect, P+M's subtenants.

It is true that *El Gallo Meat Mkt. v Gallo Mkt.* (286 AD2d 255 [1st Dept 2001]) said, "A landlord-tenant relationship is the *sine qua non* for" use and occupancy (*id.* at 256). However, the issue in *El Gallo* was who – the landlord, as opposed to someone else – could recover use and occupancy, not who could be forced to pay use and occupancy.

It is true that the issue in *14 Second Ave. Realty Corp. v Steven Corp.* (16 AD2d 751 [1st Dept 1962], *affd* 12 NY2d 919 [1963]) was whether someone who was not a tenant could be forced

to pay use and occupancy. However, *14 Second Ave.* – unlike the case at bar – involved a vendor-vendee situation (*see* 12 NY2d at 920). There are special rules for use and occupancy in a vendor-vendee situation (*see Ministers, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y. v 198 Broadway*, 152 Misc 2d 936, 940 [Civ Ct, NY County 1991]).

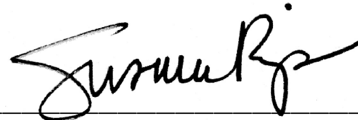
The third cause of action in the amended complaint adequately pleads a claim for unjust enrichment (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

The fourth cause of action seeks to impose liability on Poulin+Morris, the John Does, and the John Doe Companies on the theory of piercing the corporate veil of P+M. The complaint states sufficient facts showing that these defendants exercised complete domination and control over P+M thereby abusing the privilege of doing business in the corporate form and perpetrating a fraud against plaintiff (*see Stewart Tit. Ins. Co. V Liberty Tit. Agency, LLC,* 83 AD3d 532, 533 [1st Dept 2011]). Specifically, the complaint alleges, inter alia, that P+M was undercapitalized, conducted no legitimate business, and existed only as a shell company whose sole purpose was to shield the actual occupants of the leased space from liability. At this

stage of the proceedings, it cannot be said that this proposed cause of action is palpably insufficient or patently devoid of merit (*see MBIA Ins. Corp. v Greystone & Co., Inc.,* 74 AD3d 499, 500 [1st Dept 2010]).

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

ENTERED: DECEMBER 3, 2013



CLERK

Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11221 The People of the State of New York, Ind. 3178/11
Respondent,

-against-

Phillip Huggins,
Defendant-Appellant.

____

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

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

____

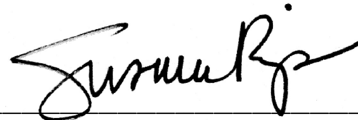
Judgment, Supreme Court, New York County (Michael J. Obus, J. at suppression hearing; Thomas Farber, J. at plea and sentencing), rendered November 15, 2011, convicting defendant of robbery in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The court properly denied defendant’s motion to suppress physical evidence. An officer saw defendant engaging in conduct that reasonably appeared to be robbery, rather than horseplay as

defendant now suggests. Accordingly, the officer had probable cause for an arrest, which does not require exclusion of all hypotheses of innocence (*see e.g. People v Lewis*, 50 AD3d 595 [2008], *lv denied* 11 NY3d 790 [2008]).

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

ENTERED: DECEMBER 3, 2013



CLERK

Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11222 In re Camila Ann DeVito, Index 107636/11
Petitioner-Appellant,

-against-

The Department of Education of the City of New York, et al.,
Respondents-Respondents.

____

Law Offices of Stewart Lee Karlin, P.C., New York (Stewart L. Karlin of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered August 9, 2012, which denied the petition seeking to, inter alia, annul respondents' determination, dated February 14, 2011, terminating petitioner's employment, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

As a probationary employee, petitioner was subject to termination "at any time and for any reason, unless [she] establishe[d] that the termination was for a constitutionally impermissible purpose, violative of a statute, or done in bad faith" (*Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 765 [1988]). Petitioner has not

met her burden (*see Matter of Witherspoon v Horn*, 19 AD3d 250 [1st Dept 2005]).

The fact that respondent Department of Education's determination to terminate petitioner's employment occurred after the effective date of her resignation does not render it one made in "bad faith." Pursuant to Chancellor's Regulation C-205, ¶26, despite her resignation, there was still a possibility that petitioner could return to work in the future, and thus the resignation was not irrevocable (*see e.g. Matter of Folta v Sobol,* 210 AD2d 857 [3d Dept 1994]).

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

ENTERED: DECEMBER 3, 2013

CLERK

Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11223 In re Samantha M.,

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

Allison Y.,
Respondent-Appellant,

Lutheran Social Services of New York,
Petitioner-Respondent.

____

Aleza Ross, Patchogue, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

Karen Freeman, Lawyers For Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

____

Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about May 11, 2012, which, after a hearing, found that respondent mother permanently neglected her child, terminated her parental rights, and committed the child to the joint custody of the Commissioner of Social Services and Lutheran Social Services of New York (the agency) for the purpose of adoption, unanimously affirmed, without costs.

The mother failed to preserve her claim that the agency's "case record," consisting of progress notes for the relevant time period covered by the petition, should not have been admitted

without an adequate testimonial foundation, and that it, therefore, did not suffice to prove a prima facie case of permanent neglect, and we decline to review it (*Matter of Myles N.*, 49 AD3d 381, 381-382 [1st Dept 2008], *lv denied* 11 NY3d 709 [2008]; *Matter of Isaiah R.*, 35 AD3d 249, 249 [1st Dept 2006]). In any event, on these facts, the records were properly admitted under the business record exception to the hearsay rule based on the certification and delegation of authority to sign the certification (*see* CPLR 4518[a]). The certification stated that the document "was within the scope of the entrant's business duty to record the act, transaction or occurrence sought to be admitted" and that each participant in the chain producing the record was acting within the course of regular business conduct (*Matter of Leon RR*, 48 NY2d 117, 122-123 [1979]; *see also Matter of Shirley A.S. [David A.S.]*, 90 AD3d 1655, 1655 [4th Dept 2011], *lv denied* 18 NY3d 811 [2012]). While the caseworker who signed the certification did not specifically address those records in her testimony, as they were admitted without objection, her testimony confirmed that she was the agency caseworker assigned to Samantha's case. Moreover, while the mother challenges the trustworthiness of those records, she cites no errors or evidence of any lack of trustworthiness, and in fact, her testimony was

largely consistent with those progress notes.

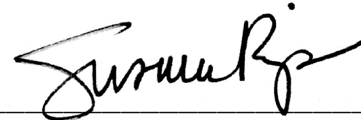
The petitioner agency established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship, including arranging for visitation with the child and referring the mother to programs for drug treatment and money management, and assisting her with her housing concerns, whereas the mother failed to keep numerous appointments, even after the agency assisted her with rescheduling, and more importantly, failed to take appropriate steps to provide a clean and suitable home for the child (*see Matter of Sheila G.*, 61 NY2d 368 [1984]; *Matter of Amilya Jayla S. [Princess Debbie A.]*, 83 AD3d 582 [1st Dept 2011]; Social Services Law § 384-b[3][g][i], [7][a]).

Contrary to the mother's arguments, the Family Court properly terminated her parental rights. No suspended judgment was warranted, as the mother plainly admitted at the dispositional hearing that she was not ready to care for the child because she was still in single room occupancy housing where children were not allowed, and she was unemployed. She further had no school plans or appropriate medical care for the child. In the absence of any steps to accomplish that which she had not done in the intervening year between the fact-finding and

dispositional hearings, the Family Court properly determined that it was in the child’s best interests to be freed for adoption by her present foster parents with whom she had lived for most of her life, and where she was well cared for (*see e.g. Matter of Erica D. (Rebecca M.)*, 95 AD3d 414, 414-415 [1st Dept 2012]); *see also Matter of Michael B.*, 80 NY2d 299, 311 [1992]).

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

ENTERED: DECEMBER 3, 2013



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Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11224 Louise Springer, et al., Index 104924/09
Plaintiffs-Appellants,

-against-

121 Varick Twelfth Floor, LLC,
Defendant-Respondent.

____

Schnaufer & Metis, LLP, Hartsdale (John C. Schnaufer of counsel), for appellants.

Michael S. Doran, New York, for respondent.

____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 15, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment, unanimously affirmed, with costs.

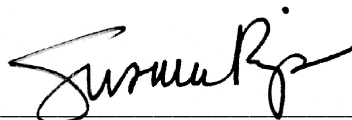
In this case involving an alleged computational error made at the closing for the sale of a cooperative unit, the motion court properly determined that there are issues of fact precluding an award of judgment as a matter of law (*see* CPLR 3212[b]). Plaintiffs argue that defendant was not entitled to a credit it received at closing and that they gave defendant timely notice of the alleged error. Therefore, plaintiffs argue, defendant must return the money. However, the record presents a question of fact as to whether the parties agreed to the credit

or whether it was, in fact the result of a computational error that survived the closing.

Despite the IAS court's finding otherwise, the record presents no issue of fact regarding whether plaintiffs provided timely notice of the claim computational error. On the contrary, defendants did not dispute receiving the notice within six months as required under the co-op contract. Further, even though plaintiffs failed to include in the Notice a $30,000 credit due to defendant, the notice of the claimed computational error was not defective in an way, and plaintiffs later amended their complaint to reflect the $30,000 credit.

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

ENTERED: DECEMBER 3, 2013



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Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11226 The People of the State of New York, Dkt. 69762C/10
Respondent,

-against-

Jose Diaz,
Defendant-Appellant.

____

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (William McGuire, J.), rendered March 11, 2011, convicting defendant, upon his plea of guilty, of operating a motor vehicle while under the influence of alcohol, and sentencing him to a conditional discharge and a $500 fine, unanimously affirmed.

Since defendant never moved to withdraw his guilty plea or to vacate the judgment of conviction, his challenge to the voluntariness of his plea is unpreserved, and we decline to review it in the interest of justice (see *People v Lopez*, 71 NY2d 662, 666 [1988]). The narrow exception to the preservation rule is not applicable because nothing in the plea allocution casts doubt on defendant's guilt (*see id.*). As an alternative holding, we find, based on all the relevant circumstances, that defendant

entered into his plea knowingly, voluntarily, and intelligently (*see People v Nyarko*, 93 AD3d 555 [1st Dept 2012], *lv denied* 19 NY3d 965 [2012]).

In any event, the only relief defendant requests is a dismissal of the information, and he expressly requests this Court to affirm his conviction if it does not grant a dismissal. Since dismissal is not warranted, we affirm on this basis as well (*see People v Schweitzer*, 83 AD3d 503 [1st Dept 2011], *lv denied* 17 NY3d 800 [2011]).

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

ENTERED: DECEMBER 3, 2013

CLERK

Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11228-
11229 Mara Gajevska,
Plaintiff-Appellant,

Index 115727/10
115728/10

-against-

Teachers' Retirement System of the City of New York, et al.,
Defendants-Respondents.

- - - - -

In re Mara Gajevska,
Petitioner-Appellant,

-against-

Teachers' Retirement System of the City of New York,
Respondent-Respondent.

____

David M. Lira, Long Beach, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Inga Van Eysden of counsel), for Teachers' Retirement System of the City of New York, respondent.

Coritsidis, Sotirakis & Saketos, PLLC, Astoria (John A. Sotirakis of counsel), for Harvey S. Brown, respondent.

____

Order, Supreme Court, New York County (Paul Wooten, J.), entered May 1, 2012, which, inter alia, denied the petition seeking a judgment that petitioner was entitled to either a determination of her rights as contingent beneficiary under the qualified pension plan (QPP) of Steven J. Brown (decedent), that she was entitled to the payment of benefits as contingent

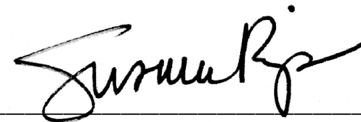
beneficiary under the QPP of decedent, or directing respondent to pay petitioner benefits as a contingent beneficiary of the QPP of decedent, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Order, Supreme Court, New York County (Paul Wooten, J.), entered April 23, 2012, which granted defendants' motions to dismiss the complaint seeking a declaratory judgment that, inter alia, plaintiff was entitled to the subject retirement benefits, unanimously affirmed, without costs.

The parties agree that the four month statute of limitations controls this action, which challenges an agency determination. The court properly determined that petitioner/plaintiff was provided with notice by respondent on September 18, 2009, that she would not receive the member's retirement benefits as a contingent beneficiary because he died prior to his retirement date, and that the designated in-service beneficiary was entitled

to the benefits. The court properly found that petitioner failed to file a proceeding to challenge that determination within the requisite four-month period (CPLR 217[1]).

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

ENTERED: DECEMBER 3, 2013



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Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11233 In re Joseph Ajeleye, Index 104886/11
Petitioner-Appellant,

-against-

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

____

Kousoulas & Associates, P.C., New York (Antonia Kousoulas of counsel), for appellant.

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

____

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered March 27, 2012, which granted the cross motion of respondents Department of Education of the City of New York, the City School District of the City of New York and the City of New York to dismiss the petition and to confirm the arbitration award terminating petitioner's employment as a New York City schoolteacher, and dismissed the proceeding brought pursuant to CPLR article 75 and Education Law 3020-a, unanimously affirmed, without costs.

Adequate evidence in the record supports the determination that petitioner was guilty of the specifications charging him with insubordination, neglect of duty, conduct unbecoming his

position, and using language that constituted verbal abuse of his students as prohibited by the regulations of the Department of Education (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-568 [1st Dept 2008]). There exists no basis to disturb the Hearing Officer's decision to credit the testimony of multiple students and the assistant principal over that of petitioner (*see Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856 [1st Dept 2011]).

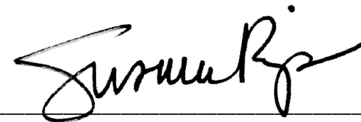
Petitioner's contention that the award was not in accord with due process and was arbitrary and capricious is unavailing. Petitioner was properly given notice of the charges against him, had the opportunity to defend himself at a hearing at which he testified and presented other evidence, and was able to cross-examine witnesses. While the Hearing Officer acknowledged flaws in the investigation, he noted that it was fair and objective.

The penalty of termination does not shock one's sense of fairness (*see e.g. Matter of Colon v City of N.Y. Dept. of Educ.*, 94 AD3d 568 [1st Dept 2012]). The record shows that the Hearing Officer considered the seriousness of the charges, as well as

petitioner’s lack of prior disciplinary history during his 14-year career with the Department of Education and the likelihood that petitioner would not correct his inappropriate behavior.

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

ENTERED: DECEMBER 3, 2013



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Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11234 The People of the State of New York, SCI 303/11
Respondent,

-against-

Luis Williams,
Defendant-Appellant.

____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Eugene Oliver, J., at plea; John Moore, J., at sentence), rendered on or about October 25, 2011,

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: DECEMBER 3, 2013

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CLERK

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

Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11235 Lucrecia Penn, Index 103708/10
Plaintiff-Respondent,

-against-

57-63 Wadsworth Terrace Holding,
LLC, et al.,
Defendants-Appellants.

____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Tara C. Fappiano of counsel), for appellants.

Paris & Chaikin, PLLC, New York (Jason L. Paris of counsel), for respondent.

____

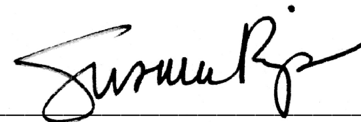
Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 2, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants, owners and property manager, failed to establish their entitlement to judgment as a matter of law, in this action where plaintiff was injured when she slipped and fell on ice in the courtyard of the building in which she lived. The record presents triable issues of fact as to whether the icy condition that caused plaintiff's fall existed prior to the storm, and whether defendants lacked notice of the preexisting condition (*see Bojovic v Lydig Bejing Kitchen, Inc.*, 91 AD3d 517 [1st Dept

2012]). Nor is Administrative Code of City of NY § 16-123 availing to defendants' position because it does not appear that the accident occurred on a public sidewalk (*see Vosper v Fives 160th, LLC,* AD3d , 2013 NY Slip Op 06815 [1st Dept 2013]).

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

ENTERED: DECEMBER 3, 2013



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Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11236 Kevin Kaiser, Index 112674/07
Plaintiff-Appellant,

-against-

Raoul's Restaurant Corporation, et al.,
Defendants-Respondents.

____

Delince Law PLLC, New York (J. Patrick Delince of counsel), for appellant.

Rotondi & Associates, P.C., New York (Louis J. Rotondi of counsel), for Raoul's Restaurant Corporation, Guy Raoul and Serge Raoul, respondents.

Lax & Neville LLP, New York (Barry R. Lax of counsel), for Cindy Smith, respondent.

____

Order, Supreme Court, New York County (Louis B. York, J.), entered May 29, 2012, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law on plaintiff's age-based discrimination claim under the New York City Human Rights Law (Administrative Code of the City of New York § 8-107). There is no dispute that plaintiff bookkeeper was a member of a protected class, was qualified for the job, and that he was terminated. However, defendants articulated legitimate, non-pretextual reasons for firing him.

Following an investigation, which included two audits, defendants formed a good-faith belief that plaintiff kept inaccurate payroll records and embezzled funds. Plaintiff's attempt to conflate the purported falsity of the embezzlement accusation with the legitimacy of defendants' belief in the accusation, is not availing (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]; *Melman* v *Montefiore Med. Ctr.*, 98 AD3d 107, 121 [1st Dept 2012]; *Kelderhouse v St. Cabrini Home*, 259 AD2d 938, 939 [3d Dept 1999]). Accordingly, defendants shifted the burden back to plaintiff to show that the reasons proffered were a pretext for discrimination.

Plaintiff failed to raise an issue of fact with respect thereto. His admission that he altered the payroll records and kept two sets of books tends to support the legitimacy of defendants' reasons for terminating him, even if he did not actually embezzle funds.

The court also properly determined that plaintiff's age-discrimination claim should be dismissed under the mixed-motive framework (*see Sandiford v City of New York Dept. of Educ.*, 94 AD3d 593, 596 [lst Dept 2012], *affd* __NY3d__ , 2013 NY Slip Op 06732 [2013]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d at 40-41, 45). Plaintiff's argument that defendants sought to "change the

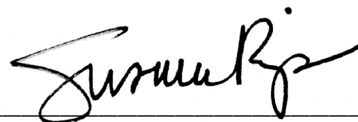
face” of defendant restaurant by replacing older employees with younger ones is belied by the record. Defendants proffered evidence that two of their maître d’s and at least one waitress, all of whom were older than plaintiff, had worked at the restaurant for decades, and continued to do so after plaintiff was fired.

Plaintiff’s defamation claim as against defendant Cindy Smith, the restaurant’s general manager, was also properly dismissed. Smith shared a common interest in plaintiff’s fitness and competence with nonparty Dutch Flowerline Inc., because they both employed plaintiff as a bookkeeper (*see Liberman v Gelstein*, 80 NY2d 429, 437-439 [1992]), and plaintiff’s claim that the subject statements were spoken with malice is based on speculation (*see Constantine v Teachers Coll.*, 93 AD3d 493 [1st Dept 2012]).

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: DECEMBER 3, 2013



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Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11238 The People of the State of New York, Respondent, Ind. 2904/10

-against-

Paul Pacheco, etc.,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi 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 (Renee A. White, J.), rendered on or about March 8, 2011,

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: DECEMBER 3, 2013

____
CLERK

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

Andrias, J.P., Acosta, Moskowitz, Richter, Manzanet-Daniels, JJ.

11240N Gloria Blaze, Index 159164/12
Plaintiff-Appellant,

-against-

New York City Department of Education,
Defendant-Respondent.

____

Ballon Stoll Bader & Nadler, P.C., New York (Marshall B. Bellovin of counsel), for appellant.

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

____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered March 11, 2013, which denied plaintiff's motion to file a late notice of claim, unanimously affirmed, without costs.

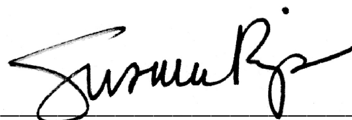
The court properly denied plaintiff's motion to file a late notice of claim, where plaintiff offered no excuse for her failure to file a timely notice of claim; failed to demonstrate that defendant acquired actual knowledge of the facts underlying the claim within 90 days or a reasonable time thereafter; and failed in her burden to demonstrate that defendant would not be substantially prejudiced by the delay (*see Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448 [1st Dept 2011]; *Matter of Strauss v New York City Tr. Auth.*, 195 AD2d 322 [1st Dept 1993]). "[K]nowledge of the facts underlying an occurrence does not

constitute knowledge of the claim. What satisfies the statute is not knowledge of the wrong. What the statute exacts is notice of the claim" (*Liberty Group Holdings v City of New York*, 5 AD3d 148, 149 [1st Dept 2004], *lv denied* 3 NY3d 609 [2004] [internal quotation marks omitted], quoting *Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1990], *affd* 78 NY2d 958 [1991]).

In any event, plaintiff's claim accrued, at the latest, in April 2011, when she asserts that she was "constructively forced into early retirement," making her motion to file a late notice of claim well beyond the limitation period of, at most, 1 year and 90 days (Education Law 3813[3], [2-b]; General Municipal Law § 50-i). Thus, the court was without authority to grant plaintiff the requested relief (*see* Education Law § 3813 [2], [2-a]; General Municipal Law § 50-i; *Consolidated Constr. Group, LLC v Bethpage Union Free School Dist.*, 39 AD3d 792, 794-795 [2d Dept 2007], *lv dismissed* 9 NY3d 980 [2007]).

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

ENTERED: DECEMBER 3, 2013



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CORRECTED ORDER - DECEMBER 3, 2013

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Leland G. DeGrasse
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

10314N
Index 113039/11

_______________________________________x

In re Patrolmen's Benevolent Association of the City of New York, Inc., etc., et al.,
Petitioners-Respondents,

-against-

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

- - - - -

Municipal Labor Committee,
Amicus Curiae.

_______________________________________x

Respondents appeal from an order and judgment (one paper) of the Supreme Court, New York County (Joan B. Lobis, J.), entered December 30, 2011, insofar as appealed from as limited by the briefs, enjoining respondents from implementing any termination or revocation of "Release Time" leave for the three individual petitioners pending resolution of arbitration proceedings commenced by petitioner Patrolmen's Benevolent Association.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch and Pamela Seider Dolgow of counsel), for appellants.

Corrected Order - December 3, 2013

Tom, J.P., Andrias, DeGrasse, **Manzanet-Daniels**, Gische, JJ.

10314N In re Patrolmen's Benevolent Association of the City of New York, Inc., etc., et al.,
Petitioners-Respondents, Index 113039/11

-against-

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

\- - - - -

Municipal Labor Committee,
Amicus Curiae.

____

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for appellants.

Gleason, Dunn, Walsh & O'Shea, Albany (Ronald G. Dunn of counsel), for respondents.

Greenberg Burzichelli Greenberg P.C., Lake Success (Harry Greenburg of counsel), for amicus curiae.

____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered December 30, 2011, reversed, on the law, without costs, the judgment vacated, the petition denied, and the proceeding dismissed.

Opinion by Andrias, J. All concur except Tom, J.P. and Gische, J. who dissent in an Opinion by Gische, J.

Order filed.

Gleason, Dunn, Walsh & O’Shea, Albany (Ronald G. Dunn and Mark T. Walsh of counsel), and Michael T. Murray, New York (Michael T. Murray, Gaurav I. Shah and David W. Morris of counsel), for respondents.

Greenberg Burzichelli Greenberg P.C., Lake Success (Harry Greenburg and Genevieve E. Peeples of counsel), for amicus curiae.

ANDRIAS, J.

Supreme Court granted petitioners a preliminary injunction enjoining respondents from denying or revoking "Release Time" to the individual petitioners, pending resolution of arbitration proceedings. Because petitioners have failed to establish a likelihood of success on the merits of the claim to be arbitrated, we reverse and vacate the preliminary injunction.

The individual petitioners were elected by members of petitioner Patrolmen's Benevolent Association of the City of New York, Inc. (PBA) to four-year terms as the sole borough-wide PBA representatives for police officers assigned to the Bronx. On July 1, 2011, at the request of the PBA, the Office of Labor Relations (OLR) issued Release Time certificates to the individual petitioners pursuant to Mayor's Executive Order #75 (3/22/73) (EO 75) which approved full-time leave with pay and benefits.

On October 25, 2011, a grand jury indicted the individual petitioners in connection with an alleged ticket-fixing scheme. On October 28, 2011, pursuant to Civil Service Law § 75(3-a), the individual petitioners were suspended without pay for 30 days, after which they were restored to modified duty. Meanwhile, by letter dated November 3, 2011, the OLR rescinded their Release Time certificates. The PBA declined the OLR's offer to issue new

Release Time certificates for three employees of the union's choice, and filed a group grievance with the OLR.

After the grievance was denied, petitioners filed a request for arbitration with the New York City Office of Collective Bargaining seeking to reinstate the certificates on the ground that the rescission violated the parties' collective bargaining agreement and EO 75. In conjunction therewith, petitioners commenced this proceeding seeking a preliminary injunction pending arbitration, pursuant to CPLR 7502(c).

CPLR 7502(c) provides that the Supreme Court "may entertain an application for ... a preliminary injunction in connection with an arbitration that is pending ... but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." The party seeking the preliminary injunction must also demonstrate a probability of success on the merits, danger of irreparable injury in the absence of a preliminary injunction, and a balance of the equities in their favor (*see Interoil LNG Holdings, Inc. v Merrill Lynch PNG LNG Corp.*, 60 AD3d 403, 404 [1st Dept 2009]; *Erber v Catalyst Trading*, 303 AD2d 165 [1st Dept 2003]). Applying these standards, even assuming that petitioners established that an award in their favor would be rendered ineffectual without provisional relief, as required by CPLR

7502(c), they have failed to make the requisite showing of a likelihood of success on the merits, and therefore have not established their entitlement to injunctive relief (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]).

The right of union-designated employees to be released from their job duties to perform union or joint labor-management activities is established in EO 75, which generally vests the City with broad oversight of employee representatives. Section 4(4) of EO 75 provides:

> "Organizing, planning, directing, or participating in any way in strikes, work stoppages, or job actions of any kind, are excluded from the protection or coverage of this Order. Any employees assigned on a full or part-time basis or granted leave of absence without pay pursuant to this Order who participate in such excluded activity may have such status suspended or terminated by the City Director of Labor Relations."

Section 4(10) provides: "Employees assigned on a full-time or part-time basis or granted leave without pay pursuant to this Order shall at all times conduct themselves in a responsible manner." Section 5 provides that "[n]othing contained in this Order shall be deemed to have the effect of changing the character of any subject matter hereof which is a managerial prerogative and as a non-mandatory subject of collective bargaining."

Enforcement of EO 75 is committed to the OLR Commissioner, who may issue implementing rules and regulations. The indictments of the individual petitioners on charges related to a ticket-fixing scheme that include allegations of grand larceny, official misconduct, tampering with public records, and criminal solicitation constitute a sufficient basis for the City to determine that the individual petitioners did not "at all times conduct themselves in a responsible manner" (*see generally Colon v City of New York*, 60 NY2d 78, 82 [1983]; *Jenkins v City of New York*, 2 AD3d 291 [1st Dept 2003]). Accordingly, OLR was entitled to unilaterally rescind the Release Time certificates.

The dissent believes that petitioners made a sufficient showing of a likelihood of success on the merits by virtue of their argument that EO 75's provision for cancellation of Release Time in two defined sets of circumstances (*see* EO 75 § 4[4],[7]) means that Release Time may not be cancelled for any other reason. However, EO 75 §4(4) focuses on strikes, work stoppages, and job actions, and makes clear that they are not protected. Although the subsection provides that any employee on a leave status who participates in such activity may be suspended or terminated, it does not state that this is the sole ground for rescission of leave status. EO 75 4(10) imposes a requirement that all employees on leave conduct themselves in a responsible

manner, the only reasonable inference from which is that there are consequences for non-compliance. Petitioners' proposed construction of EO 75 deprives the City of any authority to unilaterally revoke Release Time and would render section 4(10), the Order's catch-all provision, a nullity, which is an untenable construction (*see Namad v Salomon, Inc.,* 74 NY2d 751 [1989]; *People v Kates,* 77 AD2d 417, 418 [4th Dept 1980], *affd* 53 NY2d 591 [1981]). It is also inconsistent with the broad oversight of employee representatives that the Order vests in the City. Indeed, the Release Time certificates state on their face that they "MAY BE REVOKED, MODIFIED OR CANCELLED," and petitioners do not suggest any purpose section 4(10) might have, other than to vest the City with residual authority to rescind Release Time where warranted.

Since petitioners' interpretation of EO 75 is not plausible, they have not demonstrated a likelihood of success on the merits.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Joan B. Lobis, J.), entered December 30, 2011, insofar as appealed from as limited by the briefs, enjoining respondents from implementing any termination or revocation of "Release Time" leave for the three individual petitioners pending resolution of arbitration proceedings commenced by petitioner Patrolmen's Benevolent Association,

should be reversed, on the law, without costs, the judgment vacated, the petition denied, and the proceeding dismissed.

All concur except Tom, J.P. and Gische, J.
who dissent in an Opinion by Gische J.

GISCHE, J. (dissenting)

I respectfully dissent and would affirm the order and judgment of the motion court. The court properly exercised its discretion in granting petitioner's motion for injunctive relief in aid of arbitration, enjoining respondents from terminating or revoking the release time previously issued to the individual petitioners pursuant to Executive Order 75 (EO 75) (*see* CPLR 7502[c]; *Kalyanaram v New York Inst. of Tech.*, 63 AD3d 435, 435 [1st Dept 2009]; see *Matter of H.I.G. Capital Mgt. v Ligator*, 233 AD2d 270 [1st Dept 1996]). Petitioners met their burden of demonstrating that were they to prevail on their grievance at arbitration, any award in their favor would be rendered ineffectual without such provisional relief (CPLR 7502[c]). The motion court also found that under article 63 of the CPLR, petitioners had shown a "likelihood of success on the merits, irreparable injury in [the] absence of such relief and a balancing of the equities in [their] favor" (*Kalyanaram v New York Inst. of Tech.*, *supra*; *see Matter of H.I.G. Capital Mgt. v Ligator*, *supra*; *see also* CPLR 6301 *et seq*.).

On the merits, petitioner made a sufficient showing that the purpose of EO 75 is to provide standardized time and leave policies, practices and guidelines for City employees who serve as designated union representatives. Although EO 75 § 4(4)

allows the City's Office of Labor Relations (OLR) to suspend or terminate any employee who engages in "excluded activity," which is defined as "[o]rganizing, planning, directing, or participating in any way in strikes, work stoppages, or job actions of any kind," and EO 75 § 4(10) further requires that employees who are granted leave without pay "conduct themselves in a responsible manner," there is no language in EO 75 that would specifically allow the City to revoke any certificates previously granted in a situation where, as here, the employee has been charged with committing a crime. Both parties present strong arguments on the law. However, the issue whether the City can unilaterally revoke its previous grant of release time to these three officers, who have pleaded not guilty to charges that they were involved in a ticket fixing scheme, is the very issue of the grievance that is the subject of arbitration. Contrary to the City's arguments, the motion court did not decide the merits of the grievance.

I differ with the majority to the extent that it interprets EO 75 § 4(10) on this appeal. By interpreting this provision, the majority has resolved the very issue that is the subject of the grievance yet to be arbitrated. A party seeking a preliminary injunction does not have to provide conclusive proof of its ultimate right to such relief, and a preliminary

injunction can, in the court's discretion, be issued where the right to the ultimate relief sought is disputed (see *Datwani v Datwani*, 102 AD3d 616 [1st Dept 2013]).

The motion court did not abuse its discretion and we should not reverse. The motion court only decided that petitioners had satisfied the requirements of article 75 and article 63 and that a preliminary injunction in aid of arbitration was warranted to maintain the status quo until the ultimate issue was decided by the arbitrator. Contrary to the City's arguments, the status quo was that the individual petitioners had certificates of release time which allowed them to appear on behalf of the PBA as union representatives. The petitioners could not have sought relief from the court until the City had already acted by revoking those certificates.

Petitioners also showed that they would suffer irreparable harm without the preliminary injunction. The individual petitioners are officers who were designated by their union to act on behalf of its members. The City's offer, to allow the petitioners to substitute different representatives for the union and grant them release time for that purpose, does not ameliorate the harm because the union's chosen representatives are not fungible.

Petitioners also showed that the equities tip in their

favor. Although agency heads must coordinate with the OLR in establishing reasonable limits on the number and titles of employees who spend their time on labor-related/union activities, EO 75 does not otherwise erode the independence of the unions in the administration of union matters.

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

ENTERED: DECEMBER 3, 2013

CLERK