SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 31, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, DeGrasse, Freedman, JJ.

8189 In re Jeffrey M.,

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

New York City Administration
for Children's Services,
Petitioner-Appellant,

Noemi C.,
Respondent-Respondent.

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

Randall S. Carmel, Syosset, for respondent.

Steven N. Feinman, White Plains, attorney for the child.

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Order, Family Court, Bronx County (Anne-Marie Jolly, J.), entered on or about March 31, 2011, which dismissed the neglect petition against respondent mother, unanimously affirmed, without costs.

Respondent is the mother of Jeffrey M., who was born in 2000. In September 2010, petitioner, the Administration for Children's Services (ACS), filed a neglect petition against respondent pursuant to Family Court Act article 10. The petition

alleged that Jeffrey's physical, mental or emotional condition had been impaired, or was in imminent danger of becoming impaired, by the mother's misuse of drugs without attending a rehabilitation program, and by her failure to provide him with adequate food, clothing, shelter, proper supervision or guardianship.

ACS's caseworker, who was the only witness at the fact-finding inquest, testified that she commenced a child protective investigation upon receipt of a report from the State Central Register of Child Abuse and Maltreatment. In the course of the investigation, the caseworker visited and found respondent alone and living in a squalid abandoned building on August 26, 2010. When questioned about Jeffrey's whereabouts, respondent told the caseworker that the child had been living with his maternal aunt and grandmother since September 2009 when she became ill with lupus and lost her apartment. Respondent stated that Jeffrey occasionally visited her at the abandoned building. Respondent admitted to the caseworker that she used marijuana and crack cocaine and supported herself by means of panhandling and prostitution. Respondent stated, however, that she never used or was under the influence of drugs while around Jeffrey.

The caseworker interviewed Jeffrey at his school on August 30, 2010. Jeffrey confirmed that he was living with his

grandmother and aunt and enjoyed doing so. Jeffrey stated that he occasionally visited respondent at the abandoned building. Jeffrey added that he had never seen his mother with drugs or alcohol. When interviewed by the caseworker, Jeffrey's grandmother and aunt said he was doing well under their care and attending school. The record from respondent's health care provider indicated that respondent was depressed, suffering from lupus, using cocaine and was subject to mood swings. At the conclusion of the fact-finding inquest, Family Court dismissed the petition upon finding that petitioner failed to meet its burden of establishing that respondent had neglected Jeffrey. We affirm.

Insofar as relevant, Family Court Act § 1012(f) provides as follows:

> "'Neglected child' means a child less than eighteen years of age . . . whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship . . . or by misusing a drug or drugs" (§ 1012[f][i][B]).

Family Court Act § 1046 provides, in relevant part, that

> "[i]n any hearing under this article . . . proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the

> extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program" (§ 1046[a][iii]).

In a fact-finding hearing, any determination that a child is abused or neglected must be based on a preponderance of the evidence (Family Ct Act § 1046[b][i]). We conclude that the petition was properly dismissed because the caseworker's testimony and the medical record in evidence were insufficient to support, by a preponderance of the evidence, a determination that respondent neglected the subject child. Although respondent's living conditions were unsuitable, the record presents no basis for a conclusion that Jeffrey's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" as a result of his occasional exposure to the environment in which his mother lived (*see* Family Ct Act § 1012[f][i]). In this case, the child was thriving under the care of his aunt and grandmother. The record is similarly insufficient to establish a prima facie case of neglect under

Family Court Act § 1046(a)(iii) because, as noted above, the caseworker's investigation disclosed that respondent neither used or was under the influence of drugs in Jeffrey's presence.

Moreover, there is no evidence of the frequency of respondent's drug use (*see e.g. Matter of Anastasia G.*, 52 AD3d 830, 832 [2nd Dept 2008]).

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

ENTERED: JANUARY 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9113-
9114 Desiree Fortich, et al., Index 300963/08
Plaintiffs-Appellants,

-against-

Alex Jenny Ky-Miyasaka, et al.,
Defendants.

Thomas P. Sterry,
Defendant-Respondent.

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Silverstein & Bast, New York (Michael M. Bast of counsel), for appellants.

Westermann Sheehy Keenan Samaan & Aydelott, LLP, White Plains (Kenneth J. Burford of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered November 29, 2011, dismissing the complaint and all cross claims as against defendant Thomas P. Sterry (Dr. Sterry), pursuant to an order, same court and Justice, entered on or about November 3, 2011, which granted Dr. Sterry's motion for summary judgment, unanimously affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Dr. Sterry established his entitlement to judgment as a matter of law in this action alleging medical malpractice. Dr. Sterry, a plastic surgeon, submitted evidence showing that the

abdominoplasty he performed upon plaintiff Desiree Fortich was in a different surgical tissue plane from where the codefendant physicians performed the more invasive gynecological surgery and where the small bowel perforations were eventually located (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325-326 [1986]).

Plaintiffs failed to raise a material issue of fact to defeat the motion. The anonymous expert affirmation submitted by plaintiffs was provided by a physician who did not practice in Dr. Sterry's field and did not demonstrate that he or she possessed sufficient knowledge or expertise to testify outside of his or her specialty (*see Kaplan v Karpfen*, 57 AD3d 409, 410 [1st Dept 2008], *lv denied* 12 NY3d 716 [2009]). The expert relied on a note by a general surgical resident who indicated that Dr. Sterry likely caused one of the small bowel perforations when he plicated the bowel during the abdominoplasty, but there was no evidence that the resident observed Dr. Sterry perform the procedure or that either the resident or the expert had personal knowledge of how Dr. Sterry performed the procedure. Such evidence was insufficient to rebut Dr. Sterry's explanation that he performed the procedure on a different surgical plane nowhere near the location of the bowel injuries.

Plaintiffs' informed consent claims against Dr. Sterry were properly dismissed because they did not submit proof that any

potential lack of informed consent was a proximate cause of Mrs. Fortich's injuries (*see Orphan v Pilnik*, 66 AD3d 543, 544 [1st Dept 2009], *affd* 15 NY3d 907 [2010]). Similarly, plaintiffs' faulty communication claim was properly dismissed, as there is no evidence that Dr. Sterry gave unclear directions to the general surgical team. Moreover, even if the general surgeon did misunderstand Dr. Sterry, without more, any liability for this falls upon that surgeon, rather than upon Dr. Sterry, whose duty of care is limited to the medical functions that he undertook (*see Huffman v Linkow Inst. for Advanced Implantology, Reconstructive & Aesthetic Maxillo-Facial Surgery*, 35 AD3d 214, 216 [1st Dept 2006]).

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

ENTERED: JANUARY 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9115-
9116 In re Tiara G., and Others,

Children Under the Age of
Eighteen Years, etc.,

Cheryl R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

Steven N. Feinman, White Plains, attorney for the child Tiara G.

Carol Kahn, New York, attorney for the child Leah G.

Elisa Barnes, New York, attorney for the child Taqia T. G.

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Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about May 17, 2011, which, upon a fact-finding determination of neglect, placed the children Leah G. and Taqia T. G. in the custody of the Commissioner of Social Services until completion of the next permanency hearing, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal from the order otherwise dismissed without costs, as moot. Fact-finding order, same court and Judge, entered on or about April 20, 2011, which determined

that respondent mother had neglected the three subject children, unanimously affirmed as to the neglect finding with respect to the child Taqia T.G., and the appeal from the order otherwise dismissed, without costs, as superseded by the appeal from the order of disposition.

The finding of neglect as to Leah is supported by a preponderance of the evidence (Family Ct Act § 1046[b][i]) that the mother had inflicted excessive corporal punishment on Leah by beating her with her hands or a belt, and leaving a mark that was visible approximately one year later (*see Matter of Anthony C.*, 201 AD2d 342, 342-343 [1st Dept 1994]; *see also* Family Ct Act § 1012[f][i][B]). Leah's out-of-court statements to the caseworker regarding the beatings and the marks were corroborated by the caseworker's observation of the marks (*Matter of Ameena C. [Wykisha C.]*, 83 AD3d 606, 607 [1st Dept 2011]) and by the out-of-court statements of Tiara and Taqia (*see Matter of Shayna R.*, 57 AD3d 262, 262-263 [1st Dept 2008]).

The findings of neglect as to Taqia and Tiara are also supported by a preponderance of the evidence. Those children told an agency caseworker that the mother had inflicted similar, though less severe, corporal punishment on them. Accordingly, they are in imminent danger of being impaired by the imposition of excessive corporal punishment by the mother (*see Matter of*

Anthony C., 201 AD2d at 343). The findings of neglect as to all three children are also supported by the evidence that the mother had failed to pick Leah up from the police after she was arrested, had behaved in an erratic and aggressive manner, and had been found guilty of neglect in prior proceedings (*see Matter of Joyce A-M. [Yvette A.]*, 68 AD3d 417, 418 [1st Dept 2009]). We see no reason to disturb the court's credibility determinations (*see generally Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

The placement of Leah and Taqia has been rendered moot by the expiration of the dispositional order from which the mother appeals (*see Matter of Joyce A-M.*, 68 AD3d at 417-418). The mother has no basis to challenge the disposition as to Tiara since the dispositional order does not concern that child and the mother has not appealed from the subsequent order of disposition involving the child. We note that we are concerned about Leah's placement in view of the fact that she has absconded from the institution in which she has been placed.

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

ENTERED: JANUARY 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9117 In re Catherine Regenhard, et al., Index 109548/11
Petitioners-Appellants,

-against-

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

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Siegel Teitelbaum & Evans PC, New York (Norman Siegel of counsel), for appellants.

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

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Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about October 25, 2011, which denied the petition seeking, among other things, to annul respondents' determination denying their Freedom of Information Law request for a list of the names and home addresses of the family members, next of kin, or authorized representatives of the 2,749 people who died in the September 11, 2001 attacks on the World Trade Center, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents' determination denying petitioner's FOIL request was not affected by an error of law (*see Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]). The court

properly found that the requested information is exempt from disclosure pursuant to FOIL because such disclosure would constitute an unwarranted invasion of personal privacy (Public Officers Law § 87[2][b]). Since the disclosure of the names and home addresses of the families or representatives of the 2,749 people who died in the attacks on the World Trade Center does not fall within one of the six examples of an unwarranted invasion of personal privacy enumerated in Public Officers Law § 89(2)(b), we must balance the privacy interests at stake against the public interest in disclosure of the information (*see Mulgrew*, 87 AD3d at 507; *see also Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]). The request for a list of these names and home addresses raises heightened privacy concerns, particularly in light of the "enormous -- perhaps literally unequalled -- public attention" that has been paid to the attacks and their aftermath (*id.* at 486). We reject petitioners' assertion that there is a stronger public interest in sending a letter to the families providing greater specificity about the planned location of unidentified remains of those who died in the attacks, which would be 70 feet underground and could be viewed by the families after passing through the National September 11 Memorial Museum without paying an admission fee. Notwithstanding the importance of the location of these remains to the families,

respondents have largely addressed petitioners' concerns by sending a letter to the families providing substantially similar, if less detailed, information. Further, petitioners' objection that respondent's letter failed to encourage the recipients to provide any input does not outweigh the families' privacy interests.

Petitioners' request for attorneys' fees is denied (Public Officers Law § 89[4][c]).

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

ENTERED: JANUARY 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9118 Elida Shkreli, Index 17913/05
Plaintiff-Respondent,

-against-

Boston Properties, Inc., et al.,
Defendants-Appellants.

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Melito & Adolfsen PC, New York (Steven I. Lewbel of counsel), for Boston Properties, Inc., and BP 280 Park Avenue, LLC, appellants.

Brill & Associates PC, New York (Corey M. Reichardt of counsel), for CIBC World Markets Corp., appellant.

Pugatch & Nikolis, Mineola (Phillip P. Nikolis of counsel), for respondent.

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Order, Supreme Court, Bronx County (Barry Salman, J.), entered January 13, 2012, which, insofar as appealed from as limited by the briefs, denied defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she suffered an electric shock while working as a cleaner in the commercial premises leased by defendant CIBC World Markets Corp. from the property owners, defendants Boston Properties, Inc., and BP 280 Park Avenue, LLC (collectively BP). Although plaintiff concedes that she does not know the precise source of the electricity which shocked her, viewing the evidence in the light most favorable to plaintiff, we

find that the combination of floorwide flooding conditions, coupled with unattended live electrical equipment exposed to the wet conditions, constituted the hazardous condition which caused her alleged injuries (*see Shafer v Edelstein*, 26 Misc 3d 1203[A], 2009 NY Slip Op 52649[U] [Sup Ct, NY County 2009]). Moreover, given the passage of time between BP's discovery of the flooding condition and plaintiff's accident, issues of fact exist as to whether defendants were on actual or constructive notice of the hazardous condition (*see DeMatteis v Sears, Roebuck & Co.*, 11 AD3d 207 [1st Dept 2004]).

CIBC was under a common-law duty to maintain the leased premises in a reasonably safe condition (*see DeMatteis*, 11 AD3d at 208; *Chadis v Grand Union Co.*, 158 AD2d 443, 444 [2d Dept 1990]). Moreover, the record discloses that CIBC installed the instruments that caused the flood.

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: JANUARY 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9121 The People of the State of New York, SCI. 4077/09
Respondent,

-against-

Amanda Richardson,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Laura Safer-Espinoza, J. at plea; John Moore, J. at sentencing), rendered on or about October 14, 2010,

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

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

ENTERED: JANUARY 31, 2013

CLERK

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

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9124-
9124A In re Tashameeka Valerie P., etc., and Another,

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

Priscilla P.,
Respondent-Appellant,

SCO Family of Services,
Petitioner-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

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

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Orders of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about July 5, 2011, which, upon a fact-finding determination that respondent mother had permanently neglected her children, terminated her parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the determination that the mother permanently neglected the children, despite the agency's diligent efforts. The record reflects that the mother's visits were sporadic, that she sometimes behaved inappropriately

at visits, and that she failed to complete individual therapy, which was part of the service plan. The record further indicates that the agency scheduled visits, established a service plan, made referrals for the mother and the children for services, conducted meetings and conferences with the mother to discuss her compliance with the plan, and agency staff visited her home and the children's foster homes.

The record also supports the court's dispositional determination. The mother moved out-of-state, knowing that her already spotty visitation record would decline further, and failed to maintain phone contact with the children. The mother never requested a suspended judgment, which was not warranted in any event since the mother failed to demonstrate sufficient progress to justify delaying the children's ability to achieve stability in their lives.

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

ENTERED: JANUARY 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9125-
9125A In re Peter G. Milazzo, Index 603804/07
Petitioner-Respondent,

-against-

Leslie Hamerschlag,
Respondent-Appellant.

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Massoud & Pashkoff, LLP, New York (Ahmed A. Massoud of counsel), for appellant.

Peter M. Levine, New York, for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 23, 2012, subsuming a first contempt order and, to the extent appealed from as limited by the briefs, declaring respondent Hamerschlag in contempt of two restraining orders, unanimously affirmed, with costs. Appeal from first contempt order, same court and Justice, entered April 23, 2012, unanimously dismissed, without costs.

Respondent admits that she violated the restraining orders by removing money from the accounts of companies of whose assets she was explicitly restrained from "causing, permitting or suffering" any sale, assignment, or transfer (*see Matter of McCormick v Axelrod*, 59 NY2d 574, 582-583 [1983]). Since the orders restrained respondent and "all those in privity with her," it is of no consequence that, as she contends, some of the money

was removed by her husband, who under the circumstances was in privity with her. Moreover, since the orders also restrained respondent from "interfering with" the assets, we reject her argument that they did not encompass her attempt, after she learned that petitioner had acquired the companies in a sheriff's sale, to have petitioner forcibly removed from the companies' corporate offices by the police.

We have considered respondent's remaining arguments and find them without merit.

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

ENTERED: JANUARY 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9126 Janak Datwani, Index 112937/11
Plaintiff-Appellant-Respondent,

-against-

Kishin Datwani,
Defendant-Respondent-Appellant.

_____

Riker Danzig Scherer Hyland & Perretti LLP, New York (Thomas M. Kenny of counsel), for appellant-respondent.

Boundas Skarzynski Walsh & Black LLC, New York (James R. Steel of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Louis B. York, J.), entered February 7, 2012, which imposed a sua sponte stay of this action pending a decision on the ownership of the stock shares in question by the High Court of India, and granted plaintiff's motion for a preliminary injunction enjoining defendant from transferring the shares pending the outcome of this action, unanimously modified, on the law, to vacate the stay of this action and remand to the IAS court to determine an appropriate undertaking for the injunction, and otherwise affirmed, without costs.

It was error for the IAS court to sua sponte impose a stay of this action, as no party requested that relief, and defendant, who would have benefited from the stay, did not even make a motion, cross motion or other application for relief (*see HCE*

Assoc. v 3000 Watermill Lane Realty Corp., 173 AD2d 774, 774-775 [2d Dept 1991]). Further, resolution of the issues in the related Indian litigations would not be determinative of the dispute here (*see Somoza v Pechnik*, 3 AD3d 394 [1st Dept 2004]).

Plaintiff satisfied the requirements for a preliminary injunction barring the transfer of the stock shares (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]). Plaintiff demonstrated a likelihood of success on the merits (*see id.*), as the writings of the parties seem to include all material terms of the agreement for a sale of the shares (*see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589-590 [1999]). Plaintiff's claim for specific performance is not barred by laches, as defendant did not affirmatively change his position in reliance on plaintiff's alleged delay in seeking relief and could have sought the transfer of shares himself at any time (*see Martin v Briggs*, 235 AD2d 192, 199 [1st Dept 1997]). Further, defendant has not shown any prejudice by the delay, given that the corporation's board must still approve the transfer of shares and there is no indication that the existing board does not provide adequate protections. Nor do we have to decide whether defendant's statute of limitations defense bars plaintiff's claim at this time. Indeed, defendant concedes that discovery is required to determine the issue.

Plaintiff, who is engaged in a battle for corporate control, has shown that he would be irreparably harmed by a sale of the shares to someone else (*see Doe*, 73 NY2d at 750), and that a balance of equities tips in his favor (*id.*). Defendant cannot complain of the burden of a preliminary injunction, as he says he has no intention of selling the shares.

Although the IAS court's decision and order were cursory in their treatment of the merits of plaintiff's motion, there is no authority to vacate the order on that ground (*cf.* CPLR 6312 [c]). However, the IAS court should have provided for an undertaking for the injunction, pursuant to CPLR 6312 (b). The matter is therefore remanded for the IAS court to determine the amount of the undertaking.

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

ENTERED: JANUARY 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9127 The People of the State of New York, Ind. 3579/10
Respondent,

-against-

Donald Kelly,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about February 22, 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 31, 2013

CLERK

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

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9128 Wendy Ortiz, Index 305003/09
Plaintiff-Appellant,

-against-

Hofed Mohammed Salahuddin, et al.,
Defendants-Respondents.

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Sacco & Fillas LLP, Astoria (Si Aydiner of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovitz, P.C., New York (Stacy R. Seldin of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 15, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied insofar as it seeks dismissal of plaintiff's claim of serious injury to her right knee, and otherwise affirmed, without costs.

Defendants met their prima facie burden of demonstrating that plaintiff did not sustain a serious injury to her right knee, cervical spine and lumbar spine by submitting the affirmation of an orthopedic surgeon, a neurologist and a radiologist who found no evidence of acute or recent trauma,

normal ranges of motion (*see Robinson v Joseph*, 99 AD3d 568 [1st Dept 2012]) and only a degenerative injury in the right knee (*see Depena v Sylla*, 63 AD3d 504, 505 [1st Dept 2009], *lv denied* 13 NY3d 706 [2009]). In opposition, plaintiff raised an issue of fact with respect to the alleged right knee injury by submitting the affirmation of a radiologist finding that an MRI taken shortly after the accident showed a meniscal tear, as well as an affirmation from her orthopedic surgeon stating that he observed the torn meniscus and repaired it when he performed arthroscopy (*see Suazo v Brown*, 88 AD3d 602 [1st Dept 2011]). The surgeon's affirmation further states that plaintiff suffered limitations in movement that are permanent and were caused by the accident. He based his conclusion on surgical observations, multiple examinations, and his review of MRI reports (*see Salman v Rosario*, 87 AD3d 482, 483-484 [1st Dept 2011]).

Plaintiff correctly argues that she was not required to proffer proof of a quantitative assessment contemporaneous with the accident, and the certified records of a prior physician, who referred her for the MRI and to the surgeon who performed arthroscopy, were sufficient to establish that she sought medical treatment for her knee injury shortly after the accident (*see Perl v Meher*, 18 NY3d 208 [2011]).

Defendants met their initial burden of showing that

plaintiff did not suffer a serious injury with respect to her alleged cervical spine strain or sprain, by pointing to the absence of any objective medical evidence of injury and plaintiff's admission, at an independent medical examination, that her neck was now "OK." They similarly met their burden with respect to the alleged lumbar spine injury by proffering the affirmation of a physician opining that the injury was pre-existing (*see Camacho v Espinoza*, 94 AD3d 674 [1st Dept 2012]). In opposition, plaintiff did not raise an issue of fact since she failed to offer any evidence of a recent examination showing any significant or consequential limitations in range of motion (*see Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012]).

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

ENTERED: JANUARY 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9129 Laura Weinberger, Index 107132/09
Plaintiff-Appellant,

-against-

52 Duane Associates, LLC,
Defendant-Respondent.

A & E Stores, Inc., etc.,
Defendant.

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

Hoey, King, Epstein, Prezioso & Marquez, New York (Erik C. Porcaro of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered October 18, 2011, which granted defendant 52 Duane Associates, LLC's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action alleging injuries for a fall on an icy sidewalk, defendant established prima facie entitlement to summary judgment by submitting certified climatological data, showing that a storm was in progress at the time of plaintiff's fall (*see* CPLR 4528; *Dowden v Long Is. R.R.*, 305 AD2d 631 [2nd Dept 2003]). A landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while a storm is in progress, and does not commence until a reasonable

time after the storm has ended (*see Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 735-736 [1st Dept 2005], *affd* 6 NY3d 734 [2005]; *Valentine v City of New York*, 86 AD2d 381, 383 [1st Dept 1982], *affd* 57 NY2d 932 [1982]; *Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]).

In opposition, plaintiff failed to raise a triable issue of fact that a storm was in progress. While plaintiff's experts opined that there was no "freezing rain" at the moment of her fall, her meteorological expert determined that a winter storm, which started on February 12, 2008, left snow, sleet and ice on the ground at approximately 7 a.m. on the morning of February 13, 2008, the date of plaintiff's accident. At the time of plaintiff's accident, around 8:30 a.m., while it was no longer below the freezing level, the weather was cold, and it was raining. Thus, inasmuch as it is uncontradicted that the ice condition that caused plaintiff's accident developed during this ongoing storm, defendant is entitled to the defense (*see Solazzo* at 735-736; *McConologue v Summer St. Stamford Corp.*, 16 AD3d 468, 469 [2nd Dept 2005]).

Nor does plaintiff's affidavit raise an issue of fact as to whether defendant created a dangerous condition by trying to make a path before the accident, since it contradicted her earlier, sworn deposition, where she testified, inter alia, that there was

no path (*see Krinsky v Fortunato*, 82 AD3d 409 [1st Dept 2011]; *Garcia-Martinez v City of New York*, 68 AD3d 428 [1st Dept 2009]).

Since plaintiff's affidavit must be disregarded, her safety expert, who rendered his opinion on such affidavit, and stated that defendant created a dangerous condition, must also be disregarded (*see Rand v Cornell Univ.*, 91 AD3d 542 [1st Dept 2012]). Moreover, defendant's custom and practice may not serve as evidence that it created any dangerous condition (*see Prince v New York City Hous. Auth.*, 302 AD2d 285 [1st Dept 2003]).

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

ENTERED: JANUARY 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9130 The People of the State of New York, Ind. 3455/09
Respondent,

-against-

Aderic Rhobe,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Harold A. Adler, J.), rendered on or about July 30, 2010, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JANUARY 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9131N Tyler N. Tapp, Index 100306/11
Plaintiff-Respondent,

-against-

New York State Urban Development Corporation, etc., et al.,
Defendants-Appellants.

_____

Dopf, P.C., New York (Martin B. Adams of counsel), for appellants.

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 8, 2012, which, in this personal injury action, denied defendants' motion to compel an authorization for plaintiff's Facebook records compiled after the incident alleged in the complaint, including any records previously deleted or archived, unanimously affirmed, without costs.

The motion court correctly determined that plaintiff's mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account's usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account — that is,

information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims" (*Patterson v Turner Constr. Co.*, 88 AD3d 617, 618 [1st Dept 2011]; *see Kregg v Maldonado*, 98 AD3d 1289, 1290 [4th Dept 2012]). Defendants failed to identify relevant information.

Defendants' argument that plaintiff's Facebook postings "may reveal daily activities that contradict or conflict with" plaintiff's claim of disability amounts to nothing more than a request for permission to conduct a "fishing expedition" (*see e.g. McCann v Harleysville Ins. Co. of N.Y.*, 78 AD3d 1524 [4th Dept 2010]).

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

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

ENTERED: JANUARY 31, 2013

CLERK

Friedman, J.P., Acosta, Saxe, Renwick, Freedman, JJ.

8706 In re Aldo Gallo, Index 101822/11
Petitioner-Respondent,

-against-

Robert LiMandri, etc.,
Respondent-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for appellant.

Harras, Bloom & Archer, LLP, Melville (Janice Whelan Shea of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Geoffrey D. Wright, J.), entered April 28, 2011, which granted the petition to annul respondent's determination, dated October 14, 2010, revoking petitioner's hoist machine operator (HMO) license, and directed respondent to accept an Administrative Law Judge's (ALJ) recommendation that petitioner's license be suspended for one year, unanimously affirmed, without costs.

When the facts underlying petitioner's conviction of mail fraud are taken into account, there is virtually no justification for the claim that the conviction demonstrates poor moral character adversely reflecting on his fitness to hold an HMO license.

Petitioner's explanation of the circumstances leading up to

his conviction are not meaningfully disputed. He testified that in 1999 he became a member of Local 14 of the International Union of Operating Engineers, whose members run construction machinery such as "cherry pickers" and "excavators." To obtain job assignments, members would sit in the union hall in Queens, where union delegates would select workers. Petitioner would sometimes sit for weeks without receiving a job assignment; when he was hired, his work involved operating small machinery on construction sites.

In 2002, petitioner applied for and received a Class C HMO license, making him eligible to operate cranes and derricks. Nevertheless, petitioner used the HMO license in only two of the 11 years he was a member of the local; more typically he received low paying jobs that did not require an HMO license, such as working on compressors, or fireproofing beams.

The facts underlying his conviction began in 2002, when a coworker informed petitioner that a new construction project, the New Town Project, was about to start in Queens. Petitioner went to the New Town site twice, once speaking with an owner, the second time introducing himself to a "master mac," a position like a foreman. Finding that he was still unable to secure a job at the New Town site, petitioner decided to call Carl Carrara, another "master mac," whom he knew from union events. Petitioner

believed that Carrara was close with Steve Skinner, the union delegate. Petitioner asked Carrara to find out, through Skinner, who was getting jobs at New Town.

Carrara thereafter had a conversation with Skinner about petitioner, which conversation appears to have been recorded. As a result of the conversation, Skinner called petitioner and gave him a job operating a lull at the New Town site, at a rate of $40 or $41 per hour. Petitioner was qualified to operate a lull, and worked at the job for about 15 months. There is no evidence, or even any indication that petitioner made any threats or cash payments in order to get or keep the job, and he denied being aware of anyone else making any threats or payments to ensure that he kept the job.

In 2003, petitioner and 23 codefendants were charged with racketeering and related offenses, stemming from allegations that, between 1997 and 2003, they conspired to extort Locals 14 and 15 of the International Union of Operating Engineers to permit the defendants to assign preferential jobs to designees of the Genovese crime family. The charge against petitioner was mail fraud.

On October 6, 2004, petitioner pled guilty to mail fraud in violation of 18 USC §§ 1341 and 1346 (mail fraud) and § 2 (aiding and abetting). During the allocution, the court informed

petitioner that the count of the indictment to which he was pleading guilty charged him with "participating in a fraudulent scheme . . . whereby members of Local 14 . . . were deprived of the intangible right of honest services of their elected officials," at the "direction of members and associates of the Genovese Organized Crime Family" in connection with petitioner's "assignment . . . as an operating engineer at a construction site." Petitioner's admission consisted of the acknowledgement that between May and December 2002 he "was an operating engineer for Local 14 in New York City," and he "received a work assignment by making a request in Manhattan of people other than the Local 14 delegate to whom the request should have been made." Petitioner further admitted that he "received quarterly statements from Local 14 by mail," which admission was deemed to satisfy the mailing elements of the crime of mail fraud. He was sentenced to a term of two years of probation, of which the first six months was to include home confinement, and a fine of $2,000.

Effective July 1, 2008, applicants for renewals of HMO licenses were required to disclose prior criminal convictions (*see* Admininstrative Code of City of NY §§ 28-401.12, 28-401.19). On March 2, 2009, petitioner submitted his renewal application for his HMO license in which he disclosed that, on February 10, 2005, he had been convicted of "mail fraud," and sentenced two

years of probation, with six months of home detention.

The Department of Buildings thereafter commenced proceedings to revoke petitioner's HMO license, alleging that, by virtue of his conviction of mail fraud, petitioner had exhibited poor moral character adversely reflecting on his fitness to hold an HMO license, in violation of Administrative Code § 28-401.19(13).

At the hearing, petitioner asserted that he pleaded guilty because he was in the middle of separating from his wife and had financial problems. Petitioner added that he did not want to risk going to jail, because that would result in his wife, who was abusive and alcoholic, having full custody of his daughter. Petitioner denied knowing that he was breaking the law, and denied knowing that Carrara was a member of organized crime. After the hearing, the ALJ recommended that petitioner's license be suspended for 12 months. While he found that principles of collateral estoppel required finding that petitioner's guilty plea to mail fraud established the underlying elements of the criminal charge and therefore established that he violated the good moral character requirement of Administrative Code § 28-401.06, the ALJ noted that the Administrative Code contemplates the exercise of discretion, by providing for a range of penalties from suspension to revocation.

The ALJ distinguished petitioner's case from three other

2010 DOB proceedings — *Kilcullen*, *Persico*, and *Inglese* — where HMO licenses were revoked on account of racketeering convictions relating to organized crime. The ALJ noted that petitioner's sentence of two years' probation, with six months of home confinement, was more lenient than the other cases, which entailed sentences of five years of probation in *Kilcullen* to a year and a day (*Inglese*) and three years of prison (*Persico*). The ALJ also noted that petitioner's conviction arose from his receiving a job to operate a lull, a machine for which no license was required and which he was qualified to operate. The ALJ expressly credited petitioner's testimony that he "accepted the guilty plea because he was a single parent who wanted to avoid a jail sentence." Finally, the ALJ observed that a recent U.S. Supreme Court decision, *Skilling v United States* (___ US ___, 130 S Ct 2896 [2010]), construed the mail fraud statute, 18 USC § 1346, as "encompass[ing] fraudulently depriving another of one's honest services through bribes or kick backs only," and that in the present case, there was "no proof that [petitioner] accepted or paid a bribe," making it "questionable whether [petitioner] was convicted under a valid legal theory."

However, respondent Commissioner revoked petitioner's license rather than suspending it as recommended by the ALJ. The Commissioner emphasized that the mail fraud conviction, and the

fact that petitioner was given a construction job at the direction of associates of the Genovese crime family, established poor moral character adversely reflecting on his fitness to hold a licensed position in the construction industry. He added that notwithstanding *Skilling*, petitioner's conviction was not overturned and was therefore valid.

In our view, the facts show only that petitioner went outside of the proper channels to secure a job on a construction site. They do not reflect substantial culpability, or the type of poor moral character adversely reflecting on his fitness to hold a licensed position in the construction industry.

We reject the suggestion that we are precluded from diverging from this Court's decisions in *Matter of Duffy v LiMandri* (93 AD3d 411 [1st Dept 2012]) and *Matter of Inglese v LiMandri* (89 AD3d 604 [1st Dept 2011], *lv denied* 18 N&3d 807 [2012]). That cases arise out of the same federal prosecution does not mean each petitioner's culpability is the same as that of all the others. Indeed, in both *Duffy* and *Inglese* the petitioners pleaded guilty not merely to mail fraud but to conspiracy to commit extortion in violation of 18 USC § 1951 and § 3147(1). Moreover, the particular facts in each case, as reflected in court records and Supreme Court decisions, were more blameworthy than merely "receiv[ing] a work assignment by making

a request . . . of people other than the Local 14 delegate to whom the request should have been made." In *Matter of Inglese*, the petitioner admitted at his plea allocution that he was accorded preferential treatment in securing work as an operating engineer to run material waste at Rockefeller University knowing that someone else was being economically harmed as a result (*see* 29 Misc 3d 1234[A], 2010 NY Slip Op 52136[U] [Sup Ct NY County 2010]); in *Matter of Duffy*, the petitioner specifically admitted, during the plea allocution, "assigning preferential and/or no-show union jobs to individuals selected by or associated with the Genovese organized crime family." Moreover, in neither case did those petitioners testify to extenuating, mitigating circumstances behind the plea. Indeed, in neither case was the petitioner's factual admission at his plea allocution limited to having made a request for a work assignment to a person other than the Local 14 delegate to whom the request should have been made, and only petitioner asserted that he did not know that the person to whom he made the request was an associate of an organized crime family.

While the Commissioner certainly has discretion to reject an ALJ's recommendation, we find that the penalty imposed was excessive in light of all the circumstances, in that it lacked any justification under the facts and circumstances underlying

petitioner's mail fraud conviction (*see Matter of Principe*, __ NY3d __, 2012 NY Slip Op 8568 [Dec. 13, 2012]). Accordingly, we affirm Supreme Court's order annulling respondent's revocation of petitioner's HMO license and directing the imposition of a one-year suspension.

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

ENTERED: JANUARY 31, 2013

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8856 Elvin Lopez,
Plaintiff-Respondent,

Index 111742/09
590220/11

-against-

Elizabeth Angela Chan,
Defendant-Appellant,

Kamaran Grocery,
Defendant.

[And a Third Party Action]

_____

Callan, Koster, Brady & Brennan, LLP, New York (Gregory Kalnitsky of counsel), for appellant.

Gorayeb & Associates, P.C., New York (Roy A. Kuriloff of counsel), for respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered March 14, 2012, which, to the extent appealed from, denied the motion of defendant landlord Elizabeth Angela Chan for summary judgment dismissing the complaint as against her, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against Elizabeth Angela Chan.

In February 2008, plaintiff slipped and fell down a stairway while lowering a hand truck to deliver cases of beer to a storage cellar below a grocery store. Plaintiff was descending a short, vaulted stairway that led down from the sidewalk into the cellar.

The cellar was inaccessible from inside the store, and the only way to enter or exit it was to open two metal doors that, when closed, lay flush with the sidewalk and covered the stairway.

In August 2009, plaintiff commenced this negligence action against the defendant store and the store's out-of-possession landlord on the ground that the stairway's unsafe condition caused his accident. After discovery, the landlord moved for summary judgment dismissing the complaint as against her, arguing that the stairway was not dangerous, and that in any event she did not cause the alleged defective condition and lacked actual or constructive notice of it.

In opposition, plaintiff contended that the landlord could be held liable because the lease gave her the right to reenter the premises for needed repairs, and the stairway required repair because of "a significant structural or design defect that [was] contrary to a specific statutory safety provision" (*Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996], *lv denied* 88 NY2d 814 [1996]). According to plaintiff, the stairway violated the 1968 Building Code of the City of New York (Administrative Code of City of NY) (the Building Code) because it lacked handrails (*see* Building Code § 27-375[f]) and because the riser heights and tread widths of the flight of stairs were not uniform (*see* Building Code § 27-375[e][2]). In reply, the landlord

submitted an affidavit from a professional engineer who opined that the allegedly violated provisions only apply to "interior stairs" as defined in the Building Code and that the cellar stairway did not fit that definition. Instead, the expert stated, the stairway is an "access stairway" under the Building Code.

In March 2012, the motion court, to the extent appealed, denied summary judgment to the landlord on the ground that she had not established as a matter of law that the Building Code provisions about handrails, riser heights, and tread widths did not apply to the cellar stairway. The court found that the applicability of the Building Code provisions was a question of fact for the jury.

Summary judgment should have been granted to the landlord. We first note that the question whether Building Code provisions apply to a structure is an issue of statutory interpretation that the court should determine (*see DeRosa v City of New York*, 30 AD3d 323, 326 [1st Dept 2006]). We find as a matter of law that the cellar stairway does not qualify as an "interior stair," which is defined as "[a] stair within a building, that serves as [an] . . . exit" (Building Code § 27-232). The cellar stairway does not fit that definition because it is not within a "building" and it does not serve as an "exit." The Building Code

defines "buildings" as "enclosed structure[s] including service equipment therein" (*id.*). By "service equipment," the Building Code means "[e]quipment . . . which provides sanitation, power, light, heat, cooling, ventilation, [air-conditioning], refuse disposal, fire-fighting, transportation, or similar facility for a building which by design becomes a part of the building" (*id.*). The cellar storage area is not a "building" within the meaning of the Building Code because it is a self-contained area which is completely separate and inaccessible from the grocery store above it, and because it contains no service equipment connected with the store.

Moreover, the stairway does not serve as an "exit," which the Building Code defines as "[a] means of egress from the interior of a building to an open exterior space." The cellar stairway could not serve as an exit from the interior of the store because the cellar cannot be reached from within the store.

Since the Building Code provisions requiring handrails and uniform riser heights and tread widths only apply to "interior stairs" (*see* Building Code § 27-375), plaintiff's claim against

the landlord fails. Accordingly, the complaint as against her is dismissed.

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9132 The People of the State of New York, Ind. 4493/06
Respondent,

-against-

Fermin Hunter,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Catherine M. Reno of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Caesar D. Cirigliano, J.), rendered on or about March 3, 2009,

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 31, 2013

CLERK

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

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9134 In re Mia R.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for Presentment Agency.

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about December 22, 2011, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion by imposing a period of probation rather than granting appellant's request for an adjournment in contemplation of dismissal. Probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection. Appellant committed an unprovoked, violent attack on a fellow

student, and was in need of anger management counseling. The record supports the conclusion that she needed supervision for a longer period than the maximum period available under an ACD (*see e.g. Matter of Florin R.*, 73 AD3d 533 [1st Dept 2010]).

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, JJ.

9135 In re Anthony M., etc., Index 108/94
Defendant-Respondent,

New York State Commissioner of Mental Health,
Petitioner-Respondent,

Thomas J. Spota, etc.,
Appellant.

_____

Thomas J. Spota, District Attorney, Suffolk County, Riverhead (Guy Arcidiacono of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Patrick J. Walsh of counsel), for New York State Commissioner of Mental Health, respondent.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane G. Temkin of counsel), for Anthony M., respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about March 12, 2012, which granted the application for an order unconditionally discharging defendant Anthony M. from supervision pursuant to CPL 330.20(13), and terminating his order of conditions, unanimously affirmed, without costs.

A fair interpretation of the evidence supports the court's determination that the "issuance of [the] discharge order [was] consistent with the public safety and welfare of the community and the defendant" (CPL 330.20[13]) (*see Matter of Rabinowitz v James M.*, 63 AD3d 481 [1st Dept 2009]). There is no basis to disturb the hearing court's evaluation of the testimony of the

psychiatric experts (*see Matter of Kelly*, 265 AD2d 154 [1st Dept 1999]). Indeed, the record shows that defendant has treated his schizophrenia with medication for the past several decades and understands the role his medication plays in maintaining his health. He has also successfully been on outpatient status for more than six years.

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

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9136 In re 1234 Broadway, LLC, Index 110829/10
Petitioner-Appellant,

-against-

The New York State Division of Housing
And Community Renewal, et al.,
Respondents-Respondents.

_____

Law Office of Santo Golino, New York (Santo Golino of counsel), for appellant.

Gary R. Connor, New York (Maria I. Doti of counsel), for The New York State Division of Housing And Community Renewal, respondent.

The Price Law Firm, LLC, New York (Joshua C. Price of counsel), for Diana Djokaj, respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered October 3, 2011, which, upon reargument, adhered to a prior order denying and dismissing a CPLR article 78 petition seeking to annul an order of respondent New York State Division of Housing and Community Renewal (DHCR), issued June 16, 2010, which denied petitioner's petitions for administrative review of two orders finding rent overcharges, unanimously affirmed, without costs.

Although the court's order purported to deny the motion to reargue, by considering the merits of petitioner building owner's argument that the court had mistakenly attributed certain payroll records to petitioner rather than to the contractor that

performed apartment renovations, the court, in effect, granted reargument. Accordingly, the order is appealable (*see Premier Capital v Damon Realty Corp.*, 299 AD2d 158 [1st Dept 2002]). Petitioner's substantive arguments on appeal are, however, without merit.

The role of a court in an article 78 proceeding is to consider whether the "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary, capricious or an abuse of discretion" (CPLR 7803[3]). A court must uphold an agency's exercise of discretion unless it lacks a rational basis (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

DHCR acted within its discretion, and in accordance with Policy Statement 90-10, in requesting additional proof that petitioner actually paid the contractor, with whom it shared a familial identity of interest, for the renovations allegedly performed in the two apartment units at issue (*see Matter of Waverly Assoc. v New York State Div. of Hous. & Community Renewal*, 12 AD3d 272 [1st Dept 2004]), and, when such proof was

not forthcoming, in determining that the evidence of cost and payment was inadequate to support "individual apartment increases" in rent. Further, under all of the relevant circumstances, the imposition of treble damages was appropriate.

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9137 Samuel Burgos, Index 303086/09
Plaintiff-Respondent,

-against-

Montemurro Enterprises LLC,
Defendant-Appellant.

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Ahmuty Demers & McManus, Albertson (Glenn A. Kiminska of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 22, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant landlord failed to establish its entitlement to judgment as a matter of law in this action where plaintiff was injured when he tripped and fell on a condition caused by uneven planks on the wooden walkway in front of his apartment. The evidence submitted by defendant which included the deposition testimony of plaintiff, plaintiff's son, defendant's owner and the building's superintendent, as well as the photographs of the uneven plank condition, raises factual issues as to whether defendant had constructive notice of the defect (*see Taylor v New York City Tr. Auth.*, 48 NY2d 903 [1979]; *Calderon v Noonan Towers*

Co. LLC, 33 AD3d 495 [1st Dept 2006]). The deposition testimony also precludes a finding as a matter of law that the lighting outside plaintiff's apartment was adequate or that the alleged inadequate lighting was not a proximate cause of the accident (*see Swerdlow v WSK Props. Corp.*, 5 AD3d 587, 588 [2d Dept 2004]; *Streit v DTUT*, 302 AD2d 450 [2d Dept 2003]). Moreover, the conclusion of defendant's expert that the lighting was sufficient at the time of the accident is speculative and was based on an inspection of the premises almost two years after the accident (*see Santo v Astor Ct. Owners Corp.*, 248 AD2d 267 [1st Dept 1998]).

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9138 The People of the State of New York, Respondent, Ind. 6540/09

-against-

Fatoumata Diawara, Defendant-Appellant.

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about September 29, 2010, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9139 Stuart Strumwasser, Index 113524/10
Plaintiff-Appellant,

-against-

Lisa Zeiderman, Esq., et al.,
Defendants-Respondents,

Martin Blaustein, et al.,
Defendants.

_____

Keith D. Silverstein, P.A., Great Neck (Keith D. Silverstein of counsel), for appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Lisa L. Shrewsberry of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered November 9, 2011, which, to the extent appealed from as limited by the briefs, granted defendants Lisa Zeiderman, Esq. and Johnson & Cohen, LLP's motion to dismiss the Judiciary Law § 487(1) causes of action as against them, unanimously affirmed, without costs.

Plaintiff alleges that defendant Zeiderman submitted to the court in plaintiff's divorce action a document with a page intentionally switched to conceal the unreliability of certain projections relating to a start-up company founded by plaintiff in which he and his former wife held a minority interest. This single alleged act of deceit is not sufficiently egregious to

support a claim under Judiciary Law § 487(1) (*compare Kurman v Schnapp*, 73 AD3d 435 [1st Dept 2010] [sustaining Judiciary Law § 487(1) claim based on defendant's alleged deceit or attempted deceit of court with fictitious letter from former licensing director of Taxi and Limousine Commission referring to lifetime ban on plaintiff's owning any TLC licenses]).

Moreover, plaintiff fails to allege damages resulting from the switching of the page (*see id.*). He claims that he had to settle with his former wife to avoid expensive and potentially protracted litigation as to the value of the allegedly worthless stock. However, the complaint alleges that the dispute over the value of the stock arose when defendants retained a second appraiser, who was given a correct copy of the document and attributed substantial value to the stock. Thus, plaintiff does not allege that the settlement he entered into with his former wife was the proximate result of defendants' alleged deceit (*see*

Amalfitano v Rosenberg, 12 NY3d 8, 15 [2009]).

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: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9140 N450JE LLC, et al., Index 603490/08
Plaintiffs-Respondents,

-against-

Priority 1 Aviation, Inc., et al.,
Defendants-Appellants.

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The Tsang Law Firm, P.C., New York (Michael Tsang of counsel), for Priority 1 Aviation, Inc., appellant.

Callan, Koster, Brady & Brennan LLP, New York (David A. LoRe of counsel), for Insured Aircraft Title Service, Inc., appellant.

Reed Smith LLP, New York (Gil Feder of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered July 18, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for reargument and, upon reargument, denied defendants' motions for summary judgment dismissing the complaint, granted plaintiffs' motion to compel defendant Priority 1 Aviation, Inc. to accept their responses to its requests to admit, and denied defendants' applications for attorneys' fees, unanimously affirmed, with costs.

Plaintiffs' motion for reargument should have been denied as to their new contention that nonparty Gulfstream would have sent the list of the airworthiness discrepancies it discovered during its inspection of the subject aircraft to Priority because the contract between Priority and plaintiffs obligated Priority to

pay for the inspection (*see e.g. Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]). However, reargument was properly granted as to the court's misapprehension of § 3.1(b) of the contract (*see* CPLR 2221[d][2]; *Foley*, 68 AD2d at 567).

The motion court did not violate the law of the case doctrine by denying Priority's summary judgment motion based on arguments related to the previously dismissed third cause of action, since the court altered its own ruling, not a ruling by another court of coordinate jurisdiction (*see Kleinser v Astarita*, 61 AD3d 597 [1st Dept 2009]). Furthermore, a court has the power to amend a pleading sua sponte (*see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:17). It appears that the court, sub silentio, amended the complaint to allow plaintiffs to assert a breach of contract claim against Priority for acts or omissions beyond its alleged failure to pay $750,000 into escrow, as long as their damages did not exceed the $750,000 deposit.

Contrary to defendants' contention, plaintiffs' undisputed failure to comply with § 3.1(d) of the contract, which required them to send Gulfstream's reports to Priority, does not excuse Priority's performance, since we cannot say, as a matter of law, that plaintiffs' breach was material (*see Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581 [1992]; 23 Richard A. Lord,

Williston on Contracts § 63:3 at 438, 439-440 [4th ed 2002]).

While Priority's acceptance of the aircraft was a condition precedent to closing and it never formally accepted the aircraft, the "deemed acceptance" provision of § 3.1(c) does not apply because the cost to correct the discrepancies was less than $250,000. However, even if the deposit did not become nonrefundable pursuant to § 3.1(c), there are other bases on which plaintiffs can recover. For example, § 11.4(a) permits plaintiffs to terminate the agreement and retain the deposit upon Priority's failure to accept delivery or remit the purchase price, "*or upon any other material default by [Priority]*" (emphasis added).

In light of the foregoing, defendants are not entitled to attorneys' fees.

Priority contends that it should not be compelled to accept plaintiffs' late responses to its notice to admit because some of the responses are frivolous. However, plaintiffs moved pursuant to, inter alia, CPLR 2004, and, for purposes of that statute, law

office failure – plaintiffs' excuse here – constitutes "good cause shown" (*see e.g. Tewari v Tsoutsouras*, 75 NY2d 1, 12-13 [1989]). Priority's remedy for plaintiffs' allegedly frivolous responses to its notice to admit lies in CPLR 3123(c).

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9141 The People of the State of New York, Respondent, Ind. 1113/09

-against-

Musa Azhar, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Linda S. Riefberg of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered December 8, 2009, convicting defendant, after a jury trial, of two counts each of attempted robbery in the second degree and assault in the third degree, and sentencing him to an aggregate term of 2½ years, unanimously affirmed.

The verdict 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 jury's credibility determinations. The evidence supports the inference that defendant shared his companions' intent to forcibly steal property (*see e.g. Matter of Juan J.*, 81 NY2d 739 [1992]; *People v Allah*, 71 NY2d 830 [1988]). The only reasonable

explanation for defendant's conduct was that it was part of an attempted robbery.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9142 Warnaco Inc., et al., Index 150142/12
Plaintiffs-Respondents,

-against-

Trialand S.A.,
Defendant-Appellant.

_____

Wollmuth Maher & Deutsch LLP, New York (William A. Maher of counsel), for appellant.

Katten Muchin & Rosenman LLP, New York (Jonathan J. Faust of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered June 1, 2012, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss on the grounds of forum non conveniens and lack of personal jurisdiction, unanimously affirmed, with costs.

In evaluating defendant's motion to dismiss this action on forum non conveniens grounds, the court properly considered all relevant factors (*see* CPLR 327; *see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]), and concluded that New York was an appropriate forum for litigating this dispute over an agreement whereby defendant was permitted to distribute plaintiffs' goods throughout South America. Plaintiff Warnaco Inc. is a domiciliary of New York and, although defendant is a Uruguayan company and the

distribution occurred exclusively in Latin America, the matter bears a substantial nexus to New York. The evidence indicates that the parties' relationship developed through meetings in New York prior to execution of their 2010 agreement, and that the agreement was allegedly terminated at a subsequent meeting in New York. Defendant failed to submit any affidavits of potential witnesses or specify any necessary documents whose appearance or production would be impossible or inconvenient in New York (*see Firegreen Ltd. v Claxton*, 160 AD2d 409 [1st Dept 1990]).

Similarly, the evidence that defendant visited New York on several occasions to discuss the business of the parties' venture supports a finding that defendant's contacts with New York were sufficient to confer jurisdiction under CPLR 302(a)(1) (*see Fabrikant & Sons v Adrianne Kahn, Inc.*, 144 AD2d 264 [1st Dept 1988]).

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9143- In re Coumba F.,
9144 Petitioner-Respondent,

-against-

Mamdou D.,
Respondent-Appellant.

_____

Goetz L. Vilsaint, Bronx, for appellant.

New York Legal Assistance Group, New York (Alexandra Lewis-Reisen of counsel), for respondent.

Law Office of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the child.

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Order, Family Court, Bronx County (Andrea Masley, J.), entered on or February 18, 2011, which, upon a finding of aggravating circumstances, and incorporating an order of protection entered on or about February 17, 2011, directed respondent father, for a period of five years, to stay away from petitioner and to refrain from communicating with her except with regard to the child, to refrain from committing any family offenses against petitioner and the child, and to attend anger management and domestic violence counseling, unanimously modified, on the facts, to direct respondent to complete the anger management and counseling courses within six months of the

date of entry of this order, and otherwise affirmed, without costs.

The finding of aggravating circumstances is supported by a preponderance of the evidence showing that the child was present during a number of violent incidents directed at petitioner (*see* Family Court Act §§ 827[a][vii]; 842; *Matter of Kristine Z. v Anthony C.*, 21 AD3d 1319, 1321 [4th Dept 2005], *lv dismissed* 6 NY3d 772 [2006]). The evidence also shows that petitioner sustained a physical injury, i.e., pain and bruises after respondent struck her, and back pain for a month, for which she sought medical treatment (*see Matter of Boua TT. v Quamy UU.*, 66 AD3d 1165, 1166 [3rd Dept 2009], *lv denied* 14 NY3d 702 [2010]).

Although respondent's violence was directed toward petitioner, it occurred a number of times in the presence of the child; thus the inclusion of the child in the order is warranted (*see* Family Court Act § 827[a][vii]; *Matter of Pei-Fong K. v Myles M.*, 94 AD3d 675 [1st Dept 2012]; *see also Matter of Charlene J.R. v Walter A.M.*, 307 AD2d 1038 [2nd Dept 2003]). In addition, there is evidence that respondent acted violently toward the child. However, we note that the order permits court-ordered visitation and contact between respondent and the child, enabling respondent to maintain a relationship with the child.

The court properly ordered the father to attend anger management and domestic violence counseling. However, since it provided no deadline for the completion of the counseling, we modify as indicated.

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9145-
9146 COR-IBS, Inc., Index 114362/10
Plaintiff-Respondent,

-against-

Portfolio Analysis Systems, Inc.,
Defendant-Appellant.

_____

The Sarcone Law Firm PLLC, White Plains (Clifford J. Bond of counsel), for appellant.

Law Office of Robert S. Bennett, New York (Robert S. Bennett of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered June 25, 2012, awarding plaintiff the total amount of $365,913.07, and bringing up for review an order, same court and Justice, entered January 9, 2012, which granted plaintiff's motion for summary judgment and dismissed defendant's counterclaims, unanimously modified, on the law, to vacate the judgment and to direct a trial on the issue of damages only, and otherwise affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly determined that defendant, which entered into a license agreement and a support and services agreement for plaintiff's financial software, did not have the right to withhold payment of the annual support fee invoiced by

plaintiff, and that such action breached the support agreement, justifying termination of both agreements by plaintiff and defendant's license to use the software (*see e.g. Awards.com, LLC v Kinko's, Inc.*, 42 AD3d 178, 187 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). There is no language in the agreements that permitted defendant to withhold payment, and plaintiff did not waive the requirement of defendant's payment or modify the agreements to permit defendant's withholding of payment.

However, the record demonstrates that there was insufficient proof of the damages sustained by plaintiff due to defendant's continued use of the software after plaintiff had terminated the license. Accordingly, the matter is remanded for a trial on the issue of damages (*see Lloyd v Imperial Auto Collision*, 120 AD2d 354 [1st Dept 1986]).

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9149 The People of the State of New York, Respondent, Ind. 58053C/05

-against-

Larry Fernandez, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered June 27, 2008, convicting defendant, after a jury trial, of attempted murder in the first degree, assault in the first degree and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 25 years, unanimously affirmed.

The court properly exercised its discretion in admitting evidence that the victim regularly bought marijuana from defendant. This evidence provided necessary background information and tended to place aspects of the victim's testimony in a believable context (*see People v Leeson*, 12 NY3d 823, 827 [2009]; *People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Steinberg*, 170 AD2d 50, 72-74 [1991], *affd* 79 NY2d 673 [1992]). Any prejudicial effect was outweighed by the probative value of this

evidence.

The court also properly exercised its discretion when it admitted photographs of the victim's injuries that were relevant to establish elements of the charges, and were not unduly gory or inflammatory (*see People v Bell*, 63 NY2d 796, 797 [1984]).

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9150 The People of the State of New York, Ind. 2334/10
Respondent,

-against-

Daniel Gomez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered May 13, 2011, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). Defendant, who was represented by newly appointed counsel for the plea withdrawal motion, received a full opportunity to present his claims. Defendant asserted that the voluntariness of his plea had been undermined by his mental and physical condition, which included dementia. However, defendant's claims were contradicted by the thorough plea allocution, in which the court specifically ascertained that defendant's illnesses did not impair his ability to understand what he was doing. In addition, the court relied on its own

recollection of defendant's demeanor at the time of the plea.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, JJ.

9153-
9154 Terrilee 97th St., LLC, Petitioner, Index 109833/11
110547/11

-against-

The New York City Environmental Control Board, Respondent.

_____

Rosenberg, Calica & Birney LLP, Garden City (Ronald J. Rosenberg of counsel), for petitioner.

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

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Determinations of respondent Environmental Control Board (ECB), dated April 28, 2011, which found that petitioner violated Administrative Code of the City of New York § 28-118.3.2 and imposed fines totaling $10,000, unanimously annulled, without costs, and the petition brought pursuant to CPLR article 78 (transferred to this court by orders, Supreme Court, New York County [Michael D. Stallman, J.], entered December 23, 2011 and January 6, 2012), granted.

The Notice of Violation, issued to the premises owned by petitioner on July 9, 2009, by an inspector with the Department of Buildings, states that the premises, a class A multiple dwelling unit, a classification requiring that the majority of the rooms be used for "permanent residence purposes" (*see* Multiple Dwelling Law § 4[8][a]; *City of New York v 330 Cont.*

LLC, 60 AD3d 226, 228, 231 [1st Dept 2009]), was "'primarily transient' with approximately 53 units and 79 transient guest[s]." The NOV issued on April 28, 2010 states that the premises was "illegally occupied transiently 'primarily transiently' w[ith] approximately 70 transient [and] 23 permanent tenants."

The certificate of occupancy for the premises provides that the 93 units can hold a total of 178 persons. Thus, petitioner can rent up to 46 rooms to transient guests without violating the requirement that the building be used primarily for permanent residence purposes (*see* Multiple Dwelling Law § 4[8][a]; *330 Cont.*, 60 AD3d at 231). The NOVs do not reveal the manner in which units or tenants were deemed to be "transient," nor was that term defined in the Multiple Dwelling Law during the relevant time period. The inspector who issued the violations did not testify at the hearing, and, thus, DOB did not establish any facts supporting the statements in the NOVs that certain units or guests were "transient," rather than permanent.

Although the NOVs were affirmed and therefore any facts stated therein constitute *prima facie* evidence (48 RCNY § 3-54[a]), the characterization of the units or tenants as "transient" is not a fact but a mere conclusory statement. Given

the absence of any evidence supporting this conclusion in the record, ECB failed to prove that petitioner violated Administrative Code § 28-118.3.2.

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

ENTERED: JANUARY 31, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9155N Milagros Garcia, Index 305472/10
Plaintiff-Respondent,

-against-

La Fortuna Restaurant, Inc., et al.,
Defendants-Appellants,

John Doe, et al.,
Defendant.

_____

Rubin, Fiorella & Friedman LLP, New York (Michael C. O'Malley of counsel), for appellants.

Law Offices of John P. Grill, P.C., Carmel (John P. Grill of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura Douglas, J.), entered December 20, 2011, which granted plaintiff's motion to strike defendants' answer, unanimously affirmed, without costs.

Plaintiff established that defendant Portoreal's repeated failure to comply with court directives to appear for the completion of his deposition was willful and contumacious and, in opposition, defendants failed to meet their burden of

demonstrating a reasonable excuse for Portoreal's non-appearance (*see Touray v Munoz*, 96 AD3d 623 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004]).

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

ENTERED: JANUARY 31, 2013

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8855 Nassau Beekman, LLC, Index 116402/08
Plaintiff-Appellant,

-against-

Ann/Nassau Realty, LLC,
Defendant-Respondent.

_____

Claude Castro & Associates, PLLC, New York (Claude Castro of counsel), for appellant.

Greenberg Traurig, LLP, New York (Steven Sinatra of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 3, 2011, affirmed, with costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Karla Moskowitz
Helen E. Freedman
Sheila Abdus-Salaam, JJ.

8855
Index 116402/08

_____x

Nassau Beekman, LLC,
Plaintiff-Appellant,

-against-

Ann/Nassau Realty, LLC,
Defendant-Respondent.
_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered August 3, 2011, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment.

Claude Castro & Associates, PLLC, New York (Claude Castro and D. Paul Martin of counsel), for appellant.

Greenberg Traurig, LLP, New York (Steven Sinatra and Daniel R. Milstein of counsel), for respondent.

SAXE, J.

A standard provision included in many commercial contracts is one requiring any modification of the agreement to be in writing. Nevertheless, courts are presented over and over again with litigation arising out of circumstances where one party to a contract wrongly presumes, based on past practice, that an oral modification will be sufficient. This appeal illustrates the problem.

Plaintiff, by contract dated August 14, 2007, agreed to purchase and defendant agreed to sell a parcel of real property comprised of 21 Ann Street and 109, 111 and 113 Nassau Street, in Manhattan, for a purchase price of $56,700,000, with a down payment of $5 million. Section 16.01 of the contract contained a standard integration clause and included a provision that "[n]either this Contract nor any provision hereof may be waived, modified, amended, discharged or terminated except by an instrument signed by the party against whom the enforcement of such waiver modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument."

The contract provided for the closing to occur on August 30, 2007, but gave plaintiff the right, upon timely written notice, to extend the closing date to October 10, 2007, and declared time of the essence with respect to that date. It further specified

that "[f]ailure of the Purchaser or Seller to strictly comply with the terms of this Section shall be deemed in material default under this Contract."

Simultaneously with the execution of the contract of sale, the parties entered into a separate handwritten agreement regarding development air rights to be purchased from the owners of the adjacent condominium property at 25 Ann Street; the seller agreed to purchase those rights by August 24, 2007 and to promptly deliver the resulting agreement to plaintiff and assign plaintiff those rights. Once an agreement with the condominium owners was executed and delivered, a default by any party under that agreement would be deemed a default by that party under the contract of sale. This agreement initially permitted defendant to spend up to $1.3 million to acquire those development air rights, which maximum price was later increased to $1.55 million by a written modification. Importantly, the parties' agreement regarding those development rights provided that if the rights were not obtained from the condominium owners, defendant would have no liability to plaintiff, and that its failure to deliver those rights would not affect the contract of sale.

The closing date for the contract of sale was rescheduled multiple times by written amendments to the contract. It is plaintiff's contention that it was a standard practice of the parties to orally adjourn the closing date and then later to

finalize a written amendment with a new closing date. In the first written amendment to the contract, the closing date was extended to November 7, 2007, with the ability to further extend it to November 21, 2007. In consideration for that extension, plaintiff paid an additional deposit of $2.5 million. Then, on November 21, 2007, the parties executed a second amendment, extending the closing to November 27, 2007 but noting that time was of the essence. On November 27, 2007, the parties again executed an amendment extending the closing date to February 14, 2008, but permitting the closing to take place no later than March 14, 2008. This amendment also required plaintiff to pay an additional deposit of $2.5 million, although in fact plaintiff paid only $1.5 million of that amount. On March 5, 2008, the parties executed the fourth amendment to the contract, providing for an outside closing date of April 4, 2008, with time of the essence. This amendment also reduced the total purchase price to $51,030,000, and defendant waived plaintiff's outstanding obligation to pay an additional $1 million deposit.

The closing did not take place on or before April 4, 2008, nor was it adjourned by a written amendment to the contract. However, rather than terminate the contract based on the failure to close, on July 25, 2008 defendant unilaterally sent plaintiff a "time of the essence closing notice" scheduling a closing for September 3, 2008.

On September 2, 2008, the parties executed another amendment, in which the July 25, 2008 notice was withdrawn and a new closing date set for September 17, 2008, with time of the essence. Finally, on September 16, 2008, the parties executed an amendment agreeing that the closing "shall be 12:00 noon on September 25, 2008 time of the essence for Purchaser to perform its obligations."

On September 25, 2008, defendant appeared for a closing shortly after noon; plaintiff did not appear. Defendant's principal owner, Robert G. Friedman, prepared a record reflecting the various documents that were ready to be delivered to plaintiff upon closing of the contract of sale, including a bargain and sale deed and an Assignment and Assumption Agreement assigning to plaintiff the development air rights related to 25 Ann Street.

The parties met later that day, in an effort to negotiate a new written amendment to the contract. Emails sent by plaintiff after noon on this date reference an unexecuted proposed fifth amendment to the contract. However, no written modification resulted, and six weeks later, on November 6, 2008, defendant sent plaintiff a notice of termination, stating that defendant elected to exercise its contractual remedy to retain the down payment as liquidated damages.

Plaintiff then brought this action, seeking the return of

its down payment and additional money damages for what plaintiff termed defendant's alleged wrongful termination and anticipatory breach of the contract of sale and the related development air rights agreement. In its answer, defendant asserted a breach of contract counterclaim seeking to retain the deposit as liquidated damages.

Defendant moved for summary judgment dismissing the complaint and for summary judgment on its counterclaim. Plaintiff opposed the branch of defendant's motion seeking judgment on its counterclaim on the ground that defendant failed to attach the closing documents with the motion, making it impossible to determine if its tender was proper. Plaintiff also cross-moved for summary judgment, arguing that the September 25, 2008 closing had been adjourned by oral agreement on consent of the parties, relying on the parties' history of adjourning the closing without signed writings; it also asserted that defendant had breached the contract by failing to deliver to plaintiff the development rights agreement with the condominium owners once that agreement was executed.

The motion court denied plaintiff's cross motion for summary judgment on its contract claim against defendant, and granted the branch of defendant's motion seeking summary judgment dismissing plaintiff's contract claim, which ruling plaintiff now challenges on appeal. It also denied the branch of defendant's motion

seeking summary judgment on its counterclaim, but granted leave to renew upon submission to the court of the tendered documents; while defendant does not challenge the latter aspect of the ruling on appeal, plaintiff appears to take the position that the grant of leave to renew was improper, in that defendant would not be entitled to summary judgment in any event because defendant never attempted to tender performance *in plaintiff's presence*.

DISCUSSION

The motion court correctly denied plaintiff's motion for summary judgment on its complaint and granted summary judgment dismissing plaintiff's complaint.

For plaintiff to establish the right to summary judgment, it had the burden of establishing as a matter of law that it was not in breach of the contract, and that it was actually defendant that was in breach. Initially, in view of the terms of the written contract, the most recent modification of which set the closing for September 25, at 12:00 noon, and the demonstration that defendant appeared at that place and time asserting that it was ready, willing and able to deliver title while plaintiff failed to appear, the documentary evidence provides no support for plaintiff's claim (*see Morgan Barrington Fin. Servs. v Roman*, 27 AD3d 385 [1st Dept 2006]; *Sikander v Prana-BF Partners*, 22 AD3d 242 [1st Dept 2005]). Consequently, plaintiff must rely on its claims that the parties orally agreed to adjourn the

scheduled closing to an undetermined future date. However, since plaintiff's assertion to that effect is disputed by defendant, plaintiff clearly failed to establish a right to summary judgment on its breach of contract claim against defendant.

The question then becomes whether plaintiff's evidence suffices to create an issue of fact as to whether the parties' written agreement was modified by an agreement extending the closing date. Since the contract of sale provided that any amendments or modifications must be in a signed writing, under General Obligations Law § 15-301, the contract cannot be changed by an executory agreement that is not in a signed writing.

We reject plaintiff's contention that the parties fully performed the oral modification of the contract providing for the adjournment of the closing, since they met at 3:00 p.m. on September 25, 2008. At best, that 3:00 p.m. meeting could qualify as partial performance of the alleged oral modification. But, while partial performance of an alleged oral modification may permit avoidance of the requirement of a writing, any such partial performance must be unequivocally referable to the modification (*see Rose v Spa Realty Assoc.*, 42 NY2d 338, 341 [1977]). The "unequivocally referable" standard requires that the conduct must be "explainable only with reference to the oral agreement." Where the conduct is "reasonably explained" by other possible reasons, it does not satisfy this standard (*Anostario v*

Vicinanzo, 59 NY2d 662, 664 [1983]). If "the performance undertaken by plaintiff is also explainable as preparatory steps taken with a view toward consummation of an agreement in the future," then that performance is not "unequivocally referable" to the new contract (*id.*).

In *Rose v Spa Realty Assoc.* (42 NY2d 338 [1977], *supra*), partial performance was successfully relied on to establish the existence of an oral modification of a contract. There, the plaintiff land developers entered into an written agreement to purchase land from the defendants, which agreement specified that it could not be modified orally. While the written contract anticipated and provided for the eventual purchase of 76 acres for the construction of an 800-unit housing development, the process was broken down into stages so that, for instance, neither party was obligated to proceed further unless approvals for at least 150 dwelling units had been obtained for construction on the first parcel. However, before any of the property was conveyed, it was discovered that sewage problems made it unlikely that the sellers would be able to obtain approvals for the 150 units on the first parcel. Rather than abandoning the enterprise or adopting a new, written purchase plan, the parties orally agreed to a modification by which the number of units to be built on the first parcel would be reduced from 150 units to 96 units. The Court held that this oral

modification was sufficiently supported by conduct unequivocally referable to the modification. Specifically, after applying for government approval plans for the first 48 units as the written contract provided, the sellers then applied, *not* for approval of an additional 102 units as contemplated by the contract, but only for an additional 48 units, as the parties had orally agreed. The total of 96 units was not reflected anywhere in the contract documents, and was explainable only by reference to the oral modification.

Plaintiff's submissions fail to satisfy this standard. None of the documents and events that plaintiff relies on are unequivocally referable to the alleged oral extension. The *unexecuted* proposed fifth amendment to the contract, the emails exchanged between the parties after noon on September 25, 2008, and the 3:00 p.m. meeting attended by the parties that day are insufficient. Not only do the emails fail to even indicate that the closing was adjourned by agreement, but all these items were clearly explainable as preparatory steps taken with a view of attempting to arrive at a possible agreement in the future (*see Sutphin Mgt. Corp. v REP 755 Real Estate, LLC*, 73 AD3d 738 [2d Dept 2010]; *RAJ Acquisition Corp. v Atamanuk*, 272 AD2d 164 [1st Dept 2000]). In the absence of a resulting written modification, the mere fact that the parties met at 3:00 p.m. does not negate plaintiff's default at the 12:00 p.m. closing, or reflect an

adjournment of that scheduled closing; it may be understood to merely reflect that defendant was willing to attempt to negotiate a new modification, as the parties had done once before, and which, if accomplished, would have nullified the default. Since plaintiff had already invested $9 million into the project, it had many reasons to continue meeting and negotiating in order to attempt to salvage the deal despite the expiration of the closing deadline, so meetings held after the time set for the closing do not establish that an extension was orally agreed to.

Nor did plaintiff establish that the principle of equitable estoppel applies here. Nothing in its submissions demonstrates that defendant induced it to significantly and substantially rely to its detriment on the alleged oral modification (*Rose*, 42 NY2d at 344). Indeed, plaintiff points to no new obligations it undertook as a result of the alleged oral agreement, such as a requirement to pay an additional deposit, or anything else it did that was detrimental to its interests.

In the absence of partial performance of the alleged oral extension or a basis to apply the doctrine of equitable estoppel, plaintiff's breach of contract claim is not saved by the alleged past practice or course of conduct by which the parties orally extended closing dates and only later executed a written modification. The parties' past ability to arrive at a mutually acceptable written modification does not justify reliance on an

assumption that they would be able to agree on the necessary written modification in the future.

Finally, the motion court did not err by authorizing defendant to renew its summary judgment motion upon submission of the documents tendered at the closing. Since the alleged oral modification adjourning the closing cannot be treated as effective, defendant's only obligation was to be ready, willing and able to tender the closing documents at the place and time set; it had no obligation to attempt tender directly to plaintiff at some location or time other than that specified in the written contract of sale. Nor could defendant's failure to earlier deliver the parties' separate development rights contract establish a breach of the contract of sale, since the parties' agreement regarding those developmental air rights provided that the failure to deliver such a contract would not affect the parties' contract of sale.

Accordingly, the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered August 3, 2011, which, to the extent appealed from, granted defendant's motion for summary

judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment, should be affirmed, with costs.

All concur.

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

ENTERED: JANUARY 31, 2013

CLERK