SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 15, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Andrias, Renwick, DeGrasse, Abdus-Salaam, JJ.

7651 The People of the State of New York, Respondent, Ind. 1037/08

-against-

Kevin Rios,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 20, 2009, convicting defendant, after a jury trial, of two counts of predatory sexual assault, and sentencing him to concurrent terms of 15 years to life, unanimously affirmed.

Defendant's principal appellate claim is that his right of confrontation was violated by the admission of a DNA analyst's expert testimony that depended on reports of procedures conducted by nontestifying analysts, even though the reports themselves were never before the jury. Under the circumstances presented,

defendant's general references to confrontation and related matters were insufficient to alert the trial court to this particular claim (*see People v Paulin*, 78 AD3d 557, 558 [2010], *lv denied* 16 NY3d 862 [2011]; *People v Lewis*, 44 AD3d 422, 423 [2007], *lv denied* 9 NY3d 1035 [2008]; *compare People v Hardy*, 4 NY3d 192, 197 n 3 [2005]). Initially, we note that defendant's postverdict motion had no preservation effect (*see People v Padro*, 75 NY2d 820, 821 [1990]).

At trial, defendant originally objected to admission of reports by nontestifying analysts as "bolstering." This did not preserve a Confrontation Clause claim (*see e.g. People v Davis*, 90 AD3d 432, 433 [2011]). Defendant also made vague references to confrontation and to information that "someone else has provided." However, this was in the context of his statement that the reports "could" contain information to which he "would" object. This merely stated an intention to object in the future, contingent on whether the evidence proved objectionable, and was insufficient to preserve his claim (*see People v Bierenbaum*, 301 AD2d 119, 152 [2001], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]). Ultimately, counsel never stated an objection, and therefore failed to alert the court to his present position that the evidence had indeed proved objectionable. Significantly, defendant declined the court's offers to review

the reports to determine what was objectionable.

Moreover, defendant never articulated a claim that the witness's *testimony* should be excluded pursuant to the Confrontation Clause unless the analysts who provided the underlying information also testified. Instead, defendant only appeared to be objecting to the nontestifying analysts' reports. However, those reports ultimately never reached the jury.

We decline to review defendant's claim in the interest of justice. We note that where a defect may be readily corrected by calling additional witnesses or directing the People to do so, requiring a defendant to call the defect to the court's attention "at a time when the error complained of could readily have been corrected" (*People v Robinson*, 36 NY2d 224, 228 [1975]) serves an important interest (*see People v Gray*, 86 NY2d 10, 20 [1995]). Furthermore, although the trial court opined that the reports of the nontestifying analysts were generally admissible under the business records exception, a timely and specific objection would have given the court the opportunity to consider whether the witness's testimony violated the Confrontation Clause.

As an alternative holding, we reject defendant's Confrontation Clause claim on the merits. A fair reading of the analyst's testimony establishes that she made her own independent comparison between defendant's DNA profile and the DNA recovered

from semen stains on the victim's underwear. The record does not support defendant's assertion that the witness merely reported on or agreed with a comparison made by others in her office. Thus, the witness did not merely provide surrogate testimony that failed to satisfy the Confrontation Clause (*compare Bullcoming v New Mexico*, 564 US __, __, 131 S Ct 2705, 2709-2710 [2011]).

Furthermore, in *People v Brown* (13 NY3d 332, 340 [2009]), the Court of Appeals found a similar DNA report to be nontestimonial for Confrontation Clause purposes, and we find no basis to distinguish the reports in this case. In addition, as noted, the reports of the nontestifying analysts never reached the jury. The witness testified about the other analysts's tests only to explain the basis for her own opinion, which was the only statement offered for the truth of the matter asserted (*see Williams v Illinois*, 567 US __, __, 132 S Ct 2221, 2228 [2011]; *People v Vargas*, 99 AD3d 481 [1st Dept 2012]).

The only Confrontation Clause claim that defendant arguably preserved is his challenge to that portion of the DNA analyst's testimony that stated, in essence, that no two people can have the same DNA profile. However, this was within the realm of ordinary expert testimony, based on statistical information reasonably relied upon by experts in that field, and defendant's Confrontation Clause objection is without merit.

Defendant's challenges to the prosecutor's summation and the court's charge are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We also find that trial counsel's failure to make these challenges did not deprive defendant of effective assistance (*compare People v Cass*, 18 NY3d 553, 564 [2012], *with People v Fisher*, 18 NY3d 964 [2012]). Regardless of whether defendant's trial attorneys should have raised these issues, we find that defendant has not established that he was prejudiced, under either state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]), by counsel's failure to do so.

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

ENTERED: JANUARY 15, 2013

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8429 Kevine Wade, Index 306782/08
Plaintiff-Respondent, 84240/08

-against-

Bovis Lend Lease LMB, Inc., et al.,
Defendants-Respondents,

24 East 23rd Commercial, LLC,
Defendant,

Atlantic Hoisting & Scaffolding, LLC,
et al.,
Defendants-Appellants.

- - - - -

Bovis Lend Lease LMB, Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Century Maxim Construction Corp.,
Third-Party Defendant-Respondent,

High Rise Hoisting and Scaffolding Inc.,
Third-Party Defendant-Appellant.

_____

French & Casey, LLP, New York (Barry Meade of counsel), for appellants.

LaRock & Perez, LLP, New York (Jason A. Richman of counsel), for Kevine Wade, respondent.

Pillinger Miller Tarallo LLP, Elmsford (Lawrence J. Buchman of counsel), for Bovis Lend Lease LMB, Inc., Slazer Enterprises Owner, LLC, Madison Park Group Owner, LLC, FKF Madison Group Owner, LLC, JMJS 23rd Street Realty Owner, LLC, Slazer Enterprises, LLC and Century Maxim Construction Corp., respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.),

entered October 3, 2011, which denied the motion of defendants Atlantic Hoisting and Scaffolding, LLC and High Rise Hoisting and Scaffolding, Inc. (collectively Atlantic) for summary judgment dismissing the complaint and all cross claims and third-party claims as against them, and granted plaintiff's cross motion for partial summary judgment on the issue of Atlantic's liability on the Labor Law § 240(1) cause of action, unanimously modified, on the law, to grant Atlantic's motion to the extent of dismissing the Labor Law § 241(6) claim, and otherwise affirmed, without costs.

Plaintiff was a passenger in a temporary personnel lift installed by Atlantic at a construction site when the lift became stuck as it was taking plaintiff to his work location. Plaintiff and the other passengers were directed to exit the hoist through an exit in the top. As he emerged onto the top of the hoist, plaintiff was struck by a piece of guide rail that was part of a hoisting mechanism. The guide rail had broken off and fell over 200 feet to where it struck plaintiff.

Partial summary judgment in favor of plaintiff on his Labor Law § 240(1) claim was proper. The enumerated safety device, the hoist, failed and was a proximate cause of plaintiff's injury (*see e.g. Miraglia v H & L Holding Corp.*, 36 AD3d 456, 457 [1st Dept 2007], *lv denied* 10 NY3d 703 [2008]; *Ben Gui Zhu v Great*

Riv. Holding, LLC, 16 AD3d 185 [1st Dept 2005]). In addition, the guide rail was an object that required securing for the purposes of operating the hoist (*see e.g. Outar v City of New York*, 5 NY3d 731 [2005]; *Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268 [2001]).

The denial of Atlantic's motion to the extent it sought dismissal of the Labor Law § 200 and common-law negligence claims was also proper. The contract between Atlantic and the general contractor, required Atlantic to install the hoist using "new and of first quality" parts. Atlantic admitted that it used recycled parts, and thus, triable issues exist as to whether Atlantic's breach of the contract created the condition that caused the accident. It is settled that "a party who enters into a contract to render services may be said to have assumed a duty of care [and potential tort liability to third parties] where the contracting party, in failing to exercise reasonable care in the performance of [its contractual] duties, launches a force or instrument of harm" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002] [internal quotation marks and citations omitted]). There are also triable issues concerning whether, as the contractor with sole authority over the hoist, Atlantic had sufficient oversight authority for the hoist to impose § 200 liability (*see e.g. O'Connor v Lincoln Metrocenter Partners*, 266

AD2d 60, 61 [1st Dept 1999]; *see also Fraser v Pace Plumbing Corp.*, 93 AD3d 616 [1st Dept 2012]).

The cause of action under Labor Law § 241(6) is dismissed because the applicable Industrial Code section upon which plaintiff relies, 12 NYCRR 23-7.1, is not sufficiently specific to support the claim (*see generally Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993]; *see also Kanarvogel v Tops Appliance City*, 271 AD2d 409, 411 [2d Dept 2000], *lv dismissed* 95 NY2d 902 [2000]). The other Industrial Code sections cited by plaintiff, 12 NYCRR 23-2.5 and 23-7.2, do not apply to the facts set forth in the record before us.

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

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

ENTERED: JANUARY 15, 2013

CLERK

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

8553 Gregorio Brito, Index 309362/11
Plaintiff-Appellant,

-against-

Allstate Insurance Company,
Defendant-Respondent.

_____

Linda T. Ziatz, P.C., Forest Hills (Linda T. Ziatz of counsel), for appellant.

Law Office of Michael A. Barnett, Garden City (Jay M. Weinstein of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered June 12, 2012, which denied plaintiff's motion for summary judgment, unanimously affirmed, with costs.

Plaintiff brought this action pursuant to Insurance Law § 3420(a)(2) to compel Allstate Insurance Co. to satisfy a judgment entered in his favor against the insured in the underlying personal injury action. The default judgment was entered July 25, 2011; plaintiff's counsel allegedly caused a copy of it to be served on Allstate by mail the next day. Allstate denies that it received a copy of the default judgment, asserting that it had no notice of the underlying action until it received the pleadings in the instant action on December 8, 2011. Allstate issued a letter disclaiming coverage on December 28, 2011. Plaintiff contends that the disclaimer is invalid because it was untimely

served, whether the time is measured from July 26, 2011 or December 8, 2011.

As to the December 8, 2011 date, Allstate's issuance of the disclaimer letter 20 days later was timely as a matter of law (*see Castro v Prana Assoc. Twenty One, L.P.*, 95 AD3d 693, 694 [1st Dept 2012]). The record does not permit a determination as a matter of law regarding the timeliness of the disclaimer as measured from July 26, 2011. Allstate rebutted the presumption that it received a copy of the default judgment on July 26, 2011, by submitting an affidavit by its claims examiner detailing its mail-handling and record-keeping procedures and denying that it received a copy of the judgment or indeed of any notice of the underlying action before December 8, 2011, when it was served with process in the instant action (*see Jimenez v New York Cent. Mut. Fire Ins. Co.*, 71 AD3d 637, 639 [2d Dept 2010]).

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

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

ENTERED: JANUARY 15, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8890 The People of the State of New York, Respondent, Ind. 2537/95

-against-

Michael Nieves,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Avi Springer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about July 9, 2012, which, upon remand, denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded to a different Justice for further proceedings on the motion.

Defendant was convicted in 1997 of class B drug felonies and sentenced to concurrent terms of 5½ to 11 years. Following his release on parole, he was convicted of a class C felony in 2003 and was sentenced to a term of 3½ to 7 years to run consecutively to the sentences imposed on the class B felonies. Thereafter, in 2009, defendant moved for resentencing on the class B felonies and Supreme Court denied the motion on the grounds that defendant was ineligible (27 Misc 3d 585 [Sup Ct, NY County 2010]).

Defendant appealed and this Court reversed the denial of the motion and remanded the matter for further proceedings (94 AD3d 671 [2012]). This Court found that pursuant to Penal Law 70.30(1)(b) "[c]onsecutive terms are treated as a single, aggregate term . . . [and thus] defendant is deemed to be serving a sentence of 9 to 18 years, for a conviction that qualifies for possible resentencing" (*id.* at 672 [citations omitted]).

Defendant then brought the subject motion for resentencing, and in denying the motion, the resentencing court misconstrued this Court's prior decision. The resentencing court mistakenly concluded that this Court held that defendant was eligible for resentencing on both the class B and class C felonies. Rather, our prior decision simply reasoned that, at the time defendant's resentencing motion was initially denied, defendant was deemed to still be serving a sentence on the class B felonies despite his release to parole on that conviction because consecutive sentences are treated as a single, aggregate term.

We cannot say that the resentencing court's misapprehension of our prior decision did not influence its substantial justice analysis. Thus, we remand the matter to Supreme Court to exercise its discretion and determine whether substantial justice

dictates that the application should be denied. Defendant's request for assignment of the case to a different Justice is granted.

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

8992 The People of the State of New York, Respondent, Ind. 3864/89

-against-

Stacey Sanchez, etc., Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Cassandra Mullen, J.), entered on or about March 2, 2011, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Since defendant did not ask the hearing court for a downward departure from his presumptive risk level, that claim is unpreserved (*see People v Arps*, 65 AD3d 939 [1st Dept 2009]). In any event, we find no basis for such a departure (*see generally*

People v Pettigrew, 14 NY3d 406, 409 [2010]; *People v Mingo*, 12 NY3d 563, 568 n 2 [2009]). The mitigating factors cited by defendant are outweighed by factors presenting a risk of future recidivism.

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

8993 Ivry Semel, Index 105525/10
Plaintiff-Respondent,

-against-

Kimberly Kubali, et al.,
Defendants-Appellants.

_____

Kenneth J. Glassman, New York, for appellants.

William R. DeCoste, New York, for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 30, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The parties are owners of adjacent condominium units on the top floor of a six-story building. Together with another unit owner, they obtained rights from the condominium board for each of them to build a room on the rooftop and a terrace, and jointly retained an architect. When the project was complete, plaintiff asserted that the new fence between his terrace and defendants' terrace was encroaching by about three feet, or 50 square feet, into what had been his rooftop property, as shown on the original building plan and offering plan drawings. Defendants objected that they assumed he had reviewed and approved the architect's plans, which had been relied on in constructing the roof

additions, and any mistake was attributable to the architect. The architect asserted that the fence could not readily be moved due to, among other things, building code rules pertaining to access to fire escapes.

In support of their motion for summary judgment dismissing plaintiff's trespass, encroachment and unjust enrichment claims, defendants submitted the affidavit of the architect, who explained that, since no survey existed for the roof with a metes and bounds description, he "had to make [his] own measurements," which he did using plans previously filed with the Department of Buildings, as well as discussions with the owners, the offering plan and any other relevant material. He asserted that the new fence was in the proper place. Assuming arguendo that this would have been sufficient to meet defendants' prima facie burden of eliminating any triable issue of fact as to their interest in the exclusive possession of the disputed three-foot strip of rooftop deck (*see Menkes v Phillips*, 93 AD3d 769, 770 [2d Dept 2012]), plaintiff raised an issue of fact by submitting his deed with the offering plan drawing, and emails written by one of the defendants acknowledging that the fence had been moved from its previous location and that she had been aware that the location of the fence would have to be moved to accommodate the new structures.

To the extent defendants assert an estoppel claim based on their detrimental reliance upon plaintiff's acquiescence in the new rooftop configuration shown on the architect's plans (*U.S. Cablevision Corp v Theodoreu*, 192 AD2d 835 [3d Dept 1993]), plaintiff's affidavit denying that he knowingly acquiesced in any change in dimensions of his rooftop deck raises issues of fact.

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

8994 In re Rosie Shameka S.R.,

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

Tulip S.R., etc.,
Respondent-Appellant,

Children's Aid Society, etc.,
Petitioner-Respondent.

_____

Carol Kahn, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

_____

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about May 3, 2012, which, upon a fact-finding determination that respondent mother suffers from a mental illness, terminated her parental rights and transferred custody and guardianship of the child to petitioner Children's Aid Society for the purpose of adoption, unanimously affirmed, without costs.

The uncontroverted medical evidence provided clear and convincing evidence that respondent is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for her daughter (*see* Social

Services Law § 384-b][4][c]; *Matter of Joyce T.*, 65 NY2d 39 [1985]; *Matter of Michele Amanda N. [Elizabeth N.]*, 93 AD3d 610, 611 [1st Dept 2012]). Petitioner submitted unrebutted expert testimony that respondent suffers from a chronic major depressive disorder that prevents her from understanding how her behavior is harmful to her daughter, as well the testifying psychiatrist's report, which was prepared after a two hour interview with respondent and a review of her records. In addition, petitioner submitted a report from a psychologist who had also interviewed respondent, reviewed her medical records, and conducted psychological testing, which concluded that she suffers from depressive disorder and personality disorder and poses an ongoing risk to the subject child.

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

8995 In re The State of New York, Index 30064/08
Petitioner-Respondent,

-against-

David Steur,
Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Zea Ishee of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Laura R. Johnson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about February 9, 2011, which revoked an order of Strict and Intensive Supervision and Treatment (SIST) under Mental Hygiene Law article 10, unanimously affirmed, without costs.

Clear and convincing evidence supports the court's finding that respondent is a dangerous sex offender requiring confinement (*see* Mental Hygiene Law [MHL] § 10.11[d][4]).

To prove that a respondent is a dangerous sex offender requiring confinement, the State must show, inter alia, that, if not confined, the respondent "is likely to be a danger to others and to commit sex offenses" (MHL § 10.07[f]). A sex offense under article 10 is defined, among other things, as any felony defined in article 130 of the Penal Law (MHL § 10.03[p]). The

court determined that respondent was likely to commit the felony of persistent sexual abuse (Penal Law § 130.53). A person is guilty of persistent sexual abuse when he commits one of three specified misdemeanor offenses and, within the previous 10 years, has been convicted two or more times of any of those three misdemeanors or of any felony sex offense defined in article 130 (*id.*).

Respondent, who has admitted committing hundreds of acts of groping women's and teenage girls' breasts or buttocks, including 35 such acts on one particular day, does not dispute that he is likely to commit three qualifying misdemeanors in a 10-year period. He argues that the State failed to establish by clear and convincing evidence that he is likely to be convicted of two predicate offenses and to commit a third within 10 years. We find that this reading of the statutory scheme is overly literal and inconsistent with the legislative intent.

The core task in determining whether an individual is a dangerous sex offender requiring confinement is to determine whether the individual is likely to engage in *conduct* that constitutes a felony under Penal Law article 130. Thus, there is an ambiguity in the phrase "likely . . . to commit sex offenses" (MHL § 10.07[f]) as applied to Penal Law § 130.53, which incorporates convictions for other offenses as an element of the

offense. We find it unlikely that the Legislature intended to exempt individuals who commit serial sex offense misdemeanors from classification as dangerous sex offenders unless and until they have been successfully prosecuted for two such offenses and then commit a third. That interpretation would cast the courts in the role of forecasting law enforcement and judicial outcomes rather than the probability that an individual will engage in conduct dangerous to the community. Accordingly, we hold that when the State seeks to prove that a respondent in a Mental Hygiene Law article 10 proceeding is likely to commit the felony of persistent sexual abuse, it need only establish, by clear and convincing evidence, that the respondent is likely to engage in conduct that would support a conviction.

Respondent also argues that the court's determination that he is a dangerous sex offender requiring confinement is against the weight of the evidence because the State failed to refute his claim that his behavior might be controlled with serotonin-specific reuptake inhibitor (SSRI) medications, which reduce sexual arousal and compulsive behavior. However, all three experts testified that SSRI medications might not reduce the risk of respondent's reoffending, because his offending behavior was motivated in significant part by factors other than sexual arousal and compulsiveness. The court was entitled to rely on

the testimony and report of its appointed expert that there could be no assurances that respondent would not re-offend and that the only way to test this would be to return him to SIST (*see Matter of State of New York v Kenneth BB.*, 93 AD3d 900, 901 [3rd Dept 2012]).

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

8996 Platinum Partners Value Arbitrage Fund LP, Plaintiff-Appellant, Index 105508/10

-against-

Kroll Associates, Inc., et al., Defendants-Respondents.

_____

McElroy, Deutsch, Mulvaney & Carpenter, New York (Joseph P. LaSala of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Barry H. Berke of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Paul Wooten, J.), entered October 5, 2011, which granted defendants' motion to dismiss the complaint, deemed appeal from judgment, same court and Justice, entered October 6, 2011, dismissing the complaint (CPLR 5520[c]), and, so considered, the judgment is unanimously reversed, on the law, without costs, the judgment vacated, and the cause of action for breach of contract reinstated.

The complaint alleges that, pursuant to a written retainer agreement with plaintiff, defendant Kroll Associates, Inc., a private investigative firm, prepared a report on certain individuals connected with a business in which plaintiff was considering investing some $20 million. The single-spaced, 76-

page report summarized a substantial amount of information about the individuals in question. However, it failed to include three articles, all published nine or more years earlier and available in the Lexis/Nexis database, that disclosed material negative information about the individuals.

These allegations fail to state causes of action for fraud and gross negligence. They indicate, at the most, errors or simple oversight on defendant's part, and do not give rise to an inference of fraudulent intent (*see Giant Group v Arthur Andersen LLP*, 2 AD3d 189 [1st Dept 2003]). Further, there are no allegations to support a finding that defendant had any duty to plaintiff outside of the contract (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 551-552 [1992]). Moreover, the overlooking of a few articles in an otherwise massive and fruitful search does not "smack of intentional wrongdoing" so as to evince gross negligence (*see Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 683-684 [2012]).

However, the complaint states a cause of action for breach of contract. In the retainer agreement, defendant undertook to conduct a "comprehensive" search for relevant information and to conduct the investigation under the direction of plaintiff's counsel. Given the vagueness of the term "comprehensive" and the fact that some allegedly material articles were missed, it cannot

be said as a matter of law that defendant did not breach the contract. We note that this claim is subject to the limitation of liability clause in the retainer agreement, which limits any recovery to the fees plaintiff paid defendant.

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

8997 John Rodriguez, Index 8685/06
Plaintiff-Appellant, 85470/06
85828/07

-against-

Gilbane/TDX Joint Venture, et al.,
Defendants-Respondents-Appellants,

Gilbane, Inc.,
Defendant.

- - - - -

Gilbane/TDX Joint Venture, et al.,
Third-Party Plaintiffs-
Respondents-Appellants,

Gilbane, Inc.,
Third-Party Plaintiff,

-against-

DiFama Concrete, Inc.,
Third-Party Defendant-Respondent,

Admiral Insurance Company,
Third-Party Defendant.

- - - - -

Gilbane/TDX Joint Venture, et al.,
Second Third-Party Plaintiffs-
Respondents-Appellants,

Gilbane, Inc.,
Second Third-Party Plaintiff,

-against-

DFC Structures, LLC,
Second Third-Party Defendant-Respondent,

Admiral Insurance Company,
Second Third-Party Defendant.

_____

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellant.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Brian T. Deveney of counsel), for respondents-appellants.

Litchfield Cavo LLP, New York (Michael K. Dvorkin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered April 10, 2012, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on the issue of defendants Gilbane/TDX Joint Venture, Gilbane Inc., and TDX Construction Corp.'s (the Gilbane/TDX defendants) liability under Labor Law § 240(1), granted, in part, the Gilbane/TDX defendants' cross motion for summary judgment dismissing plaintiff's complaint on the ground that the Gilbane/TDX defendants, as the construction manager, did not supervise, direct or control the plaintiff's work, unanimously affirmed, without costs.

The IAS court correctly determined that the Gilbane/TDX defendants, as the construction manager, were not liable under the Labor Law for plaintiff's injuries, as the Gilbane/TDX defendants did not direct, control or supervise plaintiff's work. There is nothing in the record to indicate that the Gilbane/TDX defendants were other than the typical construction manager and therefore not the agent of the Dormitory Authority of New York,

the owner of the building being built at the time of injury (*see e.g. Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]).

The Gilbane/TDX defendants cross appeal from the order, contending that the IAS court erred in failing to address the portion of their cross motion seeking indemnification against third-party defendant DiFama Concrete and second third-party defendant DFC Structures, LLC. The IAS court did not err. The Gilbane/TDX defendants sought summary judgment on the issue of indemnification conditionally, predicating it on a finding by the motion court that they were liable for plaintiff's injuries. As the IAS court granted the first part of the Gilbane/TDX defendants' motion, there was no need for it to address the alternative of indemnification.

To the extent the Gilbane/TDX defendants now seek, from this court, indemnification from the third party defendants not conditioned on a finding of liability, we decline to consider the question, which should be raised in the IAS court in the first instance (*see Higgins v Consolidated Edison Co. of N.Y., Inc.*, 93

AD3d 443 [1st Dept 2012]).

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

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

8998 The People of the State of New York, Ind. 4427/09
Respondent,

-against-

Omar Abreu,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow 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 (Richard D. Carruthers, J.), rendered on or about March 16, 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: JANUARY 15, 2013

CLERK

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

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

8999 Susan Raner, Index 601409/09
Plaintiff-Appellant,

-against-

Security Mutual Insurance Company,
Defendant-Respondent,

E. Patricia Dolan,
Defendant.

_____

Hill & Moin LLP, New York (Cheryl Eisberg Moin of counsel), for appellant.

Lawrence N. Rogak, LLC, Oceanside (Lawrence N. Rogak of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered June 8, 2011, which, in this action for a declaratory judgment, granted defendant Security Mutual Insurance Company's motion for summary judgment and declared that Security Mutual was not obligated to indemnify its insured in the underlying personal injury action or pay the judgment, unanimously reversed, on the law, without costs, the motion denied, and the declaration vacated.

The policy exclusion relied upon by defendant insurer, which, with respect to coverage for personal liability and medical payments to others, specifically excludes "liability . . . resulting from premises owned, rented or controlled by an

insured other than the insured premises" is ambiguous because the definition of insured premises under the subject policy includes "that part of any premises *occasionally* rented to an insured for other than business purposes" and the policy offers no definition of the term "occasionally." Thus, the term "occasionally rented" is ambiguous and may apply to a summer vacation rental such as the one at issue here -- a beach club cabana rented for 20 successive years, albeit under separate yearly membership agreements (*see Villanueva v Preferred Mut. Ins. Co.*, 48 AD3d 1015, 1016-18 [3d Dept 2008]). Since the defendant insurer failed to establish that its interpretation is the only reasonable interpretation, or in fact the insurer's intended interpretation, the exclusion must be construed against the drafter and in favor of the insurer (*see Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]).

Despite the fact that the exclusion may be construed against the insurer, the issue of notice is not academic, since it is a condition precedent to coverage (*see George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 112 [1st Dept 2012]). Issues of fact exist as to whether the insured's notice was timely, since a jury could find that the defendant insured reasonably relied on the plaintiff's promise not to sue in delaying her notification to the insurer (*see*

Jaglom v Ins. Co. of Greater N.Y., 57 AD3d 310, 311 [1st Dept 2009], *affd* 13 NY3d 768 [2009]).

Defendant insurer satisfied its duty to disclaim specifically (*see Hotel des Artistes v General Acc. Ins. Co. of Am.*, 9 AD3d 181, 193 [1st Dept 2004], *lv dismissed* 4 NY3d 739 [2004]), by asserting the applicable policy sections on which it relied. However, issues of fact exist as to whether the disclaimer letter, issued 65 days after defendant insurer's receipt of its insured's notice to her broker, was timely. The documentation does not clearly establish when defendant insured became aware of the severity of plaintiff's injuries. Thus, the reason for disclaimer based on late notice is not readily apparent from the face of the correspondence (*cf. George Campbell Painting*, 92 AD3d at 106). Although plaintiff suggests that a cursory investigation such as a telephone call could have obtained the necessary information (*see Hunter Roberts Constr.*

Grp., LLC v Arch Ins. Co., 75 AD3d 404, 409 [1st Dept 2010]), the report prepared by defendant insurer's investigator states that he had difficulty reaching defendant insured by telephone.

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

9000-
9000A In re Jaquan R.,

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

_____

Elisa Barnes, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Leslie Cooper Mahaffey of counsel), for presentment agency.

_____

Orders of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about March 28, 2012, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of robbery in the second degree, and upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of menacing in the third degree and criminal contempt in the second degree, and placed him with the Office of Children and Family Services for placement at Graham Windham for respective periods of 18 and 12 months, unanimously affirmed, without costs.

The court's fact-finding determination was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's

credibility determinations.

The dispositional orders were proper exercises of discretion. Placement at Graham Windham was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), given the serious and repeated nature of appellant's acts, which included witness-tampering, and appellant's history of benefitting from residential placement.

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

9001 The People of the State of New York, Ind. 6283/01
Respondent,

—against—

Gregory Galberth,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered April 6, 2011, resentencing defendant, as a second violent felony offender, to a term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Velez*, 19 NY3d 642, 647-649 [2012]; *People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

9002 Ambac Assurance Corporation, et al., Plaintiffs-Appellants, Index 600070/10

-against-

DLJ Mortgage Capital, Inc., et al., Defendants-Respondents.

Patterson Belknap Webb & Tyler LLP, New York (Harry Sandick of counsel), for appellants.

Orrick, Herrington & Sutcliffe LLP, New York (John Ansbro of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 13, 2011, which, to the extent appealed from, upon reargument, struck plaintiffs' demand for a jury trial, unanimously reversed, on the law, without costs, and the jury demand reinstated.

The complaint alleges repeatedly that the insurance agreement was obtained through various types of fraud, making it clear that fraudulent inducement is plaintiff's primary claim. Thus, the provision of the agreement that waives the right to trial by jury does not apply (*see MBIA Ins. Corp. v Credit Suisse Sec. [USA], LLC*, __ AD3d __ [1st Dept 2013], Appeal No. 9003, decided simultaneously herewith; *Wells Fargo Bank, N.A. v Stargate Films, Inc.*, 18 AD3d 264, 265 [1st Dept 2005]). It is

of no consequence that the complaint does not contain the word "rescission" or expressly state that it challenges the validity of the insurance agreement (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

9003 MBIA Insurance Corporation, Index 603751/09
Plaintiff-Appellant,

-against-

Credit Suisse Securities (USA), LLC, et al.,
Defendants-Respondents.

_____

Patterson Belknap Webb & Tyler LLP, New York (Erik Haas of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (John Ansbro of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 13, 2011, which, to the extent appealed from, upon renewal, struck plaintiff's demand for a jury trial, unanimously reversed, on the law, without costs, and the jury demand reinstated.

The complaint alleges repeatedly that the insurance agreement was obtained through various types of fraud, making it clear that fraudulent inducement is plaintiff's primary claim. Thus, the provision of the agreement that waives the right to trial by jury does not apply (*see Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, __ AD3d __ [1st Dept 2013], Appeal No. 9002, decided simultaneously herewith; *Wells Fargo Bank, N.A. v Stargate Films, Inc.*, 18 AD3d 264, 265 [1st Dept 2005]). It is

of no consequence that the complaint does not contain the word "rescission" or expressly state that it challenges the validity of the insurance agreement (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

9005 Brenda Walton, as Administratrix of the Estate of Judith Ann Priester, etc., Plaintiff-Appellant, -against- David Sohn, M.D., Defendant-Respondent. Index 307903/08

Alpert, Slobin & Rubenstein, LLP, Garden City (Lisa M. Comeau of counsel), for appellant.

Ellenberg & Partners LLP, New York (Samir Patel of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered September 12, 2011, which granted defendant's motion to dismiss plaintiff's complaint as time-barred, unanimously affirmed, without costs.

Defendant met his burden on the motion by submitting evidence showing that plaintiff's claims relating to defendant's alleged failure to diagnose decedent's breast cancer were time-barred (*see* CPLR 214-a; *Massie v Crawford*, 78 NY2d 516, 519 [1991]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether the statute of limitations was tolled by the continuous treatment doctrine (*see Massie*, 78 NY2d at 519). The record shows that, after decedent's diagnosis in December of

2004, she obtained all of her breast cancer related treatment from Memorial Sloan-Kettering Cancer Center (MSK), and her treatment with defendant was limited to general medical concerns, such as her high blood pressure. Although defendant was her admitting physician in June 2006, when she sought treatment at Our Lady of Mercy Medical Center for headaches, decedent declined to permit defendant to treat her for the cancer that had metastasized to her brain. Instead, she obtained a transfer back to MSK. Thus, not only was further treatment not "explicitly anticipated" by decedent and defendant (*Rodriguez v Mount Sinai Hosp.*, 96 AD3d 534, 535 [1st Dept 2012], quoting *Cox v Kingsboro Med. Group*, 88 NY2d 904, 906-907 [1996]), it was explicitly refused by decedent.

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

9007 DLJ Mortgage Capital, Inc., 104675/10
Plaintiff-Respondent,

-against-

Thomas Kontogiannis, et al.,
Defendants,

Chicago Title Insurance Company, Inc., et al.,
Defendants-Appellants.

_____

Herrick, Feinstein LLP, New York (Arthur G. Jakoby of counsel), for Chicago Title Insurance Company, Inc., appellant.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Michael J. Schwarz of counsel), for United General Title Insurance Company, Inc., appellant.

Hahn & Hessen LLP, New York (Robert J. Malatak, John P. Amato and Annie Power of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 1, 2011, which, insofar as appealed from, denied the motions of defendants Chicago Title Insurance Company, Inc. and United General Title Insurance Company, Inc. to dismiss the complaint as against them, unanimously reversed, on the law, without costs, and the motions to dismiss granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's claims against the title insurance defendants for the acts of their agents, who were co-conspirators in a mortgage fraud scheme, should have been dismissed. The complaint

does not allege that the title insurers were aware that their agents had issued fraudulent certificates of title and commitments for title on the title insurers' behalf for mortgages that plaintiff eventually purchased. Nor can liability attach under the doctrine of apparent authority, since there is no allegation of any misleading conduct on the part of the title insurers (*see Hallock v State of New York*, 64 NY2d 224, 231 [1984]). Plaintiff purchased the fraudulent mortgages from a third party, and never dealt with the title insurer defendants directly.

In any event, plaintiff cannot show justifiable reliance upon the alleged misrepresentations of the agent (*see id.*). The loan file documents relied upon, prepared by the agents, did not show that title insurance policies had in fact been issued in connection with the fraudulent mortgages purchased by plaintiff.

Therefore, apparent authority is not available to bind the title insurers to plaintiff's claims (*see Ford v Unity Hosp.*, 32 NY2d 464, 472-473 [1973]).

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

9008 First Sterling Corporation, et al., Plaintiffs-Appellants, Index 600868/10

-against-

Union Square Retail Trust, et al., Defendants-Respondents.

_____

Bryan Cave LLP, New York (Mark Jon Sugarman of counsel), for appellants.

Seyfarth Shaw LLP, New York (Eddy Salcedo of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 10, 2012, which granted so much of defendants' motion as sought to dismiss the breach of contract, breach of the implied covenant of good faith, unjust enrichment and declaratory judgment causes of action, unanimously affirmed, with costs.

Paragraph 17.2(a) of the Circuit City and Virgin Entertainment subleases authorizes the assignment of the subleases, conclusively establishing a defense to the breach of contract cause of action. Notably, assignment of the Circuit City sublease was also authorized by the bankruptcy court and substantiated by an assignment and assumption agreement.

Plaintiffs' allegations of domination and control by

defendants OTR and Union Square Retail Trust over the single-purpose entities Union Square Development Associates I and II are conclusory and, thus, insufficient to state a veil-piercing claim (*see Siegel Consultants, Ltd. v Nokia, Inc.*, 85 AD3d 654, 657 [1st Dept 2011], *lv denied* 18 NY3d 809 [2012]).

Recognition of the implied covenant of good faith would be contrary in this instance to the express authorization of assignments.

In light of the insufficiency of the veil-piercing allegations, the unjust enrichment claim is deficient for lack of a relationship between plaintiffs and the Union Square Development defendants (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516-517 [2012]) and because a valid contract governs the subject matter (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

In view of the availability of the breach of contract cause of action, there is no necessity for a declaratory judgment cause

of action (*see James v Alderton Dock Yards*, 256 NY 298, 305 [1931]).

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

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

ENTERED: JANUARY 15, 2013

CLERK

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

9010 The People of the State of New York, Ind. 4030/02
Respondent,

-against-

Mark Moore,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rebekah J. Pazmiño 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 an order of the Supreme Court, New York County (Daniel P. Fitzgerald, J.), entered on or about September 24, 2010,

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

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

ENTERED: JANUARY 15, 2013

CLERK

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

Saxe, J.P., Renwick, Freedman, Román, Gische, JJ.

9011N In re New York State Division of Human Rights, et al., Petitioners,

-against-

Neighborhood Youth & Family Services, Respondent.

Index 251082-11

_____

Caroline J. Downey, Bronx (Toni Ann Hollifield of counsel), for New York State Division of Human Rights, petitioner.

_____

Application pursuant to Executive Law § 298 to enforce petitioner New York State Division of Human Rights' (DHR) order, dated October 15, 2008, which found that respondent had discriminated against petitioner Angel Rivera on the basis of his gender, and, among other things, directed respondent to pay Rivera back pay in the principal amount of $11,511.67 and compensatory damages for mental anguish and humiliation in the principal amount of $10,000 (transferred to this Court by order of the Supreme Court, Bronx County [Mark Friedlander, J.], entered September 29, 2011), unanimously granted, without costs.

DHR's findings are supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]; *Matter of Bronx Cross County Med. Group v Lassen*, 233 AD2d 234, 235 [1st Dept 1996], *lv denied* 89 NY2d 813 [1997]). Respondent, which defaulted in this proceeding,

obviously failed to rebut a prima facie showing that it had discriminated against Rivera on account of his gender (*see Matter of State Div. of Human Rights v ARC XVI Inwood, Inc.*, 17 AD3d 239 [1st Dept 2005]). The awards of back pay and compensatory damages are proper (*see* Executive Law § 297[4][c][ii], [iii]; *Matter of Mize v State Div. of Human Rights*, 33 NY2d 53, 56 [1973]; *Arc XVI Inwood*, 17 AD3d at 239).

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

ENTERED: JANUARY 15, 2013

CLERK