SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 7, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Mazzarelli, Andrias, DeGrasse, Román, JJ.

8317 The People of the State of New York, Respondent, Ind. 3069/09

-against-

Donald Lacy,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Winston & Strawn LLP, New York (Cale A. Johnson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J., at suppression hearing; Roger S. Hayes, J., at plea and sentencing), rendered December 4, 2009, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of seven years, unanimously affirmed.

The court properly denied defendant's suppression motion. Late at night, the police received a report of shots fired. Five minutes later the officers received a second report describing an

armed black man, wearing a blue and white shirt, two blocks from the location specified in the first report. Several minutes after that, the police observed defendant, who matched the radioed description, with two or three other men, on a deserted street just two blocks from the location specified in the second radio transmission.

It was plainly reasonable to conclude that the two calls were related. The spatial and temporal proximity to the reported firing of shots, and the fact that defendant matched the description, gave rise to a founded suspicion that defendant might be the person who had fired the shots. The general description was at least sufficient under the circumstances to warrant a common-law inquiry (*see People v Montilla*, 268 AD2d 270 [1st Dept 2000], *lv dismissed* 95 NY2d 830 [2000]).

The two officers were in uniform, and were both sitting in the front seat of an unmarked Crown Victoria. When the officers drove toward defendant the wrong way on a one-way street, defendant immediately fled before the police could even approach him to make an inquiry. This elevated the level of suspicion to reasonable suspicion, justifying pursuit (*see e.g. People v Pines*, 281 AD2d 311 [1st Dept 2001], *affd* 99 NY2d 525 [2002]). The circumstances permitted the officers to reasonably infer that

defendant fled because he realized he was in the presence of the police. We have repeatedly observed that the circumstances of a case may indicate that a suspect recognized the police, even where the officers were neither in uniform nor in a marked car (*see People v Collado*, 72 AD3d 614 [1st Dept 2010], *lv denied* 15 NY3d 850 [2010], and cases cited therein).

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

ENTERED: MARCH 7, 2013

CLERK

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

8547 In re Jeffrey Wilson, Ind. 2615/08
[M-4359] Petitioner,

-against-

Hon. Martin Marcus, etc., et al.,
Respondents.

_____

Jeffrey Wilson, petitioner pro se.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for Newton Mendys, respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon, and finding that the claims raised in the petition are not cognizable in this article 78 proceeding,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

The Decision and Order of this Court entered herein on November 13, 2012 is hereby recalled and vacated (*see* M—5938 decided simultaneously herewith).

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8660 Hideki Sato, et al., Index 113796/08
Plaintiffs-Respondents,

-against-

Ippudo NY, et al.,
Defendants-Appellants.

_____

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellants.

Brad A. Kauffman, New York, for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered May 15, 2012, which denied defendants' motion for summary judgment dismissing the complaint, reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff Hideki Sato was injured when he fell down a flight of stairs that led to the restroom area in defendants' restaurant. Sato testified that his left heel hit the top step whereupon he lost consciousness and fell. Sato further testified that when he regained consciousness he found himself lying at the bottom of the staircase. On the basis of Sato's foregoing testimony, we find that none of the stairway's alleged structural or design defects could have been a proximate cause of the

accident. Plaintiffs allege that the staircase was "inadequately lighted and/or not otherwise properly demarcated/warned about." In denying the motion, the court found an issue of fact as to whether the staircase was totally camouflaged, creating a defective condition.

This was error inasmuch as the deposition of the restaurant's general manager is unrefuted insofar as it establishes adequate warning as a matter of law. Specifically, the general manager testified that at the top of the staircase there was a yellow sign with an image of a finger pointing downward which read "bathroom this way" and "watch your step." The general manager also testified about a red non-slip mat on the landing, a spotlight at the top of the staircase as well as another light fixture above the middle of the staircase. Accordingly, defendants have established, prima facie, that the staircase was neither inherently dangerous nor constituted a hidden trap (*see e.g. Broodie v Gibco Enters., Ltd.,* 67 AD3d 418 [1st Dept 2009]). *Cherry v Daytop Vil., Inc.* (41 AD3d 130 [1st Dept 2007]), which plaintiffs cite, is distinguishable because it does not involve a claim of a hidden trap. Significantly, the affidavit of plaintiffs' safety expert, who claims to have read portions of depositions provided by their counsel, does not

reference the signs or otherwise state why they were inadequate. Accordingly, Sato's mere assertion that he did not see the signs is insufficient to raise an issue of fact as to their adequacy. Moreover, the provisions of the Administrative Code of the City of New York plaintiffs rely upon are inapplicable because the subject stairs are not "interior stairs" as defined by the Code (*see* Administrative Code § 27-232).

All concur except Román and Gische, JJ. who dissent in a memorandum by Gische, J. as follows:

GISCHE, J. (dissenting)

I respectfully dissent and would affirm the motion court's order denying defendant's motion for summary judgment dismissing the complaint. Although I agree with the majority analysis that the Administrative Code does not apply, I believe there are factual issues regarding whether there was a dangerous condition and whether the warnings were adequate.

Plaintiff Hideki Sato was injured when he fell down defendants' stairs. There exists a triable issue of fact as to whether the condition of the corridor and the stairs was a cause of plaintiff's fall. Plaintiff testified that he never saw the stairs due to a lack of illumination and the fact that the stairs, wall and ceiling were all black, creating an optical illusion (*see Cherry v Daytop Vil., Inc.*, 41 AD3d 130 [1st Dept 2007]). An adequate warning will not preclude liability where the premises are not otherwise reasonably safe (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 70 [1st Dept 2004]).

There are also factual disputes about the warning signs. Plaintiff denies even seeing the warnings, and otherwise raises

legitimate issues regarding the adequacy (including size, color and lettering) of the signs defendant claims were there (*see* *Walter v State of New York*, 185 AD2d 536 [3d Dept 1992]).

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

ENTERED: MARCH 7, 2013

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.,

8804 Andrea Gilchrist, Index 103400/08
Plaintiff-Appellant,

-against-

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

57 115 Assoc., et al.,
Defendants.

_____

G. Wesley Simpson, Brooklyn, for appellant.

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

_____

Order, Supreme Court, New York County (Geoffery D. Wright, J.), entered September 6, 2011, which, in this negligence action arising from plaintiff's fall from a chair, granted the motion of defendants City of New York and City of New York Human Resources Administration for summary judgment dismissing the complaint and denied plaintiff's cross motion to strike defendants' pleadings, unanimously reversed, on the law, without costs, defendants' motion denied, and plaintiff's cross motion granted to the extent of directing an adverse inference charge and preclusion of defendant's testimony as to the chair's condition.

The trial court should have imposed the sanction of an adverse inference charge because the chair was not the sole means

to establish plaintiff's claim (*see Alleva v United Parcel Serv., Inc.*, 96 AD3d 563, 564 [1st Dept 2012]; *Mendez v La Guacatala, Inc.*, 95 AD3d 1084, 1085 [2d Dept 2012]). Further, the court should have precluded defendant from offering any evidence at trial as to the chair's condition. Plaintiff's notice of claim specifically requested preservation of the chair, and defendants' failure to preserve it constitutes spoliation. Plaintiff's testimony that the chair was not broken would not have precluded an expert from finding a latent defect upon examination during the discovery process. Spoliation of the chair prevented the plaintiff from providing incisive evidence. Plaintiff's testimony adduced at trial could have allowed a jury to find that a defective condition or an improper use of the chair caused her accident and resulting injury. As such, an adverse inference charge along with the preclusion against defendant is a reasonable sanction considering the prejudice to the plaintiff (*see e.g. Baldwin v. Gerard Ave., LLC,* 58 AD3d 484, 485 [1st Dept 2009]).

Given the sanction of an adverse inference charge along with the preclusion of testimony regarding the condition of the chair,

defendants' motion for summary judgment is denied (*see Alleva v United Parcel Service, Inc.*, __AD3d__, 2013 NY Slip Op 00409 [1st Dept 2013]; *see also Wood v Pittsford Central School Dist.*, 2008 WL 5120494 [2d Cir 2008]; *Byrnie v Town of Cromwell Bd. of Educ.*, 243 F3d 93, 107-111 [2d Cir 2001] [defendants' spoliation of evidence was adequate grounds for denying defendants' summary judgment motion]; *Kronisch v United States*, 150 F3d 112, 125-128 [2d Cir 1998]). Moreover, based on this record, triable issues of fact exist as to whether defendant provided an inappropriate chair with wheels on a slippery floor.

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

ENTERED: MARCH 7, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

9046 The People of the State of New York, Ind. 2546/10
Respondent,

-against-

Lonnie Murray,
Defendant-Appellant.

_____

Flora Edwards, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered October 19, 2011, convicting defendant, after a jury trial, of menacing in the second degree, and sentencing him to a term of 1 year, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

To the extent defendant challenges the sufficiency of the evidence as a matter of law, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations,

including its evaluation of the extent to which a videotape contradicted the victim's testimony.

The court properly exercised its discretion in imposing reasonable limits on defendant's cross-examination of the victim. Defendant received wide latitude to attack the victim's credibility by inquiring about disputes directly involving him. The court did not deprive defendant of the right to present a defense by precluding questions about matters not directly involving the victim, which would have had little or no relevance and would have invited speculation (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see e.g. People v Sunter*, 57 AD3d 226, 227 [1st Dept 2008], *lv denied* 12 NY3d 762 [2009]).

We find that the sentence was not excessive.

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

ENTERED: MARCH 7, 2013

CLERK

Tom, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

9187 In re Liquidation of Index 42638/80
Cosmopolitan Insurance Company

- - - - -

Blackman Plumbing Supplies, Inc.,
Claimant-Appellant,

Superintendent of Financial
Services, etc.,
Respondent-Respondent.

_____

Ruskin Moscou Faltischek, P.C., Uniondale (E. Christopher Murray of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 7, 2012, which granted the motion of the Superintendent of Financial Services of the State of New York, as Liquidator of Cosmopolitan Insurance Company, to restore the case to active status and, upon restoration, to disallow and dismiss the remaining claims of appellant Blackman Plumbing Supplies, Inc. in the liquidation proceeding, and to release the $6 million that was previously directed to be held in escrow for the payment of the claims, and denied the cross motion of Blackman for a declaration that the Liquidator must reimburse Blackman for any costs incurred in defending and settling the underlying asbestos actions, and indemnify Blackman for any liability on the asbestos

claims, unanimously modified, on the law, to deny the motion of the Liquidator, and to remand for further proceedings consistent herewith, and otherwise affirmed, without costs.

The motion court erred in granting the motion of the Liquidator dismissing the remaining claims based on Blackman's failure to produce the relevant general liability insurance policies. In a prior order and judgment (one paper), entered on or about October 15, 2002, Supreme Court (Edward H. Lehner, J.) barred all claims by Blackman submitted after September 30, 2002. For the claims prior to that date, Supreme Court directed that the Liquidator create a reserve fund of $6 million, against which Blackman could submit claims. The fund was to cover the policy period between September 11, 1975 and October 17, 1980, and the record indicates that Blackman has, so far, successfully submitted claims that the Liquidator has paid. It was error for the motion court to abrogate the October 15, 2002 order and judgment by dismissing the remaining claims and releasing the fund (*see e.g. KB Operating, LLC v Briggs*, 58 AD3d 689, 692 [2d Dept 2009], *lv denied* 12 NY3d 705 [2009]).

Accordingly, we remand the matter for the adjudication of those individual remaining claims, insofar as the court is able

to determine whether each claim is covered under the Cosmopolitan policies identified in the October 15, 2002 order and judgment.

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

ENTERED: MARCH 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Renwick, Clark, JJ.

9201 Lloyd Smith, Index 110504/06
Plaintiff-Appellant,

-against-

Consolidated Edison Company
of New York, Inc., et al.,
Defendants-Respondents.

_____

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

Offices of Richard W. Babinecz, New York (Stephen T. Brewi of counsel), for Consolidated Edison Company of New York, Inc., respondent.

Smith, Mazure, Director, Wilkens Young & Yagerman, New York (Joel M. Simon of counsel), for Petrocelli Electric Co., Inc., respondent.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered May 16, 2011, which granted the motions of defendants Consolidated Edison Company of New York, Inc. (Con Ed) and Petrocelli Electric Co. (Petrocelli) for summary judgment dismissing the complaint and cross claims as against them, unanimously modified, on the law, to deny defendant Petrocelli's motion, and otherwise affirmed, without costs.

Plaintiff seeks damages for injuries he sustained on April 3, 2006, when he experienced an electric shock while crossing Broadway near its northwest intersection with White Street in

Manhattan. Defendant Petrocelli was in the process of performing electrical repair and maintenance work at the intersection pursuant to a contract with the New York City Department of Transportation (DOT). Petrocelli's work tied into, and acquired power from, equipment owned by defendant Con Ed.

Res ipsa loquitur is not a separate theory of liability but merely "a common-sense application of the probative value of circumstantial evidence" (*Abbott v Page Airways*, 23 NY2d 502, 512 [1969] [internal quotation marks and citation omitted]). A plaintiff's failure to specifically plead res ipsa loquitur does not constitute a bar to the invocation of res ipsa loquitur where the facts warrant its application (*see Ianotta v Tishman Speyer Props., Inc.* (46 AD3d 297, 298 [1st Dept 2007]). Thus, plaintiff's failure here to plead the doctrine in his complaint does not render it unavailable to him (*see Estrategia Corp. v Lafayette Commercial Condo*, 95 AD3d 732 [1st Dept 2012]).

To apply res ipsa loquitur, a plaintiff must establish that: "(1) the accident [is] of a kind that ordinarily does not occur in the absence of negligence; (2) the instrumentality or agency causing the accident [is] in the exclusive control of the defendants; and (3) the accident must not be due to any voluntary

action or contribution by plaintiff" (*Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 142 [1st Dept 2000]).

As for the first element, since a pedestrian is generally not subject to electric shock by walking on a manhole cover in the roadway absent negligence, defendants' argument that there is no evidence of any dangerous condition caused by them is unavailing. While Petrocelli's expert averred that the evidence in documents and depositions does not indicate that plaintiff's alleged electrical shock incident resulted from an impropriety attributable to the work of Petrocelli, other evidence in the record calls this conclusion into question. One Con Ed employee testified he found stray voltage at the southeast corner light pole prior to contacting Petrocelli, and another Con Ed employee testified that the northeast corner pole also had a stray voltage reading. Witnesses from both Con Ed and Petrocelli testified that stray voltage can travel, either through water or across the overhead shunts, from one pole to the next, and even to the metal manholes. Thus, defendants failed to show that the occurrence as described by plaintiff is a physical or mechanical impossibility (*see e.g. Miller v Schindler El. Corp.*, 308 AD2d 312, 313 [1st Dept 2003]).

As to the element of "exclusive control," Petrocelli was in

the process of working at that intersection in the days before the incident. Two light poles had been removed and replaced by temporary ones, and a temporary overhead power line shunt had been run. Moreover, one of the stray voltage readings obtained by Con Ed in its investigation was at one of the light poles run by a Petrocelli box. Thus, plaintiff presented sufficient evidence of control to warrant denial of Petrocelli's motion. However, Con Ed's only connection with the lamp posts where the stray readings were obtained was that it provided the power that ran through the Petrocelli control box. In light of Petrocelli's recent and continuing work at that location, it cannot be inferred that Con Ed was in control of the instrumentality that caused plaintiff's accident.

Finally, there is no evidence or allegation that plaintiff caused or contributed to the occurrence of the accident.

Petrocelli's argument that it had no duty to plaintiff as a mere third-party contractor is also unavailing. It has been recognized that under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract where the contracting party launches a force

or instrument of harm (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139-140 [2002]); *see also Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]).

Here, if a jury finds, under res ipsa loquitur, that Petrocelli negligently caused plaintiff's electrical shock, it necessarily follows that Petrocelli launched a force or instrument of harm. Thus, questions of fact bar summary dismissal on *Espinal* grounds.

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

ENTERED: MARCH 7, 2013

CLERK

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

9282 Tatjana Mitrovic, et al., Index 304369/09
Plaintiffs-Respondents,

-against-

Dr. Robert Silverman, et al.,
Defendants-Appellants.

_____

Harter Secrest & Emery LLP, Rochester (Richard E. Alexander of counsel), for Dr. Robert Silverman, appellant.

Mitchell Pollack & Associates PLLC, Tarrytown (Eileen M. Burger of counsel), for New York Chirocare, P.C., appellant.

Mark M. Basichas & Associates, P.C., New York (Aleksey Feygin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered May 21, 2012, which denied defendant Dr. Robert Silverman's motion and defendant New York Chirocare, P.C.'s cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiffs raised triable issues of fact as to whether defendants deviated from accepted practice and whether that deviation proximately caused plaintiff Tatjana Mitrovic's (plaintiff) injuries (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]. Like defendants' expert's affidavit in support of their motion, plaintiffs' expert's opinion was based upon his

education, training, experience as a practicing chiropractor and professional affiliation with chiropractors in the New York metropolitan area (*see Frye*, 70 AD3d at 24-25). These contradictory affidavits, each based upon the expert's relevant experience in the field of chiropractics, were sufficient to raise a disputed issue regarding whether defendants deviated from accepted practice by failing to order an MRI, based on the symptoms plaintiff presented, before commencing chiropractic treatment of plaintiff. While an expert affidavit cannot be speculative, there is no threshold requirement in an ordinary case, not involving a novel scientific theory, that a medical opinion regarding deviation be based upon medical literature, studies, or professional group rules in order for it to be considered. It can be based upon personal knowledge acquired through professional experience (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 545 [2002]; *see also Limmer v Rosenfeld*, 92 AD3d 609, 609 [1st Dept 2012]). The peer review article upon which defendants rely did not form a basis for their expert's opinion because it was only submitted in defendant Dr Silverman's reply paper's. Moreover, such literature only affects the weight given to an expert's opinion and does not dictate an outcome as a

matter of law (*see Marsh v Smyth*, 12 AD3d 307, 311-313 [1st Dept 2004], Saxe, J. concurring).

There is also evidence in the record supporting plaintiffs' expert's opinion on causation. While defendants deny that Dr. Silverman performed any forceful spinal manipulations or adjustments on plaintiff that could have contributed to the development of cauda equina syndrome (CES), not only do their own notations in plaintiff's medical records document that she was treated with spinal manipulative therapy to her lumbar spine, plaintiff testified at her deposition that she complained to Dr. Silverman that his treatments were painful. There is evidence in the record that plaintiff had a preexisting disc herniation and stenosis. When asked at his deposition whether spinal manipulation is contraindicated when stenosis is present, Dr. Silverman responded in the affirmative. He also agreed that according to chiropractic literature, it is possible that

chiropractic manipulation can cause CES. Consequently, plaintiffs' expert's opinion, that the defendants' treatment contributed to the development of plaintiff's CES has a basis and is not an unsupported assumption.

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9439 The People of the State of New York, Respondent, Ind. 6265/10

-against-

Andrew Taylor, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel McCullough, J. at hearing; Roger S. Hayes, J. at plea and sentencing), rendered August 30, 2011, convicting defendant of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. During an undisputedly lawful car stop, the police saw bags of what they believed to be stolen property. The record supports the hearing court's finding that the police properly seized these bags under the plain view doctrine.

Defendant contests the element of the plain view doctrine requiring that it be immediately apparent to the officer that the

items are contraband or evidence of a crime. The plain view doctrine does not require certainty or near certainty as to the incriminating nature of the items. Instead, it "merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief...that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required" (*Texas v Brown*, 460 US 730, 742 [1983] [internal quotation marks and citations omitted]).

Here, there was a chain of circumstances leading up to the seizure of the bags that warranted a reasonable belief that they contained stolen merchandise. The police officers, who had extensive experience in theft-related crimes, observed defendant and his companion get out of a car. The two men, who were carrying empty Century 21 shopping bags, walked rapidly toward a CVS store that was a frequent target of thieves. The officers also knew that, because of their large carrying capacity, Century 21 bags were popular with shoplifters, and that CVS personnel were not likely to check non-CVS bags.

The two men entered the CVS, quickly came out with the bags visibly heavier and fuller, and got back in the car. When the

police lawfully stopped the car for a traffic infraction, their suspicion was heightened when defendant spontaneously said, "[W]hy you guys trying to drop a case on me?" When an officer asked defendant what he was doing with the bags, defendant gave an answer that was contradicted by the officer's own observations of defendant's conduct.

When the officer shined a flashlight into the car, he saw a large quantity of over-the-counter medication in the shopping bags on the back seat. The officers believed that this was far more medicine than a person would be likely to purchase at one time, and they were aware that such medications were commonly sold on the street.

The totality of circumstances rendered it immediately apparent that the bags were incriminating, regardless of whether each link in the chain, viewed in isolation, had an innocent explanation. For example, while it may be perfectly legal to buy an unusually large supply of most nonprescription medicines, the quantity was suspicious in the context of defendant's actions and statements, as well as the officers' experience (*see e.g. People v Marte*, 295 AD2d 102, 103 [2002], *lv denied* 98 NY2d 769 [2002][suspicious quantity of cable boxes]).

This chain of events also provided probable cause for an arrest, or at least reasonable suspicion that justified the

officers' brief investigative detention of defendant while they ascertained that the merchandise had, in fact, been stolen (*see People v Allen*, 73 NY2d 378 [1989]; *People v Hicks*, 68 NY2d 234 [1986]). Accordingly, there is no basis for suppression of defendant's videotaped statement.

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9440 Robert Botfeld, etc., Index 106680/09
Plaintiff-Appellant,

-against-

Lily Wong,
Defendant-Respondent,

Artbags Creations, Inc.,
Defendant.

_____

Ginsberg & Wolf, P.C., New York (Robert M. Ginsberg of counsel), for appellant.

DeSena & Sweeney, LLP, Hauppauge (Shawn P. O'Shaughnessy of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered August 15, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, and the motion denied, without costs.

Plaintiff's affidavit stating that the decedent tripped over a gas cap protruding from the sidewalk did not directly contradict his earlier deposition testimony. Plaintiff was asked whether he spoke to his mother during the time she was lying on the ground, to which he answered yes, and whether she told him what she tripped over, to which he answered, "No, we didn't know." The question appears to have been limited to the time the

decedent was lying on the ground, and was not followed by further inquiry as to the possible cause of her fall or whether plaintiff inspected the area. Thus, we do not read plaintiff's answer as a statement that he never discovered the reason for his mother's fall (*compare Addo v Melnick*, 61 AD3d 453 [1st Dept 2009] [plaintiff's affidavit claiming Bronx residence in opposition to change-of-venue motion contradicted her testimony that she moved from the Bronx to New Jersey before commencing the action]; *Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522 [1st Dept 2010] [plaintiff's affidavit stating that he was unable to work for four months contradicted his bill of particulars and testimony asserting loss of work for two months]).

Defendant's argument that she had no duty to maintain the gas valve or cap is improperly raised for the first time on appeal since the issue is not a purely legal issue apparent on the face of the record but requires for resolution facts not

brought to plaintiff's attention on the motion (*see Tortorello v Carlin*, 260 AD2d 201, 205-206 [1st Dept 1999]; *Chateau D' If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9443 Erik Gutheil, Index 106295/05
Plaintiff-Respondent-Appellant,

-against-

Consolidated Edison of New York Company, Inc.,
Defendant-Respondent,

Nico Asphalt Paving, Inc.,
Defendant-Appellant-Respondent,

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

_____

McMahon, Martine & Gallagher, Brooklyn (Patrick W. Brophy of counsel), for appellant-respondent.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent-appellant.

Office of Richard W. Babinecz, New York (Stephen T. Brewi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered June 27, 2011, which, insofar as appealed from, denied defendant Nico Asphalt Paving, Inc.'s (Nico Asphalt) motion for summary judgment dismissing the complaint and all cross claims as against it, and denied plaintiff's motion for partial summary judgment on the issue of liability as against Nico Asphalt and defendant Consolidated Edison of New York Company, Inc. (Con Ed), unanimously modified, on the law, to grant Nico Asphalt's motion,

and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of Nico Asphalt dismissing the complaint and all cross claims as against it.

Plaintiff firefighter was allegedly injured when he stepped onto a spike embedded in the roadway as he was descending his fire truck while responding to a call. The record shows that more than one year earlier, Con Ed retained several contractors for the installation of a utility at the site of plaintiff's accident. Felix Equities Inc. performed excavation work, involving placing plates covering its excavation and securing the plates to the street with spikes. Nico Asphalt performed street restoration/paving work, after the excavation work was complete, and plaintiff alleges that a spike was negligently left in the roadway after the work was completed.

Nico Asphalt established its entitlement to judgment as a matter of law and plaintiff failed to rebut the showing. Nico Asphalt submitted evidence, including deposition testimony and documentation, showing that it did not place the spike in the plates, and that it had nothing to do with the spike that "directly caused plaintiff's injuries, or that indirectly caused plaintiff's injuries by increasing the inherent dangers of

firefighting" (*Cotter v Pal & Lee Inc.*, 86 AD3d 463, 466 [1st Dept 2011], *lv denied* 17 NY3d 716 [2011]).

Furthermore, assuming that plaintiff's cross motion was timely, issues of fact exist with regard to the applicability to Con Ed of the rules cited by plaintiff, and whether Con Ed's alleged violations of these provisions directly or indirectly caused plaintiff's accident and resultant injuries as a matter of law (*see Hoehn v Consolidated Edison Co. of N.Y.*, 205 AD2d 734 [2d Dept 1994]).

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9445 Adelo Hernandez, Index 101993/09
Plaintiff-Respondent, 590284/11

-against-

East Boy, Inc.,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

East Japanese Restaurant, et al.,
Third-Party Defendants-Respondents.

_____

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

James M. Sheridan, Jr., Garden City, for Adelo Hernandez, respondent.

Law Offices of Michael E. Pressman, New York (Stuart Chotewa of counsel), for East Japanese Restaurant, H. Yachi, Inc. and Yachi Enterprizes, respondents.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered August 10, 2012, which denied defendant/third-party plaintiff's motion for summary judgment dismissing the complaint and on its claim for indemnification against third-party defendants, unanimously affirmed, without costs.

Conflicting testimony raises an issue of fact whether, despite the terms of the lease, defendant retained or assumed responsibility for maintaining the premises and can be held

liable for plaintiff's injuries (*see Colon v Mandelbaum*, 244 AD2d 292 [1st Dept 1997]). In light of the unresolved issue of its negligence, defendant is not entitled to indemnification (*see Delgiudice v Papanicolaou*, 5 AD3d 236 [1st Dept 2004]; *Tormey v City of New York*, 302 AD2d 277, 278 [1st Dept 2003]).

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

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9446 Adelo Hernandez, Index 101993/09
Plaintiff-Appellant, 590284/11

-against-

East Boy, Inc.,
Defendant/Third-Party
Plaintiff-Respondent,

-against-

East Japanese Restaurant, et al.,
Third-Party Defendants-Respondents.

_____

James M. Sheridan, Jr., Garden City, for appellant.

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

Law Offices of Michael E. Pressman, New York (Stuart Chotewa of counsel), for East Japanese Restaurant, H. Yachi, Inc. and Yachi Enterprizes, respondents.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered August 14, 2012, which denied plaintiff's motion to strike the answer, unanimously affirmed, without costs.

The staircase on which plaintiff fell was replaced after he commenced this action and had served a notice to enter and inspect the premises. However, plaintiff failed to establish

that defendant was involved in the replacement of the staircase or that there was spoliation of evidence in any other way (*see generally Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]).

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9447 William Lugo, Index 300682/08
Plaintiff, 84169/08

-against-

Purple & White Markets, Inc., doing business as Associated Supermarket,
Defendant,

White Rose, Inc., et al.,
Defendants.

- - - - -

White Rose, Inc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

FICA Transportation, Inc.,
Third-Party Defendant-Respondent.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for appellants.

O'Connor Redd LLP, White Plains (Michael P. Hess of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 11, 2011, which, to the extent appealed from as limited by the briefs, granted the branch of third-party defendant FICA's motion for summary judgment that sought dismissal of third-party plaintiffs' claims for contractual indemnification, unanimously affirmed, without costs.

Under the plain meaning of the indemnification provision at issue here (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]), FICA is obligated to indemnify third-party plaintiff Rose Trucking for claims or damages involving FICA's drivers only if two requirements are met: (1) the claim or damage arose from the driver's use of "the Equipment," and (2) the claim or damage occurred as the result of the driver's acts or omissions "outside the scope" of the performance of the agreement between FICA and Rose Trucking (the agreement). The agreement defined "Equipment" as "tractors," which were leased by FICA to Rose Trucking.

Here, plaintiff driver fell from a trailer owned by Rose Trucking, while unloading it as part of the agreement. Under such circumstances and the plain meaning of the indemnification provision, neither requirement for indemnification was met.

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9448 The People of the State of New York, Ind. 6353/07
Respondent,

-against-

Alex Rosa,
Defendant-Appellant.

_____

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

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

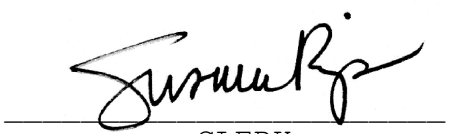
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County County (Gregory Carro, J.), rendered on or about November 3, 2010,

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

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

ENTERED: MARCH 7, 2013



CLERK

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

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9449-
9450 Index 600785/10

General Electric Capital
Business Asset Funding Corporation
of Connecticut, et al.,
Plaintiffs-Respondents,

-against-

Kazi Family, LLC, et al.,
Defendants-Appellants,

Kazi Foods of Annapolis, Inc., et al.,
Defendants.

_____

Richard A. Kraslow, P.C., Melville (Richard A. Kraslow of counsel), for appellants.

Reed Smith, LLP, New York (Alexander Terras of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 16, 2011, in plaintiffs' favor, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered November 1, 2011, which granted plaintiffs' motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The grant of summary judgment was not premature, despite outstanding discovery requests. Defendants had ample opportunity to address plaintiffs' noncompliance with their requests. Moreover, they failed to show that their defense was prejudiced

by the lack of discovery. Defendants contend that they need the discovery to evaluate the accuracy of the amounts plaintiffs claim are owing under loan agreements and guarantees and that absent the discovery plaintiffs failed to satisfy their burden on their motion. However, as the motion court found, the amounts are sufficiently explained in plaintiffs' supporting documents, which include the loan agreements, guarantees, default and acceleration notices, as well as summary tables showing defendants' indebtedness on each promissory note.

Contrary to defendants' contention, the denial, without prejudice, of an earlier motion by plaintiffs for summary judgment in lieu of complaint has no preclusive effect on the instant motion for summary judgment.

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9451-
9452-
9452A-
9452B

Index 109318/07

Fitzroy Burnett, et al.,
Plaintiffs-Respondents,

-against-

City of New York,
Defendant-Appellant.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellant.

Law Offices of Lawrence P. Biondi, Garden City (Lisa M. Comeau of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered December 7, 2011, which, to the extent appealed from, upon the parties' motions for clarification of an order, same court and Justice, entered June 29, 2011, clarified that the increased award of $500,000 (post allocation of fault) included all damages awarded by the jury, unanimously affirmed, without costs. Appeal from so much of the December 7, 2011 order as denied reargument of the issue of liability, unanimously dismissed, without costs, as taken from a nonappealable paper. Order, same court and Justice, (Geoffrey D. Wright, J.), entered June 29, 2011, which denied defendant's motion to set aside the

verdict as to liability, and granted plaintiff's cross motion to set aside the verdict to the extent of ordering a new trial on damages unless defendant stipulated to an increased total from $250,000 to $500,000 (post-allocation of fault for past and future pain and suffering and lost earnings), and adding $91,000 to that award to offset potential medical liens, unanimously modified, on the law and the facts, to vacate the additur of $91,000 for medical expenses, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered June 28, 2011, unanimously dismissed, without costs, as taken from a duplicate of the aforesaid June 29, 2011 order.

The trial evidence establishes that plaintiff Fitzroy Burnett (plaintiff), then a track worker employed by defendant, was injured while removing temporary wood shoring from beneath newly laid subway track. To reach the location of the temporary shoring, he had to walk through the troughs between the rails, which contained water, and to perform the task, he had to stand in a trough containing water. When he placed his right foot against a track tie for leverage, it slipped off the tie, and then his left foot, in the wet trough, slipped, and plaintiff fell backward and landed on a rail.

The trial court correctly concluded that the rail bed

constituted a floor, passageway, or walkway within the meaning of Industrial Code (12 NYCRR) § 23-1.7(d), that a watery slipping hazard was permitted to exist there, making footing unsafe, and that this unsafe condition caused plaintiff to slip and fall (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350-351 [1998]). The evidence demonstrates that the water was not an integral part of plaintiff's work; indeed, measures were taken by defendant to eliminate the water from the work space using pumps and an absorbing compound (*compare Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 147 [1st Dept 2012]; *Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58 [1st Dept 2004]). Since an owner's liability under Labor Law § 241(6) is vicarious, it is irrelevant that defendant, as it contends, had no notice of the hazardous condition (*see Rizzuto*, 91 NY2d at 352).

After the accident, plaintiff was taken to an emergency room where a soft cast was placed on his right foot, and he was discharged. Later that day, his right shoulder began to hurt, and on the third day after the accident, plaintiff suffered seizures, and was taken to the hospital. Although a CT scan and an MRI showed normal results, an EEG indicated marginal slowing of brain-wave activity. Plaintiff was placed on anti-seizure medications and treated by a neurologist. An orthopedic

specialist, Dr. John Sharkey, determined that he had suffered a severe, comminuted, four-part proximal humerus fracture and dislocation of his right shoulder. Sharkey surgically repaired plaintiff's shoulder, using a prosthetic device to replace the head of the humerus, and suturing a posterior labral tear and a split tear in the rotator cuff. Testifying at trial as an expert, Sharkey opined, based on plaintiff's shoulder complaints soon after leaving the emergency room on the date of his accident, that plaintiff likely had incurred a non-displaced shoulder fracture and that convulsive movements during his seizures had seriously exacerbated the injury.

Sharkey also performed open reduction surgery on plaintiff's right ankle, using plates and screws to stabilize a lateral malleolous fracture. Plaintiff then underwent two years of extensive physical therapy. He was able to return to employment with defendant in a sedentary time-keeping position. Sharkey's range-of-motion tests on plaintiff's right shoulder showed appreciable permanent restrictions and a 50% overall loss of shoulder function. Sharkey opined that plaintiff's right shoulder would likely become arthritic, weaker and more painful over time, and that his right ankle, which had fractured, would remain stiff and that he would occasionally experience difficulty

in walking.

Plaintiff's treating neurologist, who also testified as an expert, opined, based on plaintiff's unremarkable medical history and the proximity of his seizure occurrence to the subway track accident, that plaintiff had suffered a post-traumatic seizure disorder as a result of hitting his head in the fall on the track. The neurologist testified that when plaintiff discontinued his seizure medications in August 2010, he experienced another seizure and was hospitalized.

Plaintiff testified that he was no longer able to play cricket with his friends or football with his son, among other things, and that he could not perform his regular handyman chores around the house.

The jury's award of $175,000 and $75,000 for past and future pain and suffering, respectively, did not take into account the allocation of liability 50% to plaintiff. The award deviates materially from what would be reasonable compensation (*see* CPLR 5501[c]), and the trial court correctly raised plaintiff's award.

Defendant is not entitled to the $91,000 by which the court increased the total award to plaintiff to offset potential medical liens. By letter to plaintiff's counsel dated April 6, 2011, defendant asserted its claim to a lien on medical payments

it had made on plaintiff's behalf. However, in its motion papers to the court, it appeared to state openly that it would not seek to enforce any such liens, thus effectively waiving its right to do so (*see Matter of Hilton v Truss Sys.*, 82 AD2d 711, 712 [3d Dept 1981] ["if a carrier or employer desires to preserve its offset rights, it is obliged to plainly and unambiguously so state"], *affd* 56 NY2d 877 [1982]).

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9454 In re Jabar H.,

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

Gabrielle P.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

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

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about January 5, 2012, which, following a fact-finding determination that appellant-mother had permanently neglected her child, terminated her parental rights to the child and committed custody and guardianship of him to petitioner agency and the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The court properly found that the agency had exerted diligent efforts to strengthen the relationship between the mother and the child based on the testimony of the caseworker and

the progress note entries. The mother admitted that she was late to half of the visits and missed the other half of the visits with the child. The caseworker testified that she and the mother discussed the mother's noncompliance with the service plan on numerous occasions, but any improvement was short-lived. The mother admitted that she had been dilatory in complying with the plan, but blamed the agency. However, the agency is not charged with a guarantee that the parent succeed in overcoming her problems (*see Matter of Sheila G.*, 61 NY2d 368, 384-385 [1984]). The record supports the court's finding that the agency repeatedly reached out to the mother but she ignored its efforts.

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9455- Index 650129/11
9456-
9457 Brenda Pomerance, etc.,
Plaintiff-Appellant,

-against-

Brian Scott McGrath, et al.,
Defendants-Respondents.

_____

Brenda Pomerance, New York, appellant pro se.

Kagan Lubic Lepper Finkelstein & Gold, LLP, New York (Paul A. Pagano of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered December 28, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the second cause of action in its entirety and the first and fourth causes of action with leave to replead, and denied plaintiff's cross motion to examine the books and records of the 310 West 52nd Street Condominium Association pursuant to Business Corporation Law § 624 and the common law, unanimously modified, on the law, to grant the cross motion to the extent of ordering defendants to provide plaintiff with contact information for the condominium's other unit owners in written form and any other format in which the condominium or its managing agent maintains

such information, and otherwise affirmed, with costs to be paid by defendants. Appeal from order, same court and Justice, entered June 27, 2012, which, upon reargument, adhered to the original decision denying plaintiff's cross motion, unanimously dismissed, without costs, as academic. Appeal from order, same court and Justice, entered March 15, 2012, which declined to sign an order to show cause, unanimously dismissed, without costs, as taken from a nonappealable paper.

A shareholder-tenant of a cooperative corporation would be entitled to the names and addresses of the other shareholder-tenants in connection with an election, pursuant to Business Corporation Law § 624(b) (*see A&A Props. NY v Soundings Condominium*, 177 Misc 2d 200 [Sup Ct, NY County 1998]). Plaintiff, a condominium unit owner, is not entitled under the Business Corporation Law to examine the books and records of the condominium, which is an unincorporated association governed by Real Property Law article 9-B (*see 4260 Broadway Realty Co. v Assimakopoulos*, 264 AD2d 626, 627 [1st Dept 1999]). However, the right of a stockholder to examine the books and records of a corporation existed at common law, and does not depend on a statute (*see Matter of Steinway*, 159 NY 250, 258-259, 262-263 [1899]). The unit owners of a condominium collectively own the

common elements thereof and are responsible for the common expenses (*see* Real Property Law §§ 339-i; 339-m). Thus, the rationale that existed for a shareholder to examine a corporation's books and records at common law (*see Steinway*, 159 NY at 259-260) applies equally to a unit owner vis-à-vis a condominium.

Moreover, the fact that Real Property Law § 339-w gives a unit owner the right to examine certain types of documents does not mean that the unit owner may not under the common law examine additional types of documents (*see generally Steinway*, 159 NY at 263-265). The legislative history of article 9-B, which is intended to be "liberally construed to effect the purposes thereof" (§ 339-ii), indicates that one of its purposes is to encourage home ownership in the condominium form. Giving condominium unit owners the same rights as cooperative shareholder-tenants will encourage condominium ownership.

Since a unit owner should be given rights similar to those of a shareholder under Business Corporation Law § 624, at least where elections for a condominium board are concerned, we direct defendants to provide plaintiff with contact information for the other unit owners in written form and any other format in which the condominium or its managing agent maintains such information

(*see Matter of Bohrer v International Banknote Co.*, 150 AD2d 196 [1st Dept 1989]; Business Corporation Law § 624[b]).

Granting plaintiff the above relief will not grant her all of the ultimate relief she seeks. In any event, the instant action does not involve injunctive relief.

We reject plaintiff's argument that defendants should be liable for her costs of obtaining the information she seeks.

We decline to reach the merits of the first and fourth causes of action because they were dismissed with leave to replead, and plaintiff has filed amended complaints, which supersede the original complaint (*see e.g. Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 99 [1st Dept 2012]). We note, however, that the motion court did not require plaintiff to add the managing agent as a defendant; it dismissed the first cause of action "without prejudice to repleading *and/or* adding the managing agent as a party" (emphasis added).

The second cause of action alleges that plaintiff has a right as a former director to inspect the books and records of the condominium from the period of her tenure as a director. However, while one of defendants has apparently threatened to sue her, plaintiff failed to make any showing that the inspection is necessary to protect her "personal responsibility interest,"

i.e., that she is being "charged with malfeasance or nonfeasance during [her] incumbency" (*see Matter of Murphy v Fiduciary Counsel*, 40 AD2d 668, 669 [1st Dept 1972], *affd* 32 NY2d 892 [1973]).

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9458 The People of the State of New York, Ind. 2443/90
Respondent,

-against-

Felipe Concepcion,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John N. Byrne, J.), entered on or about October 14, 2005, which denied defendant's motion pursuant to CPL 440.30(1-a) for DNA testing, unanimously affirmed.

The court properly denied defendant's motion for DNA testing of a hair found in the apartment where he, his codefendant, and an unidentified man shot three women after kidnapping them. Defendant's argument that the verdict would have been more favorable to him if the results of DNA testing of the hair had been admitted is unavailing (*see generally People v Pitts*, 4 NY3d 303, 311 [2005]).

The hair has little or no value because there is no indication that it was left at the time of the crime, and it

could have been left by anyone who had ever been in that apartment. Assuming that DNA testing of the hair would have revealed that it did not belong to defendant or the codefendant, this would have merely confirmed testimony the jury had already heard: that the hair was scientifically tested and was not found to belong to either of them (*see People v Workman*, 72 AD3d 1640 [4th Dept 2010], *lv denied* 15 NY3d 925 [2010], *lv denied* 16 NY3d 838 [2011]).

Defendant argues that DNA testing of the hair might support a third-party culpability defense. He argues that testing might lead to a match with someone in a DNA database, and that this previously unidentified person, in turn, might be a person linked to circumstances that allegedly provided a possible alternative motive for the underlying homicide. This highly speculative theory does not serve as a basis for DNA testing (*see People v Figueroa*, 36 AD3d 458, 459 [1st Dept 2007], *lv denied* 9 NY3d 843 [2007]; *cf. People v Gamble*, 18 NY3d 386, 398-399 [2012] [upholding exclusion of speculative third-party culpability evidence]). Finally, we note that on defendant's direct appeal

this Court found the trial evidence to be overwhelming (187 AD2d 316, 317 [1992]), *lv denied* 81 NY2d 787 [1993]).

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9459 In re James Cannings, Index 401071/10
Plaintiff-Appellant,

-against-

East Midtown Plaza Housing Company, Inc.,
Defendant-Respondent.

_____

James Cannings, appellant pro se.

Gallet Dreyer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered October 25, 2011, which, insofar as appealed from, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly granted the motion dismissing the complaint. Defendant met its burden to show that its decision to take out a loan from a private bank to finance the replacement of windows in the cooperative building, rather than to seek a public loan, was a good faith business judgment which did not involve any self-dealing (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]; *Simpson v Berkley Owner's Corp.*, 213 AD2d 207 [1st Dept 1995]). Defendant showed that it decided not to apply for the public loan because a condition thereof was that

defendant would be obligated to remain in the Mitchell-Lama program for another 15 years. Plaintiff fails to raise a triable issue of fact.

We have reviewed plaintiff's remaining contentions and found them unavailing.

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9460-
9461 Index 105487/01

Kamco Supply Corp., etc.,
Plaintiff-Respondent,

-against-

Nevada Construction and Drywall, Inc., et al.,
Defendants,

Essential Electric Corp.,
Defendant-Respondent,

Abcon Associates, Inc., et al.,
Defendants-Appellants.

_____

Richman & Levine, P.C., Garden City (Seth A Levine of counsel), for appellants.

Marshall M. Stern, Huntington Station, for Kamko Supply Corp., respondent.

Carroll, McNulty & Kull L.L.C., New York (Erik J. Pedersen of counsel), for Essential Electric Corp., respondent.

_____

Orders, Supreme Court, New York County (Joan A. Madden, J.), entered July 21, 2011 and November 17, 2011, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for an order directing the disbursement of $190,391.51 of trust funds to the claimants of the Lien Law trust fund, unanimously affirmed, with costs.

In this action alleging a violation of article 3-A of the

Lien Law, the general contractor defendants defaulted, resulting in a judgment for plaintiff on behalf of the Lien Law trust claimants. Defendants never sought to vacate the judgment.

Following the recovery of trust funds, plaintiff moved for the disbursement of $190,391.51 of the funds to the trust claimants. Defendants opposed the motion, challenging the amounts owed to each claimant. Supreme Court correctly found that defendants, who are not trust fund beneficiaries, have no standing to make such a challenge (*see* Lien Law § 71[4]).

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9462 OneWest Bank FSB, Index 117855/09
Plaintiff-Respondent,

-against-

Gregory Carey,
Defendant-Appellant,

HTFC Corporation, et al.,
Defendants.

_____

Allison M. Furman, New York, for appellant.

Frenkel, Lambert, Weiss, Weisman & Gordon, LLP, Bayshore (Joseph F. Battista of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol E. Huff, J.), entered October 7, 2011, which denied defendant Gregory Carey's motion to dismiss the complaint, unanimously affirmed, without costs.

"In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action was commenced" (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]). Here, the evidence submitted in opposition to defendant's motion, including the affidavit from plaintiff's employee, established that an assignment of the note had been effectuated by physical delivery of the note prior to the

commencement of the instant action (*see Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d 695 [1st Dept 2012]).

We have considered defendant's remaining contentions, including the challenges to the evidence submitted in opposition to the motion, and find them unavailing.

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9463N In re Tri-Rail Construction, Inc., Index 106979/11
Petitioner-Respondent,

-against-

Environmental Control Board
of the City of New York, etc.,
Respondent-Appellant.

_____

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

Rabinowitz & Galina, Mineola (Maxwell J. Rubin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered December 9, 2011, which, insofar as appealed from as limited by the briefs, granted the petition to set aside respondent's denial of petitioner's requests to vacate defaults on 17 notices of violation, and granted hearings on the violations, unanimously reversed, on the facts, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Contrary to Supreme Court's finding that the limitations period had not elapsed because the denial letters were sent to addresses that were not petitioner's address, the evidence in the record establishes that the subject letters were, in fact, all

mailed to, among other places, petitioner's correct address, thereby triggering the 4 month statute of limitations (*see* CPLR 217[1]; and *see Matter of Carter v State of N.Y., Exec. Dept., Div. of Parole*, 95 NY2d 267, 270 [2000]).

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

ENTERED: MARCH 7, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9464 In re Kerri Roberts, Ind. 2159/11
[M-159] Petitioner,

-against-

Hon. Roger S. Hayes, etc., et al.,
Respondents.

_____

Kerri Roberts, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Roger S. Hayes, respondent.

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

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: MARCH 7, 2013

CLERK

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

9119 Blue Wolf Capital Fund II, L.P., Index 651560/10
Plaintiff-Appellant,

-against-

American Stevedoring Inc.,
Defendant-Respondent,

General Electric Capital
Corporation, et al.,
Nominal Defendants,

_____

Patrick F. McManemin, New York, for appellant.

Weiss & Hiller, PC, New York (Michael S. Hiller of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 29, 2011, affirmed, without costs.

Opinion by Freedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David Friedman
Karla Moskowitz
Leland G. DeGrasse
Helen E. Freedman, JJ.

9119
Index 651560/10

_____x

Blue Wolf Capital Fund II, L.P.,
Plaintiff-Appellant,

-against-

American Stevedoring Inc.,
Defendant-Respondent,

General Electric Capital
Corporation, et al.,
Nominal Defendants,

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (O. Peter Sherwood, J.), entered August 29, 2011, which, to the extent appealed from as limited by the briefs, denied its motion for partial summary judgment and granted defendant American Stevedoring, Inc. (ASI)'s cross motion for summary judgment dismissing the complaint.

Patrick F. McManemin, New York, and Peter R. Ginsberg Law, LLC, New York (Peter R. Ginsberg and Christopher Deubert of counsel), for appellant.

Weiss & Hiller, PC, New York (Michael S. Hiller of counsel), for respondent.

FREEDMAN, J.

This foreclosure action arises from a secured loan that plaintiff Blue Wolf, an investment firm, made to defendant American Stevedoring Inc. (ASI), an incorporated stevedore business. The parties sharply disagree about many of the circumstances surrounding the loan, but the following is not in dispute: in December 2009, ASI was suffering a self-described "cash crunch" and needed immediate financing to meet its current liabilities, including payroll. After negotiations, the parties agreed to a framework in which Blue Wolf would provide funds to ASI to keep the company afloat while Blue Wolf conducted "due diligence" to evaluate whether to make an equity investment in the company.

The loan transaction closed on January 7, 2010. The parties executed a loan agreement, pursuant to which ASI executed and delivered a promissory note in the principal amount of $1,130,000, bearing interest at a stated rate of 12% per annum and immediately payable at any time on Blue Wolf's demand. The parties also executed a collateral agreement that secured ASI's payment of its loan obligations with liens on substantially all of the company's assets, including industrial equipment it used for its stevedoring business.

At the closing, ASI only received $805,000 of the loan

principal of $1,130,000 because, as authorized by the terms of the loan agreement, Blue Wolf withheld $325,000 of the principal in connection with certain fees and deposits. These included, first, a $50,000 "commitment fee," and, second, a $75,000 deposit against Blue Wolf's costs and expenses in connection with the loan.

The third withholding, for $200,000, was designated in the loan agreement as a "deposit against future commitment fees" if ASI's obligations under the note were "rolled over into a future financing transaction" between the parties. The loan agreement further provided both that the $200,000 deposit did not "constitute a commitment with respect to any future transaction," and that if a second financing was not completed by March 31, 2010 "for any reason," Blue Wolf "reserve[d] the right to retain all or a portion" of the deposit "as compensation for [Blue Wolf's] time and expenses, as determined by [Blue Wolf] in its sole discretion."

Blue Wolf acknowledges that, after the demand loan closed and before the end of January 2010, it decided not to buy an equity interest in ASI or otherwise enter into a further financing transaction with the company. In March 2010, Blue Wolf sent ASI a letter demanding immediate payment of ASI's obligations under the note, which Blue Wolf calculated to be

$1,056,569, and informing ASI it "does not wish to pursue any further transactions" with the company because of its "loss of confidence" in it. Blue Wolf further informed ASI that it would only return half of the $200,000 deposit and would keep the remainder.

On May 14, 2010, Blue Wolf sent ASI another letter demanding payment of $1,172,513 and stating that it would keep the entire $200,000 deposit. On May 15, the lender began pursuing a strict foreclosure on the collateral pursuant to UCC 9-620. Blue Wolf first sent ASI a letter proposing that Blue Wolf take possession of collateral in full satisfaction of ASI's debt, and then retracted the letter because it did not comply with the notice requirements for strict foreclosure. Blue Wolf claims that, on July 14, 2010, it sent ASI another letter, which effectively notified the company that Blue Wolf would accept ASI's industrial machinery in full satisfaction of the loan, and that, pursuant to UCC 9-620, ASI would be deemed to have accepted Blue Wolf's proposal if it did not object within 20 days. ASI, however, contends that it never received the July 14 letter and disputes Blue Wolf's claimed ownership of the industrial machinery.

On July 22 and August 23, 2010, ASI wired payments totaling about $54,000 to Blue Wolf which it designated interest payments on the outstanding principal. Blue Wolf responded by letters

stating that it had already foreclosed on the collateral and that ASI held it for Blue Wolf's benefit. Blue Wolf offered to sell back the collateral to ASI for $1,300,000 no later than September 7, 2010, and indicated that it would hold ASI's tendered payments in escrow as partial payment for the collateral if ASI wanted to repurchase it.

ASI continued to dispute the ownership of the collateral and use it in its business. In September 2010, Blue Wolf commenced this action, seeking a declaration that it properly foreclosed on the collateral and now holds title to it. Blue Wolf also seeks an injunction against ASI's further use of the collateral, and asserts related claims for conversion and other causes of action. Thereafter, Blue Wolf moved for a TRO enjoining ASI from using the collateral in its operations and ASI cross-moved for an order dismissing the complaint on the ground that the loan transaction was usurious. With the consent of the parties, the motion court converted the cross motion for dismissal into a cross motion by ASI for summary judgment based on the affirmative defense of usury, and permitted Blue Wolf to file an additional motion for partial summary judgment on its claims.

The motion court denied Blue Wolf's motions for a TRO and partial summary judgment, granted ASI's cross motion, and dismissed the complaint. Acknowledging that ASI had not formally

objected to the foreclosure, the court found that questions of fact existed as to whether Blue Wolf gave reasonable notice of the foreclosure and whether Blue Wolf abandoned or withdrew its offer to accept the collateral in full satisfaction of ASI's debt. With respect to the cross motion, the court held that the $50,000 fee, the $75,000 deposit, and the $200,000 deposit constituted disguised charges that should be added to the note's stated 12% interest rate when determining whether the loan was usurious. The court calculated the actual interest rate on the loan to be 57.14% and therefore criminally usurious (*see* Penal Law § 190.40). The criminal usury, the court held, voided the loan transaction and barred this action.

Blue Wolf appeals, claiming that ASI failed to prove its criminal intent and that Blue Wolf's submissions to the motion court raised issues of fact whether the fee and deposits were legitimate and therefore should not be counted as interest. Blue Wolf further contends that even if the loan were criminally usurious, the proper remedy was not to void the transaction but instead to reform it so that Blue Wolf could recover the loan principal and legal interest. Finally, Blue Wolf argues that it raised issues of fact whether ASI objected to the strict foreclosure notice and that, by not formally objecting to the notice of foreclosure, ASI waived the usury defense.

We find that the loan transaction is void because it was criminally usurious as a matter of law, and accordingly the collateral agreement is unenforceable. The maximum per annum interest rate for a loan or forbearance of money is 16% under New York's civil usury statute and 25% under the state's criminal usury statutes (*see* General Obligations Law § 5-501 [civil usury]; Penal Law § 190.40, § 190.42 [criminal]). With some exceptions that do not apply here, a corporation may assert criminal usury as a defense where the amount of the loan or forbearance is more than $250,000 and less than $2,500,000 (*see* GOL 5-521[3]).

To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate (*see Giventer v Arnow*, 37 NY2d 305, 309 [1975]). If usury can be gleaned from the face of an instrument, intent will be implied and usury will be found as a matter of law (*see Fareri v Rain's Intl.*, 187 AD2d 481, 482 [2d Dept 1992]).

In this case, it can be discerned from the four corners of the loan agreement that the $200,000 deposit "against future commitment fees" constitutes additional interest within the

meaning of the usury statutes. To determine whether a transaction is usurious, courts look not to its form but to its substance or real character (*see O'Donovan v Galinski*, 62 AD3d 769, 769-770 [2d Dept 2009]). If an instrument provides that the creditor will receive additional payment in the event of a contingency beyond the borrower's control, the contingent payment constitutes interest within the meaning of the usury statutes (*see Diehl v Becker*, 227 NY 318, 326 [1919]; *Browne v Vredenburgh*, 43 NY 195, 198 [1870]). Here, the fate of the deposited funds was contingent on events that were entirely within Blue Wolf's control, insofar as the loan agreement provided that it could refuse to proceed with another financing and then retain the $200,000 "in its sole discretion."

The true character of the $50,000 "commitment fee" and the $75,000 deposit against Blue Wolf's expenses cannot be determined from the face of the loan agreement. We need not, however, reach the question whether ASI proved those amounts constitute interest because the $200,000 of deemed interest, when added to the stated 12% annual interest on the loan principal, renders the loan criminally usurious. The standard formula for calculating an effective interest rate in usury cases is set forth in *Band Realty Co. v North Brewster, Inc.* (37 NY2d 460, 462 [1975]). Using the formula, we first determine the amount of annual

interest payments that Blue Wolf would receive under the loan agreement and the note. That amount equals the sum of the stated annual interest of 12% on $1,130,000 ($135,600) *plus* the loan funds retained by Blue Wolf that are deemed to be interest ($200,000), or $335,600. Next, we determine the amount of net loan funds that ASI received at closing, which equals the gross amount of the note ($1,130,000) *minus* the retained interest ($200,000), or $930,000. Finally, we express the interest payments as a percentage of the net loan funds: $335,600 equals 36.09% of $930,000 (*see id.* at 462). The effective rate of interest for the demand loan, 36.09%, exceeds the legal rate.

Since ASI has successfully asserted criminal usury as an affirmative defense, the loan transaction and the associated note, loan agreement, and collateral agreement are void and unenforceable (*see* General Obligations Law § 5-511 [unless lender is bank or savings and loan association, usurious transaction is void]; *Szerdahelyi v Harris*, 67 NY2d 42, 47-48 [1986]; *Hammelburger v Foursome Inn Corp.*, 54 NY2d 580, 590 [1981] ["it would be most inappropriate to permit a usurer to recover on a loan for which he could be prosecuted"] [emphasis and internal quotation marks omitted]; *Bietola v McCue*, 308 AD2d 416, 416-417 [1st Dept 2003]).

Blue Wolf contends that ASI cannot raise usury as a defense

to this action to enforce strict foreclosure, noting that this Court has stated that criminal usury "is strictly an affirmative defense to an action seeking repayment of a loan" (*Intima-Eighteen, Inc. v Schreiber Co.*, 172 AD2d 456, 457 [1st Dept 1991], *lv denied* 78 NY2d 856 [1991]). Unlike the corporate borrower in *Intima*, however, ASI does not invoke the usury statutes "as a means to effect recovery" (*id.* at 457-458). *Intima* should not be construed to prohibit a borrower from raising usury as a defense to a foreclosure action (*see also Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 738 [1992] [usury defense raised]; *Hammelburger*, 54 NY2d at 584 [same]).

Blue Wolf also asks us to reform the loan transaction instead of voiding it, but an equitable remedy like reformation is unavailable to a party with unclean hands (*see Speranza v Repro Lab Inc.*, 62 AD3d 49, 53-54 [1st Dept 2009]; *Judge v Travelers Inc. Co.*, 262 AD2d 983, 983-984 [4th Dept 1999]). Since Blue Wolf charged criminally usurious interest, it is not entitled to equitable relief.

Finally, we reject Blue Wolf's claim that the motion court erred by dismissing this action before it determined whether ASI had defaulted. A default would have been vacated because ASI's submissions presented a reasonable excuse and a meritorious defense (*see Rockefeller v Jeckel*, 161 AD2d 1090, 1091 [3d Dept

1990] ["defendant's usury claim itself implicates sufficient public policy considerations to justify the vacatur of [a] default in the interest of justice"]; *Vega Capital Corp. v W.K.R. Dev. Corp.*, 98 AD2d 627, 628 [1st Dept 1983] [default judgment vacated based on usury defense]).

Accordingly, the order, of the Supreme Court, New York County (O. Peter Sherwood, J.), entered August 29, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment and granted defendant American Stevedoring, Inc. (ASI)'s cross motion for summary judgment dismissing the complaint, should be affirmed, without costs.

All concur.

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

ENTERED: MARCH 7, 2013

CLERK