SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 26, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9626 The People of the State of New York, Ind. 581/09
Respondent,

-against-

Angel De La Rosa,
Defendant-Appellant.

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Richard M. Greenberg, Office of The Appellate Defender, New York (Anastasia Heeger Of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Robert M. Stolz, J. at suppression hearing; Daniel P. FitzGerald, J. at plea; Charles Solomon, J. at sentencing), rendered September 22, 2009, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him to a term of nine months, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

The court, which had the unique opportunity to see and hear the witnesses, credited testimony that the police made a lawful traffic stop, smelled marijuana through the car window, and saw cocaine in open view.

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

ENTERED: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9627-
9627A In re Heenam Bae, etc., et al., Petitioners, Index 110875/11

-against-

The Industrial Board of Appeals, et al., Respondents.

_____

Klein Zelman Rothermel, LLP, New York (Jesse Grasty of counsel), for petitioners.

Eric T. Schneiderman, Attorney General, New York (Benjamin Holt of counsel), for respondents.

_____

Determinations of respondent Industrial Board of Appeals, dated September 9, 2011, and December 14, 2011, which, respectively, inter alia, directed respondent Commissioner of Labor to recalculate a wage order dated August 27, 2009, and issue an amended wage order, and, upon application for reconsideration, adhered to the prior determination, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alexander W. Hunter, Jr., J.], entered on or about February 23, 2012) dismissed, without costs.

Substantial evidence supports the Board's determination that the claimant, Mehmet Aydin, worked 56 hours per week at petitioners' dry cleaning plants from August 2000 until January

30, 2005, and is entitled to unpaid overtime and interest (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]). Aydin testified that, during this period, he worked from 7:30 or 8 a.m. until 6 p.m. on weekdays and from 8 a.m. until 5 p.m. on Saturdays. The burden then shifted to petitioners to produce evidence of "the precise amount of work [he] performed" or to undermine "the reasonableness of the inference to be drawn from [his] evidence" (*see Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687 [1946]; *see Matter of D & D Mason Contrs., Inc. v Smith*, 81 AD3d 943, 944 [2d Dept 2011], *lv denied* 17 NY3d 714 [2011]; *Matter of Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, 379 [2d Dept 1996]). Petitioners admit that they maintained no records of Aydin's hours for the relevant time period; they attempted to reconstruct those hours. The Board was entitled to credit Aydin's testimony and to discredit petitioners' reconstruction, which was based upon a series of estimates and extrapolations that rested on dubious or unsubstantiated assertions, including monthly dry cleaning revenue figures (*see Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281 [1st Dept 2007]).

Petitioners failed to show that the hearing was tainted by bias or that they were otherwise deprived of their right to due

process (*see Matter of Hughes v Suffolk County Dept. of Civ. Serv.*, 74 NY2d 833 [1989]; *Matter of Sunnen v Administrative Rev. Bd. for Professional Med. Conduct*, 244 AD2d 790 [3d Dept 1997], *lv denied* 92 NY2d 802 [1998]).

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

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

ENTERED: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9628-
9628A

In re Adam Mike M., and Another,

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

Jeffrey M.
Respondent-Appellant,

Leake and Watts Services, Inc.,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

Lisa H. Blitman, New York, attorney for the children.

_____

Orders of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about March 16, 2012, which, upon fact-findings of mental illness and permanent neglect, terminated respondent father's parental rights to the subject children, and committed the guardianship and custody of the children to petitioner and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent suffers from a mental illness is supported by clear and convincing evidence. The uncontroverted expert testimony demonstrated that respondent suffers from anti-social personality disorder which affects his ability to parent

and places the children in danger of being neglected if returned to his care (*see Matter of Victor B.*, 91 AD3d 458 [1st Dept. 2012]).

In addition, the finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). Petitioner engaged in diligent efforts to encourage and strengthen respondent's relationship with his children, who have special needs, by twice referring him to a parenting skills program where he received approximately two years of training and by scheduling regular visitation (*see Matter of Nakai H. [Angela B.H.]*, 89 AD3d 434 [1st Dept 2011]). Despite these diligent efforts, respondent continued to deny responsibility for the conditions necessitating the children's removal from the home, failed to complete or benefit from the parenting skills program, and failed to demonstrate that he has adequate parenting skills to address the children's significant special needs (*see Matter of Emily Rosio G. [Milagros G.]*, 90 AD3d 511, 511 [1st Dept 2011]). The court was permitted to draw a negative inference from respondent's failure to testify (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79-80 [1995]; *Matter of Alexis C. [Jacqueline A.]*, 99 AD3d 542, 542-543 [1st Dept 2012]).

Respondent's assertion that the agency failed to exercise diligent efforts because it did not address his anti-social personality disorder is unpersuasive. It ignores the undisputed expert testimony that there is no treatment for this type of mental illness. Although the expert testified that the underlying symptoms of anti-social personality disorder, such as depression and anxiety, can be treated with medication, he also testified that respondent's records do not indicate that he suffers from either condition.

Given that the children have been in foster care since infancy and they are now seven years old, a preponderance of the evidence demonstrates that it is in their best interests to terminate respondent's parental rights and free them for adoption by the foster parents who have provided support and care for the children (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]).

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

ENTERED: MARCH 26, 2013

CLERK

Gonzales, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9629 Monica Sidaoui, Index 150273/11
Plaintiff-Appellant,

-against-

Guillermo Aboumrad,
Defendant-Respondent.

_____

Hunter Taubman Weis LLP, New York (Mark D. Hunter of counsel), for appellant.

Kert & Kert PLLC, Garden City (Georgia Protan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol Edmead, J.), entered on or about February 17, 2012, which granted defendant Guillermo Aboumrad's motion to dismiss the complaint on the grounds of forum non conveniens, unanimously affirmed, without costs.

The motion court properly granted defendant's motion to dismiss on the ground of forum non conveniens after considering the relevant factors (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). The transaction out of which this action arose, the opening of an account at Citigroup by the parties during their marriage, occurred in Mexico. The bank representative, the only witness from New York, traveled to the parties' marital home in Mexico

with the account documents where they were signed by plaintiff. Both parties to this action are residents of Mexico, many related documents are located in Mexico, and there are presently multiple actions pending between the parties in Mexico that may affect the determination of the instant action. In addition, plaintiff has not established that Mexico is not an adequate alternative forum for this dispute and defendant has shown that travel to New York would be unduly burdensome.

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

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

ENTERED: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, JJ.

9630 Rhonda Jackson, as Administratrix of the Estate of Michael Williams, etc., Plaintiff-Respondent-Appellant, Index 114825/09

-against-

Jose R. Sanchez-Pena, M.D., et al., Defendants,

Mayank D. Patel, M.D., Defendant-Appellant-Respondent.

_____

Savona, D'Erasmo & Hyer LLC, New York (Raymond M. D'Erasmo of counsel), for appellant-respondent.

Levine & Grossman, Mineola (Scott D. Rubin of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered on or about December 20, 2011, which, in this medical malpractice action, granted defendant-appellant's motion to dismiss the complaint as against him upon the condition that defendant not raise the statute of limitations as an affirmative defense should a similar action be commenced in another jurisdiction, unanimously modified, on the law, to vacate the condition, and otherwise affirmed, without costs.

Defendant, a doctor who resides and practices in New Jersey, conducted two colonoscopies of the decedent, a New York resident, in New Jersey in April and May 2008. Defendant has never lived

in New York, is not licensed to practice in New York, maintains no office or other place of business in New York, and pays no New York taxes. However, a New York doctor referred decedent to defendant.

The court properly dismissed the action as against defendant for lack of personal jurisdiction. Given defendant's affidavit denying any payment or other financial arrangement for the New York doctor's referrals, it cannot be said that defendant was transacting business in New York based solely on his treatment, wholly in New Jersey, on an ad hoc basis, of the referred patients (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200-201 [1st Dept 2003]; *see also Ingraham v Carroll*, 90 NY2d 592, 596 n 1 [1997]). Further, there is no evidence that defendant paid or arranged for decedent's transportation to and from New Jersey. Accordingly, jurisdiction does not exist under CPLR 302(a)(1).

Nor does jurisdiction exist under CPLR 302(a)(3) based on a "tortious act without the state causing injury to [decedent] . . . within the state" (*id.*). Plaintiff asserts that, while the allegedly negligent act occurred in New Jersey, questions of fact exist as to where the injury occurred, as the decedent's condition deteriorated over time after he returned to New York.

However, "[i]n a medical malpractice case, the injury occurs where the malpractice took place" (*O'Brien*, 305 AD2d at 202). Accordingly, the injury here occurred in New Jersey, not New York.

Given the motion court's correct conclusion that it lacked personal jurisdiction over defendant, it lacked authority to require defendant to waive any statute of limitations defense in any similar action commenced in another jurisdiction (*Foley v Roche*, 68 AD2d 558, 566 [1st Dept 1979]). The court's reliance on *Lancaster v Colonial Motor Frgt. Line* (177 AD2d 152, 159 [1st Dept 1992]), which conditioned dismissal upon such a waiver, is misplaced, as defense counsel in *Lancaster* expressly consented to waive that defense (*id.*).

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

ENTERED: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9631 Elaine Crane, et al., Index 113102/10
Plaintiffs-Respondents,

-against-

Salaam Bombay,
Defendant-Appellant.

_____

Lewis, Brisbois, Bisgaard & Smith, LLP, New York (Nicholas Hurzeler of counsel), for appellant.

Jacob Fuchsberg Law Firm, New York (Edward J. Hynes of counsel), for respondents.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered October 2, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant restaurant failed to establish its entitlement to judgment as a matter of law in this action where plaintiff Elaine Crane alleges that she was injured when she tripped and fell over a bicycle that was chained to scaffolding on the sidewalk near the restaurant. Defendant failed to show that it did not own or use the bicycle over which plaintiff fell. Defendant's manager testified that the restaurant employed three delivery people, one who used a moped, and another who parked his bicycle around the corner. Defendant, however, did not produce evidence concerning

where the third delivery person parked his bicycle or whether that person was working on the day of the accident. Furthermore, the record shows that the manager had no first-hand knowledge of where the bicycles were parked that day (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385 [2005]).

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

ENTERED: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9632 The People of the State of New York, Ind. 3989/11
Respondent,

-against-

Maurice Long,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about March 21, 2012,

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 26, 2013

CLERK

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

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9634 Gregg M. Mercado, et al., Index 102473/09
Plaintiffs-Respondents, 590277/11

-against-

Caithness Long Island LLC, et al.,
Defendants-Appellants,

F&S Power Corp.,
Defendant.

- - - - -

Caithness Long Island LLC, et al.,
Third-Party Plaintiffs-
Respondents-Appellants,

-against-

Fresh Meadow Power, LLC,
Third-Party Defendant-
Appellant-Respondent.

_____

Torino & Bernstein, P.C., Mineola (Charles R. Strugatz of counsel), for Caithness Long Island LLC, Siemens Energy, Inc., and F & S Power, LLC., appellants/respondents-appellants.

McGaw, Alventosa & Zajac, Jericho (James K. O'Sullivan of counsel), for Fresh Meadow Mechanical Corp., appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Peter T. Shapiro of counsel), for appellant-respondent.

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

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 5, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiff's cross motion for

summary judgment on the issue of liability on his Labor Law § 240(1) claim and on his Labor Law § 241(6) claim to the extent it is predicated on Industrial Code § 23.1-15, granted third-party defendant Fresh Meadow Power, LLC (FMP)'s cross motion for summary judgment dismissing the claim by defendants Caithness Long Island, LLC, Siemens Energy, Inc., and F&S Power, LLC (collectively, Caithness Defendants) seeking common-law indemnification claim against it, and granted FMP's cross motion for summary judgment dismissing the contractual indemnification claim to the extent any recovery by plaintiff exceeds a $1 million insurance policy limit, unanimously modified, on the law, plaintiff's cross motion for summary judgment on his Labor Law § 241(6) claim denied, FMP's cross motion for summary judgment dismissing the claim for contractual indemnification granted except to the extent any recovery by plaintiff exceeds $1 million, and otherwise affirmed, without costs.

Plaintiff's cross motion for partial summary judgment on his claim pursuant to Labor Law § 240(1) was properly granted. Plaintiff established that his injuries were caused, at least in part, by the absence of proper protection required by the statute. The evidence demonstrates that plaintiff, a welder who was working at a power plant that was being constructed, was

struck on the head by a pipe that fell from a height of approximately 85 to 120 feet as a result of a gap in a toeboard installed along a grated walkway near the top of a generator in the power plant (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 98 AD3d 864, 864-865 [1st Dept 2012]*; Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479 [1st Dept 2007]). It is undisputed that there was no netting to prevent objects from falling on workers and contrary to defendants' contention, plaintiff is not required to show exactly how the pipe fell, since, under any of the proffered theories, the lack of protective devices was the proximate cause of his injuries (*see Augustyn v City of New York*, 95 AD3d 683 [1st Dept 2012]). Nor is plaintiff required to show that the pipe was being hoisted or secured when it fell, since that is not a precondition to liability pursuant to Labor Law § 240(1) (*see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757 [2008]; *Vargas v City of New York*, 59 AD3d 261 [1st Dept 2009]).

In opposition, defendants failed to raise a triable issue of fact since they failed to show that adequate protective devices required by Labor Law § 240(1) were employed at the site. That plaintiff was wearing a welding hood but not a hard hat does not raise an issue of fact since "[a] hard hat is not the type of safety device enumerated in Labor Law § 240(1) to be constructed,

placed and operated, so as to give proper protection from extraordinary elevation-related risks to a construction worker" (*Singh v 49 E. 96 Realty Corp.*, 291 AD2d 216 [1st Dept 2002]).

However, plaintiff's cross motion for partial summary judgment on his Labor Law § 241(6) claim should have been denied in its entirety, since there are issues of fact as to whether plaintiff's comparative negligence constitutes a valid defense to this claim (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]; *Spaces v Gary Null Assocs., Inc.*, 14 AD3d 425, 426 [1st Dept 2005]). Although plaintiff testified that a hard hat would not fit over his welding hood, the site safety manager testified to the contrary. The safety manager further testified that the use of fiber metal hard hats was mandatory, and that such hats were available on the site, raising an issue of fact.

Third-party defendant FMP's cross motion for summary judgment dismissing the claim for contractual indemnification against it should have been denied, except insofar as the claim is subject to the anti-subrogation rule. Accordingly, the order is modified to correct what appears to have been a typographical error involving the omission of the word "except." On the merits, the claim is based on a contractual provision requiring FMP to indemnify the Caithness Defendants only to the extent the

accident was caused by FMP's negligence. There are triable issues of fact as to whether FMP's negligence contributed to the accident, since plaintiff's failure to wear a hard hat can be imputed to FMP, his employer, for purposes of contractual indemnity (*see Schaefer v RCP Assoc.*, 232 AD2d 286 [1st Dept 1996]; *see also Guiga v JLS Constr. Co.*, 255 AD2d 244 [1st Dept 1998]).

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: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9635- Index 110711/06
9636 International Plaza Associates, L.P.,
Plaintiff-Respondent,

-against-

Michael A. Lacher, et al.,
Defendants-Appellants.

_____

Anderson Kill & Olick, P.C., New York (Adam J. Rader of counsel), for appellants.

Harwood Reiff LLC, New York (Donald A. Harwood of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered July 12, 2011, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for a protective order striking defendants' second request for production of documents and interrogatories 1-28 in defendants' second set of interrogatories, and denied defendants' cross motion to compel plaintiff to respond to the above discovery requests, unanimously affirmed, with costs, with leave to defendants to serve a proper request for production of documents. Order, same court and Justice, entered May 21, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the issue of liability under defendant Michael A.

Lacher's guaranty, unanimously affirmed, with costs.

We defer to the trial court's determination regarding disclosure (*see e.g. Don Buchwald & Assoc. v Marber-Rich*, 305 AD2d 338 [1st Dept 2003]), especially because plaintiff argued that many of defendants' second discovery requests were duplicative of their first discovery requests and that the court had resolved issues arising from the first discovery requests at a January 2009 conference, of which there is no transcript in the appendix. Although some of defendants' second discovery requests may have been relevant and non-duplicative, the motion court appropriately vacated the requests in their entirety (*Editel, N.Y. v Liberty Studios*, 162 AD2d 345, 346 [1st Dept 1990]; *Dykowsky v New York City Tr. Auth.*, 124 AD2d 465 [1st Dept 1986]). The court indicated that it would have allowed a second set of document requests restricted to documents that defendants had specifically requested during depositions. Therefore, we grant defendants leave to serve a proper request for production of documents.

Plaintiff's motion for summary judgment as to liability under Lacher's guaranty was supported not only by affidavits from a witness whose name plaintiff had not previously disclosed but also by numerous exhibits (*compare Williams v ATA Hous. Corp.*, 19

AD3d 406 [2d Dept 2005], and *Concetto v Pedalino*, 308 AD2d 470 [2d Dept 2003]), *with Bethlehem Steel Corp. v Solow*, 70 AD2d 850 [1st Dept 1979], *appeal dismissed* 48 NY2d 754 [1979]). We also note that the court has given defendants an opportunity to depose the previously undisclosed witness.

Defendants' argument that plaintiff failed to prove the debt underlying the guaranty is unavailing (*see e.g. Reliance Constr. Ltd. v Kennelly*, 70 AD3d 418 [1st Dept 2010], *lv dismissed* 15 NY3d 848 [2010]; *Sterling Natl. Bank v Biaggi*, 47 AD3d 436 [1st Dept 2008]). It is undisputed that defendant Law Office of Michael A. Lacher, LLP, d/b/a Lacher & Lovell-Taylor (LLT) has paid no rent from June 2006 onward, although it occupied the premises through October 31, 2006. To be sure, LLT has arguments as to why it should not have to pay rent. However, the lease states that rent is payable on the first day of the month and that "[t]he minimum rent and additional rent shall be payable by [LLT] without any set-off, abatement or deduction whatsoever." Hence, at least the minimum and additional rent was "due under the Lease," as the guaranty requires. Furthermore, the guaranty states that it "shall not be . . . affected by . . . any defense available to Guarantor" and it is an unconditional guaranty (*cf. Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d

1, 10 [1st Dept 2006], *affd* 8 NY3d 59 [2006]). Contrary to defendants' contention, a guarantor's liability may exceed the scope of the principal's liability (*Raven El. Corp. v Finkelstein*, 223 AD2d 378 [1st Dept 1996], *lv dismissed* 88 NY2d 1016 [1996]).

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

ENTERED: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9637 The People of the State of New York, Ind. 2646/09
Respondent,

-against-

Rogelio Aguasvivas-Done,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered on or about June 18, 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: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9638 Seth Fielding, Index 113572/07
Plaintiff-Appellant,

-against-

Stephanie Kupferman, et al.,
Defendants-Respondents.

_____

Gregory Antollino, New York, for appellant.

Kaufman Dolowich Voluck & Gonzo LLP, Woodbury (Brett A. Scher of counsel), respondents.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 9, 2011, dismissing the complaint, and bringing up for review an order, same court and Justice, entered July 15, 2011, which, upon reargument, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Defendants established their entitlement to judgment as a matter of law in this action alleging legal malpractice. Defendants submitted evidence showing that the divorce settlement, in which plaintiff achieved his goal of retaining the parties' marital residence, was advantageous to plaintiff, and resulted in his receiving consideration that more than compensated him for the allegedly unforeseen tax consequences of

liquidating his Keogh account (*see e.g. Kluczka v Lecci*, 63 AD3d 796, 798 [2d Dept 2009]). Defendants also submitted evidence demonstrating that the subject tax consequences were discussed with plaintiff during the course of the settlement negotiations.

In opposition, plaintiff failed to raise a triable issue of fact. His argument that if he had been properly advised on the tax consequences, he would have reached a better settlement or outcome after trial, is speculative (*see Klucka* at 798). Plaintiff failed to take into account the benefits he received in the actual settlement, including buying out his wife's share of the marital residence based on an outdated appraisal that assigned a value that was significantly lower than the actual value at the time the agreement was executed. Moreover, plaintiff failed to provide proof of any ascertainable actual damages sustained as a result of the alleged negligence (*see Lavanant v General Acc. Ins. Co. of Am.*, 212 AD2d 450 [1st Dept 1995]).

Under the circumstances presented, plaintiff's claim for disgorgement of legal fees already paid was properly dismissed (*see Reisner v Litman & Litman, P.C.*, 95 AD3d 858 [2d Dept 2012]; *compare Boglia v Greenberg*, 63 AD3d 973, 976 [2d Dept 2009]).

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

ENTERED: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román JJ.

9639 Long Island Lighting Company, Index 604715/97
Plaintiff,

KeySpan Corporation,
Plaintiff-Appellant-Respondent,

-against-

Allianz Underwriters Insurance Company, et al.,
Defendants,

American Re-Insurance Company, et al.,
Defendants-Respondents-Appellants,

Northern Assurance Company of America,
Defendant-Respondent.

_____

Covington & Burlington LLP, New York (Jay T. Smith of counsel), for appellant-respondent.

Landman Corsi Ballaine & Ford, P.C., New York (Michael L. Gioia of counsel), for American Re-Insurance Company, respondent-appellant/respondent.

Boutin and Altieri, P.L.L.C., Carmel (John L. Altieri of counsel), for Century Indemnity, respondent-appellant/respondent.

White and Williams LLP, New York (Robert F. Walsh of counsel), respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 2, 2012, which, insofar as appealed from as limited by the briefs, upon renewal, granted so much of defendants-respondents insurers' motions for summary judgment as sought a declaration that defendant-respondents have no duty to

defend or indemnify plaintiffs regarding environmental damage claims on the Bay Shore manufactured gas plant site, due to plaintiffs' failure to provide timely notice under the respective policies, but denied the motions as to the Hempstead site, unanimously modified, on the law, to deny the motions as to the Bay Shore site, vacate the declaration, and otherwise affirmed, without costs.

The record evidence establishes, as a matter of law, that LILCO failed to satisfy its obligation under the subject policies to give notice upon the happening of an occurrence "reasonably likely" to reach the excess insurance policies involving environmental contamination at both the Bay Shore and Hempstead manufactured gas plant sites (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 24 AD3d 172 [1st Dept 2005], *appeal dismissed* 6 NY3d 844 [2006]).

However, summary judgment declaring that defendant insurers have no duty to defend or indemnify plaintiffs as a result of this late notice is premature because issues of fact remain as to whether defendants waived their right to disclaim coverage based on late notice. Defendant insurers' reservation of rights, which specifically reserved, among other things, the defense of late notice, and sought additional information, did not preclude the

finding of waiver due to failure to timely issue a disclaimer. Here, additional information was provided such that a jury could determine that the insurers possessed sufficient knowledge to require that they meet the obligation to issue a written notice of disclaimer on the ground of late notice as soon as reasonably possible after first learning of the accident or of grounds for disclaimer of liability (*see Matter of Firemen's Fund Ins. Co. of Newark v Hopkins*, 88 NY2d 836, 837 [1996]). Contrary to the finding of the court below, issues of fact exist as to whether sufficient information was provided to insurers in 1995 such that their subsequent failure to issue a notice of disclaimer on the grounds of late notice, until raising it as a defense in their answers filed in 1997, resulted in a waiver (*Cf. Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 AD3d 33, 35 [1st Dept 2009]).

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

ENTERED: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9640 The People of the State of New York, Ind. 6040/08
Respondent,

-against-

Edward Saldano,
Defendant-Appellant.

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered May 12, 2010, convicting defendant, after a jury trial, of criminal sexual act in the first degree, sexual abuse in the first degree, assault in the second degree, and robbery in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

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

rape does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]). The testimony of the officer who arrived at the scene while the incident was still in progress strongly supported the victim's claim that the sexual encounter was forcible. Defendant's challenge to the physical injury element of the assault count is unavailing (*see People v Chiddick*, 8 NY3d 445, 447 [2007]).

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

ENTERED: MARCH 26, 2013

CLERK

Gonzalez, J.P., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9641 Quedan Construction Services, Inc., Index 600756/09
Plaintiff-Appellant,

-against-

Weinman Bros., Inc.,
Defendant-Respondent.

_____

Kevin E. Rockitter, Woodbury, for appellant.

Steven S. Sieratzki, New York, for respondent.

_____

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered April 19, 2012, dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to preserve its claim that the trial court prematurely dismissed its unjust enrichment claim. In any event, the dismissal before trial was appropriate, since plaintiff was required, at trial, to make an election between its alternative theories of recovery "'at a time within the discretion of the Trial Judge'" (*see Wilmoth v Sander*, 259 AD2d 252, 254 [1st Dept

1999]). Plaintiff failed to prove a prima facie case on its breach of contract cause of action, since it did not adduce evidence of the value of the work it had performed above the $290,000 it had already been paid.

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

ENTERED: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9643 The People of the State of New York, Ind. 10096/95
Respondent,

-against-

Esau Staley,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Carol Berkman, J.), entered on or about October 15, 2010, which adjudicated defendant a level three sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

We reject defendant's argument that he was improperly subjected to SORA's registration requirements, including risk level classification, because his transfer to federal from state prison to serve a sentence for a federal crime allegedly did not constitute "release" within the meaning of SORA. Under the statute's plain language, the registration requirements are triggered upon "release from any state or local correctional facility, hospital or institution" (Correction Law 168-f[1]),

without regard to whether an inmate will be subject to supervision or incarceration in another jurisdiction.

Defendant also challenges assessments under several risk factors, asserting that instead of 140 points, his correct point score should be 110. Defendant concedes that the reduced score would still support a level three adjudication, but argues that he should receive a discretionary downward departure. Regardless of whether defendant's correct point score is 140 or 110, we find no basis for a downward departure (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US, 130 S Ct 552 [2009]; *People v Mingo*, 12 NY3d 563, 568 n 2 [2009]), particularly in light of the egregious circumstances of the underlying sex crime.

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

ENTERED: MARCH 26, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9644N Marriott International, Inc., et al.,
Plaintiffs-Respondents,

-against-

Eden Roc, LLLP,
Defendant-Appellant.

Index 653590/12

_____

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for appellant.

Venable LLP, New York (Edward P. Boyle of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about November 7, 2012, which granted plaintiffs' motion for a preliminary injunction and set an undertaking in the amount of $400,000, unanimously modified, on the law, to the extent of vacating the injunction, and otherwise affirmed, without costs.

In this action for breach of contract between plaintiff hotel manager and defendant hotel owner, plaintiff seeks to maintain the status quo by precluding defendant from interfering with its management of the hotel. The parties' detailed management agreement places full discretion with plaintiffs to manage virtually every aspect of the hotel. Such an agreement,

in which a party has discretion to execute tasks that cannot be objectively measured, is a classic example of a personal services contract that may not be enforced by injunction (*see e.g. Wien & Malkin LLP, v Helmsley-Spear, Inc.*, 12 AD3d 65, 71-72 [1st Dept 1991], *revd on other grounds*, 6 NY3d 471 [2006][property management agreement a personal services contract]; *Woolley v Embassy Suites, Inc.*, 227 Cal App 3d 1520, 1534, 278 Cal Rptr 719 [Cal App 1st Dist 1991]; Restatement 2d of Contracts, § 367).

While it is unnecessary to reach the question, we note that, contrary to defendant's contention, the agreement is not an agency agreement. Defendant lacks control over plaintiff, the alleged agent, since the agreement provides for plaintiff to have unfettered discretion in managing the hotel's operations (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 96-97 [1st Dept 2009]).

Defendant failed to present evidence that the $400,000 undertaking was not rationally related to its potential damages (*Kazdin v Putter*, 177 AD2d 456 [1st Dept 1991].

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

ENTERED: MARCH 26, 2013

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8358 Rhonda Wittorf, Index 103233/06
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered August 17, 2011, which, inter alia, granted defendant's motion to set aside the jury verdict on the ground that plaintiff failed to establish a prima facie case, affirmed, on the law, without costs.

On November 5, 2005, plaintiff and her boyfriend rode their bicycles to the entrance of the Central Park transverse road at West 65th Street, where a City Department of Transportation (DOT) crew supervisor was in the process of setting up warning cones to close off both lanes of the road to vehicular traffic before starting to repair a "special condition" in the transverse. The supervisor testified that a "special condition" was a defect "bigger than a pothole" but "less involved" than road resurfacing.

Plaintiff's boyfriend asked the supervisor if they could ride through, and he told them "go ahead." Although plaintiff's boyfriend crossed the transverse safely, plaintiff was injured when she struck a large pothole.

The jury found that the roadway where the accident occurred was not in a reasonably safe condition. However, the City could not be held liable on that basis because the jury found that the City had not received timely written notice of the particular defect and did not cause or create the condition by an affirmative act of negligence. The sole basis for the City's liability was the jury's findings that the supervisor was negligent in allowing plaintiff to enter the transverse and that his negligence was a substantial factor (60%) in causing plaintiff's injuries.

The trial court orally denied plaintiff's motion to set aside the verdict on prior written notice, cause and create, comparative negligence (40%) and additur. Subsequently, the trial court granted defendant's written motion pursuant to CPLR 4404 to set aside the verdict on the ground that the City was immune from liability because the supervisor was engaged in the

discretionary governmental function of traffic control, not the proprietary function of street repair, when he allowed plaintiff to proceed.

"'Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general'" (*Valdez v City of New York*, 18 NY3d 69, 76-77 [2011], quoting *McLean v City of New York*, 12 NY3d 194, 203 [2009]). Accordingly, "even if a plaintiff establishes all elements of a negligence claim, a state or municipal defendant engaging in a governmental function can avoid liability if it timely raises the defense and proves that the alleged negligent act or omission involved the exercise of discretionary authority" (*id.* at 76; *see also McLean* at 202). In contrast, when performing a proprietary function, the governmental entity is generally subject "to the same duty of care as private individuals and institutions engaging in the same activity" (*Schrempf v State of New York*, 66 NY2d 289, 294 [1985]).

"A governmental function generally is defined as one 'undertaken for the protection and safety of the public pursuant

to the general police powers'" (*Murchinson v State of New York*, 97 AD3d 1014, 1016 [3rd Dept 2012], quoting *Balsam v Delma Eng'g Corp.*, 90 NY2d 966, 968 [1997]). A proprietary function is one in which "governmental activities essentially substitute for or supplement traditionally private enterprises"(*Sebastian v State of New York*, 93 NY2d 790, 793 [1999] [internal quotation marks omitted]).

"'A governmental entity's conduct may fall along a *continuum of responsibility* to individuals and society deriving from its governmental and proprietary functions . . . [and] any issue relating to the safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the State's alleged negligent action falls into, either a proprietary or governmental category'" (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 446 [2011], *cert denied* _ US_, 133 S Ct 133 [2012], quoting *Miller v State of New York*, 62 NY2d 506, 511-512 [1984]). In performing this analysis, a court must examine "the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred . . . , not whether the agency involved is engaged generally in proprietary activity or is in

control of the location in which the injury occurred" (*Miller* at 513 [internal quotation marks omitted]; *see also Matter of World Trade Ctr. Bombing Litig.* at 447).

The dissent believes that the City must be held liable for the supervisor's failure to warn her of the dangerous condition in the transverse, or for his negligently waving her into a place of danger, because those acts were integrally related to the pothole repair undertaken by the City in a proprietary capacity. However, at the time of plaintiff's accident, the repair work had not begun, and the supervisor was engaged in traffic control, which is "a classic example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers" (*see Balsam v Delma Eng'g Corp.*, 90 NY2d at 968; *see also Santoro v City of New York*, 17 AD3d 563 [2005]; *Devivo v Adeyemo*, 70 AD3d 587 [1st Dept 2010]). Thus, the City is entitled to governmental function immunity because the specific act or omission that caused plaintiff's injuries was the supervisor's discretionary decision to allow plaintiff to proceed since his crew had not completed its preparations for the road work, and not the City's proprietary function in maintaining the

roadway (*see Clinger v New York City Tr. Auth.*, 85 NY2d 958, 959 [1995]; *Kadymir v New York City Tr. Auth.*, 55 AD3d 549, 552 [2nd Dept 2008]). When plaintiff encountered the supervisor, he was not at the entrance of the transverse to repair potholes; the repair was to take place later, under the second overpass, which, according to plaintiff's boyfriend, was a "good distance" away. The fact that the supervisor was a DOT employee and not a police officer is of no consequence. Controlling traffic is a governmental function.

Plaintiff also argues that the jury's finding that the City had not received written notice of the roadway condition was against the weight of the credible evidence. Plaintiff asserts that there was written notice of the defect as far back as July 13, 2005, nearly four months before her accident.

Administrative Code of City of NY § 7-201(c)(2) requires plaintiffs to show that the City received prior written notice of the alleged defect to maintain an action. The notice must

designate the specific defect alleged in the complaint (*see Belmonte v Metropolitan Life Ins. Co.*, 304 AD2d 471, 474 [1st Dept 2003]), and the awareness of one defect in the area is inadequate notice of another defect that caused the accident (*see Roldan v City of New York*, 36 AD3d 484 [1st Dept 2007]).

Weighing the documentary evidence related to the purported written notice, which addressed defects in the eastbound lane, in conjunction with the testimony of plaintiff and the supervisor with respect to the location of the pothole that caused the accident, the jury could rationally conclude that the City did not have the requisite prior written notice of the specific roadway defect (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). The supervisor testified at his deposition that he remembered that the subject pothole was in the westbound, not the eastbound, lane of the transverse, and that the memory was "frozen" in his mind. Plaintiff testified that she was closer to the yellow line than her boyfriend while traveling in the

eastbound lane and had just moved to the left when she encountered the pothole. The jury was free to resolve the conflicts in the evidence and the issues of credibility in defendant's favor (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206, 207 [1st Dept 2004]).

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

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

On the date of the accident, plaintiff and a companion rode their bicycles to the entrance of the Central Park transverse road at West 65th Street. When they arrived at the transverse, a City Department of Transportation (DOT) employee, who had been sent to the area to repair damaged sections of roadway in the transverse, was in the process of blocking the entrance to vehicular traffic. Plaintiff's companion asked the DOT employee if they could cross the park using the transverse, and the employee allowed them to proceed.

Although her companion crossed the transverse unharmed, plaintiff struck a large pothole, sustaining severe facial injuries, including fractures of her upper jaw bone, the loss of four front teeth, and avulsion injuries of her lips, chin, nose and face, requiring, to date, more than 21 surgeries to repair. Plaintiff alleges that the injuries she sustained were caused by the negligence of the DOT worker who permitted her to cross the park, knowing that there was a defect in the transverse, without providing adequate warning of the hazard. After the jury found that the DOT worker's conduct was negligent and proximately caused plaintiff's injuries, the court granted defendant's motion pursuant to CPLR 4404 to set aside the verdict on the ground that

the City was immune from liability since the DOT worker's conduct involved a discretionary act in connection with a governmental function. The majority now affirms.

It is well settled that the City may be held liable for negligence in the exercise of its "proprietary duty" to keep the roads and highways under its control in a reasonably safe condition (*see Balsam v Delma Eng'g Corp.*, 90 NY2d 966 [1997]; *Friedman v State of New York*, 67 NY2d 271, 283 [1986]), and that the duty to maintain the roads includes an obligation to adequately warn users of "existing hazards" in the road (*see Hicks v State of New York*, 4 NY2d 1, 7 [1958]; *Alexander v Eldred*, 63 NY2d 460, 463-464 [1984]; *Levine v New York State Thruway Auth.*, 52 AD3d 975, 976-977 [3rd Dept 2008]).

"It is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability, not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred" (*Miller v State of New York*, 62 NY2d 506, 513 [1984] [internal quotation marks omitted]). In this case, the DOT employee's claimed negligent act or omission was permitting plaintiff to use the roadway without providing any warning of a known dangerous

condition. That conduct occurred while he was engaged in physical maintenance of the road, a proprietary act (*see Levine* at 976-977; *Grant v Ore*, 284 AD2d 302, 303 [2d Dept 2001]; *compare Balsam*, 90 NY2d at 968 ["No claim is made here that the police were charged with the responsibility to physically maintain the property (an icy road) where plaintiff's accident occurred"]).

In my opinion, the majority takes too narrow a view of governmental functions. The majority focuses on the DOT employee's actions in waving plaintiff and her companion through, rather than on the roadway activity the crew had been dispatched to perform, which clearly falls along the continuum of a proprietary function. The decision to allow plaintiff to proceed along the transverse cannot be viewed separately from the City's proprietary function in maintaining the roadway. Here, the DOT employee was in the process of barricading an entrance to the traverse, an activity integral to his overall assignment of repairing hazardous roadway conditions. The fact that the specific function of barricading a street as part of a maintenance project might be one performed by a police officer, in my view, is not determinative of the governmental or proprietary nature of the activity. The DOT employee was not

engaged in a traffic control exercise but rather was performing an act integral to his roadway maintenance duties. Accordingly, I would reverse the trial court's order and reinstate the jury verdict.

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

ENTERED: MARCH 26, 2013

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8407 In re Arlene Allen, Index 402322/10
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

Kelly D. Macneal, New York (Maria Termini of counsel), for appellant.

Arlene Allen, respondent pro se.

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Order and judgment (one paper), Supreme Court, New York County (Emily Jane Goodman, J.), entered March 4, 2011, inter alia, granting the petition to the extent of vacating the April 14, 2010 determination of respondent New York City Housing Authority (NYCHA), which terminated petitioner's tenancy, and remanding the matter to NYCHA for imposition of a lesser penalty, if any, unanimously vacated, the proceeding treated as if it had been transferred to this Court for de novo review pursuant to CPLR 7804(g), and, upon such review, the determination of respondent, unanimously modified, on the law, to the extent of vacating the penalty, and the matter remanded to respondent for the imposition of a lesser penalty, and otherwise affirmed, without costs.

Review of the record shows that respondent NYCHA's

determination that petitioner violated the permanent exclusion stipulation was supported by substantial evidence and has a rational basis in the record (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). However, in light of the particular circumstances presented here, we find that the penalty of eviction is shocking to one's sense of fairness (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 233 [1974]). Petitioner, who is over 70 years old, has lived in the subject building for more than 35 years with no record of any prior offenses. Nothing in the record suggests that she now presents any risk to the other tenants or to NYCHA's property. Moreover, petitioner was in the process of applying for removal of the permanent exclusion prior to the hearing. The record shows that the hearing officer discussed this with petitioner and received petitioner's supporting documentation in evidence, yet issued a determination to terminate the tenancy prior

to, and without any consideration of, the merits pertaining to the tenant's application for removal of the permanent exclusion. Accordingly, on remand, NYCHA should determine an appropriate lesser penalty.

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

ENTERED: MARCH 26, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8783 Lucy Mimran, Index 308754/07
Plaintiff-Appellant-Respondent,

-against-

David Mimran,
Defendant-Respondent-Appellant.

_____

William S. Beslow, New York, for appellant-respondent.

Cohen Clair Lans Greifer & Thorpe LLP, New York (Bernard E. Clair of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Sara Lee Evans, J.), entered December 7, 2011, which, among other things, dissolved the parties' marriage and divided the marital property, awarding plaintiff a distributive award of $3,768,921.50, and brings up for review an order, same court and Justice, dated May 2, 2011, which, insofar as appealed from as limited by the briefs, placed a value of $32,603 on the defendant's interest in certain family-controlled business enterprises; found plaintiff's equitable interest in one of defendant's investments to be $1.25 million; imputed to the defendant annual income of $650,000 per year for purposes of calculating child support; and declined to allocate the parties' liabilities extant on the day that plaintiff commenced the divorce action, unanimously modified, on the facts, to increase the

distributive award to plaintiff to $7,406,421.50, to be paid in three equal installments, and otherwise affirmed, without costs.

The record presented no evidence demonstrating that defendant's interest in his family's businesses was $250 million dollars. The only evidence presented that purported to demonstrate such an interest was a document, one of the pages of which was marked "Draft" and appeared to be incomplete. Further, the record evidence did not demonstrate that the document had ever been submitted to any financial institution.

There is no merit to plaintiff's position that the court should have awarded a greater amount of child support than was awarded in the final judgment. Based on the record, the court properly imputed $650,000 in income to defendant and properly based the child support award on that amount (Domestic Relations Law § 240[1-b][b][5]).

The trial court erred when it limited plaintiff's distributive award with respect to the Breeden investments to the sum of $1,250,000, representing one half of the $2,500,000 in liquidation proceeds that defendant retained and invested in Mirman Schur, a start-up movie company. Between May 2006 and June 2007, defendant made a $26,550,000 investment in three Breeden entities: Breeden Capital Management (BCM), Breeden Capital Partners, LLC (BCP), and

Breeden Partners (Cayman) Ltd. (Breeden Cayman). To fund the investment, defendant used $8,250,000 from the proceeds of the sale of the parties' marital residence on Central Park West and borrowed the rest. In 2008, defendant effectively liquidated his investment in Breeden Cayman for $18,600,000. Between March 2009 and January 2010, he liquidated his interests in BCP and BCM for $6,675,000 and $2,800,000, respectively. Thus, by January 2010, defendant had received from his Breeden investments a total of $28,075,000.

Because $8,250,000 in marital property was used to fund the Breeden investments, plaintiff should have been awarded the sum of $4,125,000 from the liquidation proceeds, representing her half-interest, under the parties' post-nuptial agreement, in the proceeds from the sale of the Central Park West apartment. Further, because defendant invested $26,550,000 and received $28,075,000, plaintiff is entitled to an additional $762,500, representing half of the $1,525,000 gain.

Accordingly, we modify to increase the distributive award with respect to the Breeden funds to $4,887,500 from $1,250,000, a net increase of $3,637,500. This raises the total distributive award to $7,406,421.50.

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, Román, JJ.

9384 Morrisania Towers Housing Company Limited Partnership, et al., Plaintiffs-Respondents, Index 116364/10

-against-

Lexington Insurance Company, Defendant-Appellant.

_____

Lewis Brisbois Bisgard & Smith LLP, New York (David M. Pollack of counsel), for appellant.

Jaffe & Asher, LLP, New York (Marshall T. Potashner of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about April 3, 2012, which denied defendant's motion to dismiss the complaint, and granted plaintiffs' cross motion for summary judgment declaring that defendant is obligated to defend and indemnify plaintiffs Morrisania Towers Housing Company Limited Partnership and NHPMN Management, LLC in the underlying personal injury action, and that the coverage under the policy issued by plaintiff Liberty Mutual Insurance Company is excess to the coverage under the policy issued by defendant, and so declared, unanimously affirmed, with costs.

The June 8, 2005 letter by which the underlying plaintiff's counsel first notified Morrisania of the claim against it stated

that the underlying plaintiff sought damages for personal injuries he sustained due to the negligent ownership, operation, and control of Morrisania's premises, which were managed and operated by NHPMN. By making specific reference to NHPMN's functions, i.e., operation and control, with respect to the premises, this letter constituted a written claim against NHMPN as well.

Although the notice provisions of the insurance policy issued by defendant were set forth under the caption, "Insuring Agreement," the notice requirement was a condition precedent to coverage, not an element of coverage (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]). Thus, the requirement was waivable, and the motion court correctly found that defendant waived it. Defendant had all the information it needed to disclaim coverage based on late notice as of June 8, 2009, the date on which it received the tender letter from counsel for Morrisania and NHMPN (which had learned five days earlier that a policy naming them as additional insureds had been issued by defendant to nonparty McRoberts Protective Agency, Inc., the company that provided security services at the premises). However, defendant did not issue a disclaimer letter until July 30, 2010, nearly 13 months later, and it offered no

justification for the delay (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64 [2003]; *Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 408-409 [1st Dept 2010]).

In contract to the policy issued by defendant, the Liberty Mutual policy states, "We will pay those sums in excess of the 'Self-Insured Amount' that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'property damage' to which this excess insurance applies." Moreover, the Liberty Mutual policy "expressly negates contribution with other carriers, [and] manifests that it is intended to be excess over other excess policies" (*see State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 375-76 [1985]). Thus, coverage under the Liberty Mutual policy is excess over all other coverage, including other excess coverage, and the policy was not intended to apply until after the exhaustion of the limits of the policy issued by defendant.

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9606 The People of the State of New York, Ind. 2301/08
Respondent,

-against-

Wilbert Wilson,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Eunice C. Lee of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Maximillian S. Shifrin of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered May 18, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. In a known drug location, the police saw defendant, for no apparent reason, quickly entering and leaving a car containing other men. Defendant then placed a clear plastic bag containing a white object in his pocket, and an officer reasonably believed this object to be cocaine on the basis of his training and experience. This provided, at least, reasonable suspicion for

defendant's detention (*see People v Valentine*, 17 NY2d 128, 132 [1966]; *People v DiMatteo*, 62 AD3d 418 [1st Dept 2009]; *People v Alexander*, 218 AD2d 284 [1st Dept 1996], *lv denied* 88 NY2d 944 [1996]), even though the police did not see a transfer of money.

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9607 Elba Torres, as the Administratrix of the Estate of Crystal I. Reyes, et al., Plaintiffs-Respondents,

-against-

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

The Wildlife Conservation Society, Defendant.

Index 303086/11

_____

Michael A. Cardozo, Corporation Counsel, New York (Jessica Wisniewski of counsel), for appellants.

Law Offices of Stephen B. Kaufman, P.C., Bronx (John V. Decolator of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 2, 2012, which, insofar as appealed from as limited by the briefs, denied the motion of the municipal defendants (City) for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Dismissal of the complaint as against the City is warranted in this action where the 14-year-old decedent drowned after she and friends scaled a fence, ignored signs prohibiting swimming,

and entered into the Bronx River, which runs through River Park, even though she did not know how to swim. Although the City has a duty to maintain its property in a reasonably safe condition, in view of all the circumstances (*see Basso v Miller*, 40 NY2d 233, 241 [1976]), "the duty to take reasonable precautions does not extend to open and obvious conditions that are natural geographic phenomena which can readily be observed by those employing the reasonable use of their senses" (*Cohen v State of New York*, 50 AD3d 1234, 1235 [3d Dept 2008], *lv denied* 10 NY3d 713 [2008] [internal quotation marks omitted]; *see Fox v Central Park Boathouse, LLC*, 71 AD3d 598 [1st Dept 2010]).

Here, the risk of drowning at the location of the river where the decedent drowned was open and obvious, particularly to a non-swimmer *(see Melendez v City of New York*, 76 AD3d 442 [1st Dept 2010]). The presence of debris and tree branches in the

river was a natural, transitory occurrence in a river (*see e.g. Herman v State of New York*, 63 NY2d 822 [1984]). Contrary to the motion court's determination, further discovery is unnecessary since the dangers and risks posed by swimming in the river were apparent.

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9608 In re Bryant C., Jr.,

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

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Neal D. Futerfas, White Plains, for appellant.

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

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 30, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed an act that, if committed by an adult, would constitute the crime of robbery in the second degree, and placed him on enhanced supervision probation for 18 months, directed restitution and ordered three months of drug testing, unanimously affirmed, without costs.

The court properly denied appellant's motion to suppress physical evidence and a showup identification as fruits of an allegedly unlawful entry into an apartment. Exigent circumstances justified the warrantless entry (*see People v McBride*, 14 NY3d 440, 445-446 [2010], *cert denied* __US__, 131 S

Ct 327 [2010]). The police were in close pursuit of fleeing suspects who had just been identified by the victim as the robbers who had threatened to stab and shoot him. Police officers saw the suspects and a third person entering a building, and one of the officers saw a suspect entering a particular apartment. The fact that the person who came to the door was not one of the suspects did not dispel the exigency; in any event, one of the suspects was visible just inside the apartment. Once the police lawfully entered the apartment, they were justified in conducting a security sweep (*see Maryland v Buie*, 494 US 325 [1990]). This led to the arrest of appellant, and the recovery of the victim's property, which was in plain view.

We have considered and rejected appellant's arguments concerning the court's conduct and rulings at the suppression hearing. Appellant was not deprived of a fair hearing.

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

The disposition was the least restrictive alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), and there is no reason to modify it in any respect.

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9609 HSBC Bank USA, National Association, Index 152194/12
Plaintiff-Respondent,

-against-

Community Parking Inc.,
Defendant,

Elida Pena,
Defendant-Appellant.

_____

Joseph A. Altman, Bronx, for appellant.

Sankel, Skurman & McCartin, LLP, New York (Claudio Dessberg of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 19, 2012, which granted plaintiff's motion for summary judgment in lieu of complaint against defendants Community Parking Inc. and Elida Pena and directed entry of judgment in the principal amount of $95,000, plus interest from August 24, 2011, unanimously modified, on the law, the motion denied as to defendant Pena, the matter remanded for further proceedings, and otherwise affirmed, without costs.

In support of its motion for summary judgment in lieu of complaint, plaintiff submitted a business credit application containing a personal guaranty, apparently signed by defendant Pena on behalf of the corporate defendant and on her own behalf

as guarantor. In opposition, defendant Pena submitted an affidavit denying that she had signed the credit application on behalf of defendant Community Parking, her husband's company, or on her own behalf, and submitted examples of her signature on her New Jersey state identification card, Social Security card, and checks. There are a few differences between the signature on the credit application and those on the exemplars provided by Pena that are sufficiently significant, even to an untrained eye, to raise a triable issue of fact as to the authenticity of the signature on the credit application (*see TD Bank, N.A. v Piccolo Mondo 21st Century, Inc.*, 98 AD3d 499, 500-501 [2d Dept 2012]; *Poughkeepsie Sav. Bank v Tyson*, 170 AD2d 818, 820 [3d Dept 1991]). An expert's opinion was not required to establish a triable issue of fact regarding the forgery allegation (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004]; *see also Diplacidi v Gruder*, 135 AD2d 395 [1st Dept 1987]). Notably, the signature on the credit application was not witnessed or notarized, so that no presumption of authenticity arises from the signature itself (*TD Bank* at 500-501; *compare Seaboard Sur. Co. v Earthline Corp.*, 262 AD2d 253 [1st Dept 1999]). Nor did plaintiff provide any evidence concerning the circumstances surrounding the execution of the application, or

establish that defendant Pena engaged in any prelitigation conduct that was so inconsistent with her claim of forgery as to establish its entitlement to summary judgment as a matter of law.

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9612-
9612A Mot Parking Corp., Index 102797/09
Plaintiff-Respondent,

-against-

86-90 Warren Street, LLC,
Defendant-Appellant.

_____

Judith M. Brener, New York (Jeffery M. Goldman of counsel), for appellant.

Kaiser Saurborn & Mair, P.C., New York (David N. Mair of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered January 13, 2012, against defendant in favor of plaintiff in the amount of $108,546.47, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered December 15, 2011, which granted plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

General Obligations Law § 15-301(1) states that "[a] written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an *executory* agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is

sought or by his agent" (emphasis added). The statute does not apply to an *executed* agreement (*see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]). In this case, the parties' December 2007 oral agreement was executed, not executory. Therefore, it was enforceable, notwithstanding the no-oral-modification clause in the lease.

Defendant failed to raise a triable issue of fact as to whether plaintiff's vice president, Martin Lipson, and defendant's then in-house leasing agent, Ron Longstreet, reached an oral agreement in December 2007. In opposition to plaintiff's motion, defendant submitted an affidavit from its general counsel, Judith M. Brener, denying the existence of an oral agreement. However, as the motion court noted, Brener had no personal knowledge of the negotiations between Lipson and Longstreet (*see GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 968 [1985]). Defendant neither submitted an affidavit from Longstreet nor explained in its opposition (as opposed to oral argument) why it could not obtain such an affidavit. Further, it never argued before the motion court that there may exist undisclosed facts essential to its opposition (*see* CPLR 3212[f]); on the contrary, it cross-moved for summary judgment. Both plaintiff's motion and defendant's cross motion were made months

after the filing of the note of issue and certificate of readiness for trial. Accordingly, defendant cannot now invoke CPLR 3212(f) to avoid summary judgment (*cf. Rosenthal v Manufacturers Hanover Trust Co.*, 30 AD2d 650 [1st Dept 1968]).

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, Degrasse, Richter, Gische, JJ.

9613 The People of the State of New York, Ind. 172/11
Respondent,

-against-

Eric Delarosa,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York (Renee A. White, J.), rendered on or about June 28, 2011, 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: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9614 Winkeya Windley, Index 100182/05
Plaintiff-Respondent, 590681/08

-against-

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

The New York City Transit Authority,
Defendant-Respondant.

- - - - -

New York City Transit Authority,
sued herein as The New York City
Transit Authority,
Third-Party Plaintiff-Respondent,

-against-

4761 Broadway Associates, LLC,
Third-Party Defendant-Appellant.

_____

Mauro Lilling Naparty LLP, Woodbury (Timothy J. O'Shaughnessy of counsel), for appellant.

Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about July 25, 2012, which denied third-party defendant 4761 Broadway Associates, LLC's motion for summary judgment, unanimously modified, on the law, to grant the motion insofar as it seeks dismissal of defendant New York City Transit Authority's common-law indemnification claim, and otherwise affirmed, without costs.

4761 Broadway and the Transit Authority were parties to a prior action in which the plaintiff allegedly slipped on the same stairway at issue here. In the prior action, 4761 Broadway moved for summary judgment on the grounds that it did not have a duty to maintain the staircase, and that such duty was owed by the Transit Authority. The Transit Authority did not oppose that motion, and Supreme Court granted it, holding that 4761 Broadway "demonstrated that they do not own or control or maintain the subject stairway."

The Transit Authority is collaterally estopped from relitigating the issue of whether 4761 Broadway owns, controls or maintains the subject stairway. The Transit Authority had the requisite full and fair opportunity to litigate the issue in the prior action, but it failed to do so, and it has not offered any explanation for this failure (*see Academic Health Professionals Ins. Assn. v Lester*, 30 AD3d 328, 329 [1st Dept 2006]). Further, there is no indication that the Transit Authority sought to vacate or appeal the prior order. Under the circumstances, the Transit Authority "willfully and deliberately refuse[d] to participate" in the prior action (*Matter of Abady*, 22 AD3d 72, 85 [1st Dept 2005]), and collateral estoppel applies notwithstanding its default (*id.* at 83-85). Accordingly, Transit Authority's

common-law indemnification claim, predicated on 4761 Broadway's alleged control over and ownership and maintenance of the stairway, should have been dismissed.

However, Transit Authority's contractual indemnification claim, based on a 1926 agreement between the Transit Authority's predecessor-in-interest and 4761 Broadway's predecessor-in-interest, should not be dismissed. Pursuant to the agreement, 4761 Broadway may have a contractual duty to indemnify the Transit Authority for liability arising from plaintiff's fall upon the stairway. This issue was never litigated or decided in the prior action and therefore it is not subject to collateral estoppel (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-456 [1985]). Further, 4761 Broadway is not entitled to summary judgment on this issue, because a question of fact exists as to whether the Transit Authority abandoned the agreement. Indeed, the maintenance records and cleaning schedule that 4761 Broadway submitted in support of its motion do not evince the Transit Authority's clear and unequivocal repudiation or abandonment of the agreement (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]; *EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 49 [1st Dept 2004], *lv dismissed* 3 NY3d 656 [2004], *lv denied* 3 NY3d 607 [2004]).

Moreover, the issue of abandonment is intrinsically factual (*see Fundamental Portfolio Advisors, Inc.*, 7 NY3d at 104) and cannot be resolved on this motion, particularly since the Transit Authority is entitled to have all reasonable inferences drawn in its favor (*see id.* at 105-106).

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9616 Arch Specialty Insurance Company, Index 601961/09
Plaintiff-Respondent,

-against-

Kam Cheung Construction, Inc.,
Defendant-Appellant.

_____

Kushnick Pallaci, PLLC, Melville (Lawrence A. Kushnick of counsel), for appellant.

Goldberg Segalla LLP, Albany (Matthew S. Lerner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 23, 2012, which denied defendant's motion for summary judgment, granted plaintiff's cross motion for summary judgment, and declared the subject policy of insurance void, unanimously affirmed, without costs.

Defendant's misrepresentation on its application was material as a matter of law because, had the insurer known the true facts, it would have refused "to make such contract" (Insurance Law § 3105[b][1]) either by not issuing the policy or by charging a higher premium (*see Interested Underwriters at Lloyd's v H.D.I. III Assoc.*, 213 AD2d 246 [1st Dept 1995]; *see also Matter of Union Index. Ins. Co. of N.Y.*, 89 NY2d 94, 106-107 [1996]). The affidavit of the insurer's underwriter and the

rating guidelines used by its underwriters were sufficient proof of its underwriting practices to demonstrate that, had the true facts been known, the policy would not have been issued for the premium charged (*see Kiss Constr. NY, Inc. v Rutgers Caves. Ins. Co.*, 61 AD3d 412, 414 [1st Dept 2009]). In view of the foregoing, we need not address defendant's claim for attorneys' fees.

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9618 Marilyne Cartagena, Index 310342/09
Plaintiff-Respondent,

-against-

John P. Girandola,
Defendant-Appellant.

_____

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for appellant.

The Flomenhaft Law Firm, PLLC, New York (Stephen D. Chakwin, Jr., of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered January 30, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiff's cross motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

In this action for personal injuries, plaintiff established her entitlement to judgment as a matter of law on the issue of liability. She testified, without contradiction, that while crossing the street in the crosswalk, with the light in her favor

and after looking for oncoming traffic, defendant's truck struck her while making a left turn. Defendant failed to raise an issue of fact as to plaintiffs comparative negligence.

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9619 Pierre Bernard, Index 111756/06
Plaintiff-Respondent,

-against-

Rick Sayegh, M.D., et al.,
Defendants-Appellants.

Cabrini Medical Center, et al.,
Defendants,

_____

Voute, Lohrfink, Magro & McAndrew, LLP, White Plains (Brian D. Meisner of counsel), for Rick Sayegh, M.D., appellant.

Gordon & Silber, P.C., New York (Meredith Cook Lander of counsel), for Sebastiano Cassaro, M.D., appellant.

Pellegrini & Associates, LLC, New York (Frank L. Pellegrini of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered May 15, 2012, which, in this medical malpractice action, to the extent appealed from as limited by the briefs, denied defendants-appellants' motions to dismiss pursuant to CPLR 3211(a)(5), unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment dismissing the complaint as against defendants-appellants.

The general release states that consideration provided by defendant hospital constituted "complete payment for all damages and injuries" and was intended to release not only the hospital

but also, "whether presently known or unknown, all tortfeasors liable or claimed to be liable jointly with the [hospital]; and, whether presently known or unknown, all other potential or possible tortfeasors liable or claimed to be liable jointly with the [hospital]."

The action should have been dismissed as against defendants-appellants based on the unambiguous language in the release, which clearly intended to put an end to the action (*see Wells v Shearson Lehman/American Express*, 72 NY2d 11, 23 [1988]; *Rodriguez v Saal*, 51 AD3d 449, 450 [1st Dept 2008]). Given the unambiguous terms of the release, the motion court should not have considered extrinsic evidence (*see Wells*, 72 NY2d at 24; *Rodriguez*, 51 AD3d at 450) — namely, the stipulation of settlement of the action with the hospital, filed in connection with the hospital's bankruptcy proceedings. The general release does not refer to the stipulation, which was executed more than a month before the general release and negotiated during bankruptcy proceedings in federal court (*compare Rodriguez*, 51 AD3d at 450, *with BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 852 [1st Dept 1985]).

We reject plaintiff's argument that the appeal is moot. Plaintiff never sought permission from the motion court to reform

the general release (*see Ribacoff v Chubb Group of Ins. Cos.*, 2 AD3d 153, 154 [1st Dept 2003]). Moreover, absent evidence from the hospital that there was any mutual mistake, the reformed general release, executed after entry of the order under review, will not be considered (*id.*). Further, plaintiff never argued before the motion court that the stipulation of discontinuance of the action against the hospital and another doctor renders this controversy moot. Accordingly, we decline to consider this claim (*see Sonnenschein v Douglas Elliman-Gibbons & Ives*, 96 NY2d 369, 376-377 [2001]).

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9620 Mary L. Ho, etc., Index 104998/10
Plaintiff-Appellant-Respondent,

-against-

Greenwich Insurance Company,,
Defendant-Respondent-Appellant.

_____

Law Office of Stephen K. Seung, New York (Robert Nizewitz of counsel), for appellant.

Pillinger Miller Tarallo, LLP, Elmsford (Adam T. Newman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered August 2, 2011, which, inter alia, denied the parties' motions for summary judgment, unanimously affirmed, without costs.

In determining whether fire was the direct cause of damage to plaintiff's building, and thus whether the loss is covered, the insurer is liable for every loss which necessarily follows from the fire or arises by necessity from incidents and surrounding circumstances (*see Throgs Neck Bagels v GA Ins. Co. of N.Y.*, 241 AD2d 66, 70 [1st Dept 1998]).

Here, however, based upon the conflicting affidavits of the parties' experts, the motion court properly found issues of fact as to whether the insured's loss necessarily followed from the

fire two doors and twenty or so feet away, causing the collapse of 109 East Broadway, the demolition of the adjacent building 107 East Broadway, and the purported structural weakening of 105 East Broadway.

For the reasons noted above, issues of fact also preclude a finding as a matter of law that the insurer's exclusion for enforcement of an "ordinance or law" was not applicable to plaintiff's fire loss claim (*see Throgs Neck Bagels Inc.*, 241 AD2d at 67).

Plaintiff's property damage claim does not fall within the ambit of Insurance Law § 3420[d] (*see Scappatura v Allstate Ins. Co.*, 6 AD3d 692 [2d Dept 2004].

We have considered all other contentions and find them to be without merit.

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9621 The People of the State of New York, Ind. 3151/01
Respondent,

-against-

Craig Benton,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered October 26, 2011, resentencing defendant to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9622-
9622A FIMBank P.L.C., Index 650715/12
Plaintiff-Appellant,

-against-

Woori Finance Holdings Co. LTD., et al.,
Defendants-Respondents.

_____

Sullivan & Worcester LLP, New York (Michael T. Sullivan of counsel), for appellant.

Burke & Parsons, New York (Stephen P. Kyne of counsel), for Woori Finance Holdings co., LTD., and Woori Bank, respondents.

Choi & Park, LLC, New York (Chull S. Park of counsel), for Kwangju Bank LTD., respondent.

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Orders, Supreme Court, New York County (Barbara R. Kapnick, J.), entered September 14, 2012, which granted defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(8) and CPLR 327, unanimously affirmed, without costs.

In this action arising from two letters of credit issued in Korea to plaintiff, a Maltese corporation, defendants, commercial banks, are headquartered in Korea, and are wholly owned subsidiaries of defendant Woori Finance Holdings (WFH), a Korean holding company. The letters of credit were made for the benefit of plaintiff's customer, a company located in Dubai, United Arab Emirates, in connection with the purchase of scrap steel which was to be shipped from Japan to South Korea. Defendant banks

made the decision to dishonor the letters of credit in Korea.

The motion court properly granted the motions by defendants WFH and Kwangju Bank LTD. to dismiss the complaint for lack of jurisdiction (CPLR 3211[a][8]). Defendants are not "engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of [their] 'presence' in this jurisdiction" (*McGowan v Smith*, 52 NY2d 268, 272 [1981], *quoting Simonson v International Bank*, 14 NY2d 281 [1964]). Nor are there contacts with New York "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities" (*Goodyear Dunlop Tires Operations, S.A. v Brown*, __ US __, 131 SCt 2846, 2853 [2011], *quoting International Shoe Co. v Washington*, 326 US at 310, 318 [1945]; *see also Wiwa v Royal Dutch Petroleum Co.*, 226 F3d 88, 95 [2d Cir 2000], *cert denied* 532 US 941 [2001]).

Plaintiff contends that all three defendants are part of a highly integrated enterprise, led and dominated by WFH. However, even assuming Woori Bank is subject to personal jurisdiction here, WFH is not subject to personal jurisdiction based on its ownership of Woori Bank (*see Moreau v RPM, Inc.*, 20 AD3d 456, 457 [2nd Dept 2005]). Plaintiff has not established that WFH's control over Woori Bank's activities is so complete that Woori

Bank is in fact "merely a department" of WFH (*Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 432 [1972]). It has shown only common ownership, demonstrating that WFH is simply a holding company. WFH does not control defendants finances, interfere with the selection and assignment of executive personnel or fail to observe the corporate formalities (*Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.*, 751 F2d 117 [2d Cir 1984]). Nor does the SEC Form 20-F, relied on by plaintiff, establish pervasive control by WFH. The form's language describes an appropriate parental role of WFH in supervising its subsidiaries.

Plaintiff's alternate request for jurisdictional discovery was properly denied. Plaintiff failed to show that the requested discovery could adduce facts establishing personal jurisdiction in New York (*see Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]).

The motion court providently exercised its discretion in dismissing the complaint as to Woori Bank on the ground of forum non conveniens (*see* CPLR 327; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-80 [1984], *cert denied* 469 US 1108 [1985]; *Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 178 [1st Dept 2004]). This dispute has no substantial nexus with New York

and the resolution of this case may require consideration of Korean law. Contrary to plaintiff's contention, even though the letters of credit are subject to the terms and conditions of the UCP, "the UCP does not cover every contingency and the meaning of the letter's terms will have to be determined by reference to the law governing the transaction" (*Shin-Etsu*, 9 AD3d 176).

Korea is an adequate alternative forum for this dispute. There is no evidence to support plaintiff's allegations and speculation about bias in the Korean courts in favor of defendants. Meager and conclusory allegations are insufficient to support a finding of bias by a foreign court (*see In re Arbitration between Monegasque De Reassurances S.A.M. v Nak*, 311 F3d 488, 499 [2nd Cir. 2002]).

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

ENTERED: MARCH 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9624 The People of the State of New York, Dkt. 28841C/09
Respondent,

-against-

Phillip Taylor,
Defendant-appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered October 14, 2010, convicting defendant, after a nonjury trial, of driving while ability impaired and sentenced him to time served, unanimously affirmed.

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 court's credibility determinations, including its assessment of the extent to which a videotape recorded two hours after defendant's arrest corroborated and/or contradicted police testimony about defendant's condition upon his arrest. The trial court was also in the best position to evaluate defendant's explanation for refusing a breathalyzer test. The arresting officer testified that defendant had a

strong odor of alcohol on his breath, that his eyes were bloodshot and watery, that his speech was slurred, and that he had difficulty walking. In addition, when the officer pulled defendant over for running a red light, defendant exhibited a noticeable difficulty in bringing his car to a stop. This evidence supported the conclusion that defendant was driving while impaired (*see generally People v Cruz*, 48 NY2d 419 [1979]).

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

ENTERED: MARCH 26, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9013-
9014 The People of the State of New York, Respondent,

-against-

Anthony Marshall,
Defendant-Appellant.

Ind. 6044/07

- - - - -

The People of the State of New York,
Respondent,

-against-

Francis Morrissey,
Defendant-Appellant.

_____

Cuti Heckler LLP, New York (John R. Cuti of counsel), for Anthony Marshall, appellant.

Law Offices of Thomas P. Puccio, New York (Thomas P. Puccio of counsel), for Francis Morrissey, appellant.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered December 21, 2009, convicting defendant Anthony Marshall, unanimously modified, on the facts, to the extent of vacating the second degree grand larceny conviction under the eighth count of the indictment and dismissing that count, and otherwise affirmed. Judgment, same court and Justice, rendered December 21, 2009, convicting defendant Francis Morrissey, unanimously affirmed. As to both defendants, the matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

Opinion by Clark, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
Leland G. DeGrasse
Rosalyn H. Richter
Darcel D. Clark, JJ.

9013-
9014
Ind. 6044/07

_____x

The People of the State of New York,
Respondent,

-against-

Anthony Marshall,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Francis Morrissey,
Defendant-Appellant.

_____x

Defendants appeal from the judgment of the Supreme Court, New York County (A. Kirke Bartley, J.), rendered December 21, 2009, convicting defendant Anthony Marshall, after a jury trial, of grand larceny in the first degree, grand larceny in the second degree (five counts), criminal possession of stolen property in the second degree (two counts), offering a false instrument for filing in the first degree (two counts), scheme to defraud in the first degree, conspiracy in the fourth

degree (two counts), and conspiracy in the fifth degree, and imposing sentence. Judgment of the same court and Justice, rendered December 21, 2009, convicting defendant Francis Morrissey of forgery in the second degree, scheme to defraud in the first degree, conspiracy in the fourth degree (two counts), and conspiracy in the fifth degree, and imposing sentence.

Cuti Heckler LLP, New York (John R. Cuti and Eric Hecker of counsel), and Warner Partners, PC, New York (Kenneth E. Warner and Rhett O. Millsaps, II, of counsel), for Anthony Marshall, appellant.

Law Offices of Thomas P. Puccio, New York (Thomas P. Puccio of counsel), and Davis & Gilbert LLP, New York (Paul F. Corcoran and Dominick R. Cromartie of counsel), and Schulte Roth & Zabel LLP, New York (William D. Zabel, Gary Stein and Frank J. LaSalle of counsel), for Francis Morrissey, appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Gina Mignola and Amyjane Rettew of counsel), for respondent.

CLARK, J.

The issues on this appeal are whether: (1) the verdicts on each count are supported by legally sufficient evidence and are in accord with the weight of the evidence; (2) the evidentiary rulings, prosecutorial conduct, and jury instructions were proper; (3) the court's response to a juror's note during deliberations was proper; and (4) whether the grand larceny count against defendant Anthony Marshall, which carries a mandatory prison sentence, should be dismissed in the interest of justice. For the reasons discussed below, we find that defendant Marshall's conviction for grand larceny in the second degree under the eighth count of the indictment is against the weight of the evidence. We have considered the remainder of defendants' arguments and find them unavailing.

Defendant Anthony Marshall's mother, Mrs. Brooke Astor, inherited millions of dollars in cash and real estate upon the death of her husband, Vincent Astor, in 1959. During her life, Mrs. Astor received income from the Vincent Astor Trust, and she had a general power to appoint the corpus of the trust in whatever way she desired. Vincent Astor left the remainder of his fortune to the Vincent Astor Foundation, a philanthropic organization run by Mrs. Astor, who remained actively involved in the Foundation until 1997.

In 1978, Mrs. Astor hired her son to run the Astor office. Defendant Marshall's responsibilities included managing his mother's finances and affairs. He held this job continuously through June 2006.

Marshall was the primary beneficiary of Mrs. Astor's various wills. From 1960 through 1990, with minor exceptions, Mrs. Astor's will bequeathed to Marshall all her real property, and either left her residuary estate to him outright or, between 1970 and 1990, to a trust which he had liberal rights to invade or request invasion of to obtain the principal during his life with broad power of appointment upon her death. Mrs. Astor's will also appointed Marshall trustee and co-executor.

Although Mrs. Astor made certain changes to her estate plan in the early 1990s, Marshall retained his status as the primary beneficiary of her estate and continued to use Mrs. Astor's funds. In 1997, Mrs. Astor changed her will, leaving half of the residuary estate to Marshall in a charitable remainder unitrust (CRUT), but she did not make any additional changes related to Marshall or his appointments as trustee and co-executor.

In late 2000, Mrs. Astor was diagnosed with "mild" stage Alzheimer's disease. On February 2, 2001, Mrs. Astor appointed Marshall as her health care proxy. On the same day, she executed a new will undoing the change to the residuary estate made in

1997. Once again, Marshall was to receive 100% of the residuary in trust, with the right to receive 5% of the value of that trust each year during his life, and the power to appoint the remaining principal to the charities of his choice.

On April 16, 2001, Mrs. Astor was diagnosed with dementia of moderate severity. Marshall asked her physician, Dr. Norman Relkin, if his mother remained competent to make a will. Dr. Relkin replied that although she had diminished capacity, this did not mean that she could not make decisions. He further stated that he could not project about what the future held for Mrs. Astor or attest to her legal competency.

On November 7, 2001, Mrs. Astor executed a codicil to her February 2001 will that increased Marshall's stake in the CRUT from 5% to 7% per year, and relieved him of his obligations to pay taxes on a $5 million bequest she had made to him earlier in the year.

Mrs. Astor's dementia progressed, and for the period from September 2003 through March 2004, there were approximately 68 instances of confusion and 46 instances of paranoia.

In 2003, Marshall began pressuring his mother's long-time attorney to help him obtain a greater share of her assets, more power to distribute her money to the charities of his choice, and

a larger share of assets for his wife, if he should predecease his mother.

On December 18, 2003, Mrs. Astor's attorney supervised the execution of a codicil to her 2002 will, which gave Marshall the right to appoint 49% of the assets of the Vincent Astor Trust to charity (First Codicil).

Subsequently, Mrs. Astor's long-time attorney was discharged. Defendant Francis Morrissey, an attorney hired by Marshall who helped orchestrate the termination of Mrs. Astor's long-time counsel, contacted attorney Warren Whitaker, who was then hired by Marshall using Mrs. Astor's power of attorney. At defendant's behest, Mr. Whitaker drafted a "Second Codicil," which eliminated the CRUT and the requirement that any amount go to charity, giving Marshall the residuary estate outright. On January 12, 2004, Mrs. Astor signed the Second Codicil after a 20-minute meeting with Mr. Whitaker, who she had not previously met.

On March 4, 2004, Morrissey presented a "Third Codicil" with Mrs. Astor's signature, which further diverted millions of dollars from Mrs. Astor's favorite charities into the hands of defendants by, among other things, increasing the legal fees and compensation Morrissey would receive. This reduced the amount of money that was supposed to be given to the charities by

approximately $5.75 million. Two members of Mrs. Astor's household staff signed the document attesting to her competency.

In 2006, Marshall's son Philip initiated a guardianship proceeding to protect Mrs. Astor's person and property. During those proceedings, Marshall filed an answer and cross petition that allegedly included false information about money he had received from his mother.

In November 2007, the grand jury handed down an indictment charging both defendants with a scheme to defraud and related counts of conspiracy to commit larceny and false filing. In addition, Marshall was charged with multiple counts of grand larceny, possession of stolen property, and falsifying business records and Morrissey was charged with forgery and possession of a forged instrument.

At trial, the People sought to show that defendants engaged in a scheme to steal money from Mrs. Astor's estate. According to the People, defendants engaged in a scheme to enrich themselves by fraudulently changing Mrs. Astor's will. The People presented evidence that Morrissey and Marshall helped draft and execute the First and Second Codicils knowing that Mrs. Astor was not capable of understanding or consenting to them. They further maintained that Morrissey forged Mrs. Astor's name to the Third Codicil.

Moreover, the People submitted evidence that in 2005, Marshall abused his position of trust under his mother's power of attorney to purloin more than $2 million by granting himself a retroactive pay raise and using his mother's money to buy a 55-foot yacht, as well as to pay the yacht captain's wages, the expenses related to his wife's property in Maine, and the salary of his mother's social secretary who was really working for his theatrical company. They also sought to show that Marshall stole two valuable works of art from Mrs. Astor's home.

During jury deliberations, one juror sent a note stating: "Due to heated argument, a juror feels personally threatened." The court instructed the jurors to conduct their discussions with civility and mutual respect for one another. After two more days of deliberations, the jury acquitted Marshall of two counts, but otherwise found defendants guilty as charged.

Prior to sentencing, Marshall filed a *Clayton* motion, seeking to dismiss the count of grand larceny in the first degree. The court denied the motion, and sentenced defendants to an aggregate term of one to three years in prison.

In February 2010, defendants filed motions to vacate, claiming juror misconduct and asserting that the juror who sent the note had been coerced. On July 29, 2010, the court denied the motion, and this Court subsequently denied defendants' motion

for permission to appeal from that decision. Defendants' appeal from the judgment of conviction followed.

In examining the record for legal sufficiency, we must view the evidence in a light most favorable to the People to determine whether "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]).

Weight of the evidence review requires this Court to determine whether an acquittal would not have been unreasonable, and if so, to weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions (*see Danielson*, 9 NY3d at 349). A verdict is against the weight of the evidence if it appears that the trier of fact failed to give the evidence the weight it should be accorded (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

The verdicts as to both defendants were based on legally sufficient evidence and are not against the weight of the evidence (*see Danielson*, 9 NY3d at 349), except as indicated. The record amply supports the jury's determination that defendants are guilty of a scheme to defraud Mrs. Astor by

fraudulently changing her will via the codicils at a time when they knew her physical and mental condition precluded her from having the capacity to agree to any such changes. The record, including the testimony of the People's expert handwriting analyst, also amply supports the jury's determination that Morrissey forged Mrs. Astor's signature on the third codicil to her will. Furthermore, except as indicated, the record amply supports the jury's determination that Marshall committed a series of larcenous acts.

The jury was confronted with factual issues concerning such matters as Mrs. Astor's actual and apparent mental condition at the relevant times, defendants' criminal intent, and whether the final codicil was a forgery. We find no basis for disturbing the jury's credibility determinations, weighing of conflicting expert testimony, and choices between competing inferences.

Defendant Marshall argues that, due to the law in effect at the time, the durable power of attorney executed by Mrs. Astor allowed him to make unlimited gifts to himself, without regard to whether they were in the principal's best interest (*see Matter of Salvation Army v Ferrara*, 3 Misc 3d 944, 945-946 [Sur Ct, Rockland County 2004], *affd* 22 AD3d 578 [2d Dept 2005]). However, *Ferrara,* the case upon which Marshall relies, was

subsequently reversed by the Court of Appeals (7 NY3d 244 [2006]).

In addition, the count charging grand larceny in the first degree does not allege that Marshall abused the power to make gifts to himself. Instead, it alleges that after Mrs. Astor's health deteriorated, Marshall improperly authorized a significant increase in the compensation he received for managing her finances. It further alleges that the increase was disproportionate to the salary his mother had authorized prior to the decline of her physical and mental health. In defending against this charge, Marshall does not rely on the gift-giving power. Rather, he points to the directive in the power of attorney that authorized him to conduct the "business operating transactions" on Mrs. Astor's behalf. *Ferrara's* holding does not apply to that directive. Thus, the People only had to establish that the raise was not in good faith and was against the principal's interests. We see no reason to upset the jury's conclusion that Marshall abused his power in this regard.

Upon exercising our independent factual review power (CPL 470.15), we find that the verdict convicting Marshall of grand larceny under the eighth count of the indictment is against the weight of the evidence (see *Danielson*, 9 NY3d at 348-349). The evidence does not warrant a finding that Marshall committed grand

larceny by having a social secretary employed by Mrs. Astor perform tasks for a production company that he was operating from his mother's apartment, especially in light of evidence that Mrs. Astor supported Marshall's theater ventures. Additionally, there was no evidence to suggest that the secretary's work for Marshall caused her to forgo work she was supposed to do for Mrs. Astor.

When the court received a note from the deliberating jury stating that a juror wished to be dismissed, the court properly exercised its discretion in denying defendants' applications for a mistrial. While the note indicated that a juror felt "personally threatened" by a "heated argument," it did not indicate that there were actual threats of physical violence. Therefore, the note did not provide any indication that a juror was grossly unqualified or engaged in substantial misconduct (*see* CPL 270.35). Although the more prudent course of action would involve an inquiry of the jurors, the court acted well within its discretion by denying defendants' application for individual inquiries of the jurors and "in determining that supplemental instructions, as well as a break from deliberations, would be sufficient" (*People v Haxhia*, 81 AD3d 414 [1st Dept 2011], *lv denied* 17 NY3d 796 [2011], *cert denied* _US_, 132 S Ct 1539 [2012]; *see People v Gathers*, 10 AD3d 537 [1st Dept 2004], *lv denied* 3 NY3d 740 [2004]; *People v Cabrera*, 305 AD2d 263 [1st

Dept 2003], *lv denied* 100 NY2d 560 [2003]; *cf. People v Lavender*, 117 AD2d 253 [1st Dept 1986], *appeal dismissed* 68 NY2d 995 [1986]). The court was in the best position to consider the jurors' demeanor at the time it delivered its supplemental charge. Following the court's thorough admonitions to the jury, the problems appeared to resolve themselves, and there is no reason to believe that the ultimate unanimous verdict, confirmed by polling, was the result of coercion.

Furthermore, the parties stipulated to expand the record on appeal to include the record of defendants' post-conviction CPL 440.10 motion relating to the events that occurred during jury deliberations and the expanded record provides no support for defendants' position. On the contrary, it unequivocally establishes that while a juror addressed angry remarks to another juror, there were no actual threats of violence. Accordingly, defendant could not have been prejudiced by the absence of an inquiry, since an inquiry would most likely have revealed the same facts developed in the parties' submissions on the CPL 440.10 motion.

The evidentiary rulings challenged by defendants on appeal were proper exercises of the trial court's discretion. The alleged instances of prosecutorial misconduct, viewed individually or collectively, did not deprive defendants of a

fair trial. The court's curative actions were sufficient to prevent defendants from being prejudiced by any improprieties. We have considered and rejected defendants' remaining arguments for a new trial.

After the verdict, Marshall moved to dismiss, in the interest of justice, the first-degree grand larceny count, which requires a mandatory prison term. The court held that Marshall had not established any "compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution [on this count] would constitute or result in [an] injustice." This determination was well within the court's discretion (CPL 210.40[1]; *see generally People v Clayton*, 41 AD2d 204 [2d Dept 1973]). On appeal, Marshall similarly contends that this Court should dismiss the first-degree grand larceny count in the interest of justice. We do not agree.

In order to exercise our interest of justice jurisdiction, there must exist "special circumstances deserving of recognition" (*People v Chambers*, 123 AD2d 270, 270 [1st Dept 1986]). Ordinarily, this Court will not exercise its interest of justice jurisdiction absent "extraordinary circumstances" (*see e.g. People v Fair*, 33 AD3d 558 [1st Dept 2006], *lv denied* 8 NY3d 945 [2007]). Marshall argues that his age, health, military service, public service, lack of a prior criminal history, and the

nonviolent nature of the criminal conduct itself, are special circumstances, which merit consideration for dismissal in the interest of justice. We have considered these facts, and find that, under the circumstances, there is no compelling or extraordinary factor warranting the exercise of our interest of justice jurisdiction to dismiss the first-degree grand larceny count (*see* CPL 470.15[6][a]).

We are not convinced that as an aged felon Marshall should be categorically immune from incarceration and it is generally inappropriate to use the interest of justice as a device for granting dispensations from mandatory sentencing statutes (*see e.g. People v Velasquez*, 25 AD3d 501 [1st Dept 2006], *lv denied* 6 NY3d 854 [2006]). Further, Marshall's age, along with the medical conditions presented, do not establish, based on the record before us, that incarceration will likely cause his death (*see People v Browarnik*, 42 AD2d 953 [1st Dept 1973]; *see also People v Notey*, 72 AD2d 279 [2d Dept 1980]). We also note that, if defendant becomes terminally ill, the Legislature has provided a mechanism for release from prison on medical parole (*see* Executive Law § 259-r).

Moreover, even though defendant stands convicted of a first-time nonviolent felony offense, the lack of a criminal history is an ordinary circumstance that does not vitiate a prison term for

obtaining millions of dollars through financial abuse of an elderly victim. Defendant's military and public service is laudable, but it does not rise to the level of an extraordinary or special circumstance. His service may, in fact, be a substantial factor in the lenience shown by the trial court in pronouncing the mandatory minimum sentence of one to three years in prison. In addition, defendant's argument that substantial restitution paid to resolve the probate matters is a compelling factor, is unavailing.

Accordingly, the judgment of the Supreme Court, New York County (A. Kirke Bartley, J.), rendered December 21, 2009, convicting defendant Anthony Marshall, after a jury trial, of grand larceny in the first degree, grand larceny in the second degree (five counts), criminal possession of stolen property in the second degree (two counts), offering a false instrument for filing in the first degree (two counts), scheme to defraud in the first degree, conspiracy in the fourth degree (two counts), and conspiracy in the fifth degree, and sentencing him to an aggregate term of one to three years, should be modified, on the facts, to the extent of vacating the second degree grand larceny conviction under the eighth count of the indictment and dismissing that count, and otherwise affirmed. The judgment of the same court and Justice, rendered December 21, 2009,

convicting defendant Francis Morrissey of forgery in the second degree, scheme to defraud in the first degree, conspiracy in the fourth degree (two counts), and conspiracy in the fifth degree, and sentencing him to an aggregate term of one to three years, should be affirmed.

As to both defendants, the matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

All concur.

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

ENTERED: MARCH 26, 2013

CLERK