SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 14, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Richter, Feinman, Gische, JJ.

10685-
10686 Index 650046/11

Nader & Sons, LLC, et al.,
Plaintiffs-Respondents,

-against-

Dan Shavolian, etc.,
Defendant-Appellant,

Robert Flink, etc.,
Defendant.

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Zane and Rudofsky, New York (Edward S. Rudofsky of counsel), for appellant.

Wolf, Haldenstein, Adler, Freeman & Herz, LLP, New York (Eric B. Levine of counsel), for respondents.

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Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 20, 2012, awarding plaintiffs damages against defendant Shavolian in the amount of $3,382,530.67, and bringing up for review an order, same court and Justice, entered December 17, 2012, which, inter alia, granted plaintiffs' motion for summary judgment and denied defendant Shavolian's cross motion for summary judgment

dismissing the complaint, unanimously affirmed, without costs. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs Nader & Sons, LLC and Sisko Enterprises, LLC brought this action seeking payment on a promissory note (the Secured Promissory Note or the Note) as to which defendant Dan Shavolian is the promisor. This case arises out of a series of transactions involving two companies owned by nonparty Ezri Namvar, Namco Capital Group (Namco) and N.Y. 18 (NY 18), and a company operated by defendant, 127 West 25 LLC (25 LLC). At the time of the transactions at issue, NY 18 purportedly owned a 35% membership interest in 25 LLC. The remaining 65% of 25 LLC was owned by DHD 127, LLC (DHD). DHD is owned by defendant.

In June 2008, Namco and plaintiffs entered into the Loan, Pledge and Security Agreement (the Loan Agreement), in which Namco borrowed $12.5 million.[1] As collateral, NY 18 pledged its membership interest in 25 LLC to plaintiffs. However, in July 2008, Namvar, NY 18 and DHD entered the Termination Agreement which terminated NY 18's interests in 25 LLC and stated that NY

[1] The Loan was originally between Nader & Sons, LLC and Namco for the amount of $7.5 million. In July 2008, the Loan was amended and Sisko Enterprises, LLC became an additional lender, increasing the amount of the loan to $12.5 million.

18 "has no right, title or interest in" 25 LLC. Pursuant to the Secured Promissory Note, defendant promised to pay NY 18 the sum of $2.6 million with interest. Payment on the Note would become due 90 days after the last of the following events occurred: (i) the date of the Note (August 7, 2008), (ii) the date defendant received written notice by NY 18 that any pledge by NY 18 of its membership interests in 25 LLC were null and void (Pledge Termination Condition), or (iii) the date that any claims arising out of action taken by NY 18 in connection to 25 LLC against defendant or 25 LLC were satisfied (Claim Satisfaction Condition).[2]

In September 2008, Namco defaulted on the Loan Agreement. In 2010, plaintiffs and NY 18 entered into the Partial Settlement Agreement in which NY 18 assigned its rights in the Note to plaintiffs. However, when plaintiffs sought payment on the Note, defendant refused. Plaintiffs then brought this action, asserting breach of the Note and foreclosure on the collateral securing the Note.

Plaintiffs moved for summary judgment, asserting that the Note's conditions precedent had been satisfied. Defendant cross-

[2] The final condition applies to claims that existed prior to the completion of the Pledge Termination Condition.

moved for summary judgment dismissing the complaint. The motion court granted plaintiffs' motion for summary judgment, finding that plaintiffs had established that the conditions of the Note had been satisfied and that defendant had defaulted on the Note. The court also denied defendant's cross motion and ordered that defendant pay plaintiffs the principal sum on the Note as well as interest accrued.

For the reasons set forth in the motion court's decision, we affirm. Plaintiffs tendered a UCC Financing Statement Amendment (UCC Statement) terminating their interest in NY 18's membership in 25 LLC and a general release of all claims arising out of NY 18's actions in connection with 25 LLC. As the assignees to the Note, plaintiffs stepped into NY 18's shoes and therefore notice from plaintiffs that both conditions have been met satisfies NY 18's obligations under the Note (*Matter of Stralem*, 303 AD2d 120, 123 [2d Dept 2003]).

Defendant's contentions that plaintiffs have failed to satisfy both conditions are unconvincing. Defendant argues not only that the conditions have not been met, but that they can never be met. He asserts that by transferring its interest in the Note to plaintiffs, NY 18 enforced its pledge of its interests in 25 LLC to plaintiffs and therefore NY 18 can no

longer declare its pledge null and void. Under defendant's interpretation of the Note, once NY 18 enforced its pledge of any membership interest in 25 LLC, the Pledge Termination Condition could never be satisfied. Defendant has therefore rendered the Pledge Termination Condition impossible to satisfy (*see Cushman & Wakefield v Dollar Land Corp. (U.S.)*, 44 AD2d 445, 449 [1st Dept 1974], *affd* 36 NY2d 490 [1975]). Moreover, a party cannot "take advantage of a condition precedent, the performance of which he himself has rendered impossible" (*Cushman & Wakefield*, 44 AD2d at 449, quoting *Stern v Gepo Realty Corp.*, 289 NY 274, 277 [1942]; *see also Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y.*, 28 NY2d 101, 106 [1971]). Defendant's argument, if accepted, would result in a windfall to him.

Defendant failed to establish that there are any legitimate issues of fact as to the amount actually owed under the Note, and

he is not entitled to any credit or offset.

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

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

ENTERED: JANUARY 14, 2014

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10780 Brill & Meisel, Index 115685/08
Plaintiff-Respondent-Appellant,

-against-

James M. Brown, et al.,
Defendants-Appellants-Respondents.

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Wolf Haldenstein Adler Freeman & Herz LLP, New York (Eric B. Levine of counsel), for appellants-respondents.

Brill & Meisel, New York (Mark N. Axinn of counsel), and Furman Kornfeld & Brennan LLP, New York (Andrew R. Jones of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered August 8, 2012, which, to the extent appealed from as limited by the briefs, held in abeyance plaintiff's motion for summary judgment on the complaint and defendants' cross motion for summary judgment dismissing the complaint on the ground of discharge for cause pending the report and recommendations of a special referee on the discharge for cause issue, granted in part plaintiff's motion for summary judgment dismissing defendants' counterclaim for legal malpractice, declined to grant plaintiff's motion for summary judgment on its account stated and breach of contract causes of action, and denied defendants' cross motion to strike plaintiff's references to a "Damages Analysis" as proof of

the value of defendants' damages, unanimously modified, on the law, to the extent of vacating the part of the order referring the issue of discharge for cause to a special referee, denying plaintiff's motion for summary judgment on the complaint, denying defendants' cross motion for summary judgment dismissing the complaint on the ground of discharge for cause, and granting defendants' cross motion to strike plaintiff's references to a Damages Analysis as proof of the value of defendants' damages, and otherwise affirmed, without costs.

The motion court properly considered defendants' untimely cross motion for summary judgment, because they sought dismissal of the same claims on which plaintiff timely sought summary judgment (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]; *Osario v BRF Constr. Corp.*, 23 AD3d 202, 203 [1st Dept 2005]; *cf. Kershaw v Hospital for Spec. Surgery*, ___ AD3d ___, 2013 NY Slip Op 8548 [1st Dept 2013] [motion incorrectly denominated a cross motion, untimely filed, will not be considered absent good cause shown]). In addition, the court properly considered defendants' cross motion notwithstanding that it was based on an unpleaded defense of discharge for cause, as plaintiff does not argue that it was surprised or prejudiced by

the defense (*see Arteaga v City of New York*, 101 AD3d 454 [1st Dept 2012]).

The motion court erred in referring the discharge for cause issue to a special referee instead of denying the motions for summary judgment. There are numerous triable issues of fact, in addition to damages, on the issue of discharge for cause, and those factual issues are closely intertwined with plaintiff's claims of breach of contract, unjust enrichment and account stated, as well as defendants' counterclaim of legal malpractice (*see Marshall, Bratter, Greene, Allison & Tucker v Mechner*, 53 AD2d 537, 537-538 [1st Dept 1976]; *see also Matter of Bank of N.Y. [Ling Kuo Li]*, 269 AD2d 112, 113 [1st Dept 2000]).

The motion court further erred in concluding that plaintiff's allegedly negligent execution of a confidentiality agreement could not be a basis of discharge for cause because defendants did not learn of it until after they had discharged plaintiff. Misconduct that occurs before an attorney's discharge but discovered after the discharge may serve as a basis for a fee forfeiture (*see Coccia v Liotti*, 70 AD3d 747, 757 [2d Dept 2010], *lv dismissed* 15 NY3d 767 [2010]).

The motion court correctly found that issues of fact exist as to whether defendants sustained damages in connection with

their malpractice counterclaim and whether plaintiff proximately caused those damages. In particular, the motion court correctly held that issues of fact exist as to whether defendants incurred unnecessary, as yet unreimbursed, attorneys' fees when plaintiff continued to pursue allegedly futile contempt proceedings in a Housing Court action even after Housing Court made clear it could not afford defendants any relief. Further, plaintiff failed to eliminate any triable issues of fact as to whether its conduct in signing a confidentiality agreement was the proximate cause of defendants' damages, as defendants allegedly incurred additional fees in procuring another inspection and report not covered by the agreement, and in attempting to overturn the agreement.

The motion court correctly ruled that any damages stemming from disclosure of defendant Altman's litigation outline are too speculative to support defendants' malpractice counterclaim (*see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 67 [1st Dept 2002]). Among other things, it is too speculative to conclude that cross-examination at Altman's deposition would have been shorter, and thus legal fees lower, but for disclosure of the outlines.

The motion court, however, erred in denying defendants' cross motion to strike plaintiff's references to a "Damages

Analysis" as proof of the value of defendants' damages. The document was created for settlement purposes in a Supreme Court action against the cooperative corporation of defendants' building. Such documents "are inadmissible to prove either liability or the value of the claims" (*CIGNA Corp. v Lincoln Natl. Corp.*, 6 AD3d 298, 299 [1st Dept 2004]; *see also* CPLR 4547).

As issues of fact remain regarding whether defendant was discharged for cause, summary judgment is not warranted on plaintiff's account stated claim (*see EMC Iron Works v Regal Constr. Corp.*, 7 AD3d 366, 367 [1st Dept 2004]). Defendants' timely written objections to plaintiff's final invoice, dated July 2, 2008, for work performed in the Supreme Court action also creates triable issues of fact as to plaintiff's account stated claim (*id.*). Defendants' general objections, however, to plaintiff's bills do not suffice to challenge the remainder of the amount owed (*see Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500, 501 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]).

Given the numerous triable issues of fact regarding plaintiff's representation, triable issues of fact exist

regarding plaintiff's performance of the retainer agreement. Accordingly, summary judgment is not warranted on plaintiff's breach of contract claim (*see Kluczka v Lecci*, 63 AD3d 796, 798 [2d Dept 2009]).

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

ENTERED: JANUARY 14, 2014

CLERK

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

10845 Guillermo Robles, Index 109463/09
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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Cullen and Dykman LLP, New York (Joseph C. Fegan of counsel), for appellant.

Susan R. Nudelman, Dix Hills, for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 6, 2012, which denied defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

In his notice of claim, plaintiff alleged that "[o]n 4/08/2008, at approximately 8:30 a.m., [he] was lawfully traversing the courtyard area located in front of 178 Avenue D, New York, New York, when [he] was caused to trip and fall on the raised concrete perimeter." At his General Municipal Law § 50-h hearing, plaintiff identified the specific tree well in the courtyard where he allegedly fell in photographs shown to him by defendant.

In his complaint, dated July 1, 2009, plaintiff alleged "[t]hat on or about April 8, 2008, [he] was lawfully traversing the courtyard area, located in front of 178 Avenue D, in the City and State of New York, and was caused to slip/trip and fall as a result of a dangerous and hazardous condition." On or about March 29, 2010, almost two years after the accident, plaintiff served a bill of particulars in which, for the first time, he identified a different tree well in another area of the courtyard as the accident site. This location was based on a report prepared by plaintiff's expert, who had inspected the courtyard on April 26, 2008.

Although his expert's report was allegedly prepared within weeks of the accident, plaintiff did not provide it to defendant before his bill of particulars was served. Moreover, in the report, plaintiff's expert did not identify the person who advised him of the accident location, and, at plaintiff's deposition on August 31, 2010, plaintiff once again identified the tree well depicted in the photographs shown to him at his § 50-h hearing as the location. At no time did plaintiff move to amend his notice of claim to revise the location of the particular tree well that allegedly caused him to fall.

Under these circumstances, Supreme Court should have granted

defendant summary judgment dismissing the complaint. In addition to giving a vague description in his notice of claim that did not describe the location of the alleged defect with sufficient particularity (*see Yankana v City of New York*, 246 AD2d 645 [2d Dept 1998]), plaintiff gave contradictory versions of the accident location, which further rendered the notice of claim defective, since it served to obscure the correct location. Plaintiff did not advise defendant of the revised location until more than three years after the alleged accident, which prejudiced defendant's ability to conduct a meaningful and timely investigation of the claim (*see Roberson v New York City Hous. Auth.*, 89 AD3d 714 [2d Dept 2011]; *Harper v City of New York*, 129 AD2d 770, 771 [2d Dept 1987] [City prejudiced where notice of claim was not specific in describing accident location and plaintiff later materially contradicted herself]).

Plaintiff's affidavit in opposition to the motion contradicted his testimony at his § 50-h hearing and his deposition as to the accident location and was insufficient to defeat the motion (*see Yan Quan Wu v City of New York*, 42 AD3d 451, 453 [2d Dept 2007]). Plaintiff, who had lived in the housing project for 20 years or more and was represented by counsel, was given ample opportunity to review the photographs

that were shown to him at both his § 50-h hearing and his deposition, and there is no evidence that he was pressured or manipulated into misidentifying the accident location. Nor did his expert state in his affidavit in opposition to the summary judgment motion that plaintiff was the person who advised him where the accident allegedly occurred. The affidavits of the two witnesses who corroborated the revised location should have been precluded. Despite defendant's formal demands for the names and addresses of all witnesses, and multiple court orders directing compliance, plaintiff failed to disclose the requested information until he opposed defendant's motion for summary judgment, four months after plaintiff filed a note of issue (*see Dunson v Riverbay Corp.*, 103 AD3d 578 [1st Dept 2013]).

The dissent believes that the affidavit of plaintiff's grandson, Kenneth Robles, should be considered because plaintiff testified at his deposition on August 31, 2010, that Kenneth came to help him sometime after the fall. However, even after the deposition, plaintiff did not identify Kenneth as a witness as required by the court's compliance order of January 13, 2011. Under these circumstances, where plaintiff repeatedly failed to meet his discovery obligations, both before and after his deposition, and offered no valid excuse for his failure to do so,

preclusion is warranted (*see Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 [1st Dept 2009]; *Muniz v New York City Hous. Auth.*, 38 AD3d 628 [2d Dept 2007]).

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

ACOSTA, J. (dissenting)

The main issue on this appeal from an order denying summary dismissal of a personal injury action is whether the notice of claim identified the location of a tree well where the 73-year-old plaintiff tripped and fell sufficiently to permit defendant to locate the place, fix the time, and understand the nature of the accident. In my opinion, although plaintiff misidentified the location of the accident in a photograph shown to him at his General Municipal Law §50-h hearing, his bill of particulars and an expert report served before his deposition provided the exact location of the tree well at issue, with both photographs and a description. I also reject defendant's claims of prejudice since it is clear from the record that defendant was aware of the discrepancy before making the motion, and its expert inspected and photographed both locations.

Plaintiff alleges that he sustained injuries on April 8, 2008, when he tripped and fell on a tree well in the courtyard area at defendant's Jacob Riis housing project. Plaintiff testified at his § 50-h hearing that after passing one of the two "posts in front of the project," he "tripped or something" and "became a little unconscious." A female neighbor he had "seen around" but could not identify by name stopped to help him, and

she called an ambulance and his grandson Kenneth.

Plaintiff was shown four black and white photographs, from which he selected the photograph marked Exhibit "B" as depicting the location of his accident. Plaintiff described the area of his fall as pieces of concrete surrounding one of several trees in the courtyard area, stating that what he saw "was a concrete [*sic*] and the curb of this surrounding [*sic*], and it was, like, an inch with a little, like, circle around it. I didn't see well, because I don't see well, but I did see it." The condition of the concrete "was, you know, broken, you know. There are a lot of kids, in fact, who have fallen there." Plaintiff marked the exact location of his fall by drawing an "X" with a blue pen. In reviewing the photographs, plaintiff ruled out the other tree wells depicted because the trees inside were "too big," and he had fallen against a "skinnier one." The concrete at the base of the tree was broken and "not good," and he had previously seen a woman fall in that location.

Within a year, plaintiff filed a complaint alleging that he was caused to "slip/trip and fall as a result of a dangerous and hazardous condition" in "the courtyard area, located in front of 178 Avenue D, in the City and State of New York."

Plaintiff's bill of particulars alleges that defendant was

negligent in permitting a "dangerous and defective condition" to exist at a "raised concrete perimeter surrounding a tree located in a housing complex courtyard." Specifically, plaintiff placed the accident as occurring

> "in the court yard area approximately one hundred and sixty (160) feet east curb [*sic*] at the easterly side of Avenue D and approximately sixteen (16) feet south of the wrought iron fence which in turn is located at the rear and southernly [*sic*] side of the main entry/exit walkway leading to the building which is owned by Defendant, NEW YORK CITY HOUSING AUTHORITY, located at 178 Avenue D, New York, New York 10009."

Plaintiff later served a CPLR 3101(d) expert witness disclosure, which included the expert report of engineer Robert Schwartzberg, who inspected and photographed the accident site as described in plaintiff's bill of particulars, and 10 color photographs of the area.

Plaintiff was deposed on August 31, 2010, and testified that he was in a courtyard halfway between the buildings known as 170 and 178 Avenue A when his accident occurred. When shown Exhibit "B" from his §50-h hearing, and asked whether it showed an area near where his accident occurred, he initially testified, "Maybe, I just can't really distinguish that." Defense counsel next asked plaintiff whether he "recognize[d] the area that is depicted in that photograph; yes or no," to which plaintiff

responded "Yes, I do recognize it. Yes." Plaintiff further testified that the photograph showed where he fell, pointing to the area he had previously marked.

Regarding how the accident occurred, plaintiff testified that he fell "[a]gainst a tree" when his left foot tripped on a piece of concrete surrounding the tree. He could not identify the woman who assisted him after he fell, other than that she was a resident of 1141 FDR Drive. While he did not know her name, he saw her come home from work almost every day in the late afternoon. His grandson, Kenneth Robles Jr., who arrived at the accident site shortly after his accident, was present in the waiting room during plaintiff's deposition.

Raul Franco, defendant's supervisor of grounds, testified that his duties involved inspecting the grounds on a weekly and monthly basis, looking for any tripping hazzards. While he inspected the trees inside the concrete tree wells, he did not inspect the concrete itself. He did not know why the concrete wells were not part of the regular inspection, and he personally did not find any reason to look at them.

Defendant moved for summary judgment arguing that plaintiff had failed to identify any dangerous or defective condition, and that defendant was free from negligence. Defendant argued that

plaintiff's expert opined on an area different from the area plaintiff identified as the location of his fall, and his opinion was thus irrelevant.

In support of its motion, defendant annexed the affidavit of engineer Mark Marpet. Marpet observed that the area plaintiff marked on the photograph labeled Exhibit "B" and the area examined by plaintiff's expert witness were different. Marpet took photographs of both areas, but only performed measurements on the tree well depicted in Exhibit "B." According to Marpet, the height differential between the three-sided tree well and its adjacent pavers varied along its length between negative three-eights and positive three-fourths of an inch. Since the largest vertical displacement was three-fourths of an inch, Marpet opined that the well was not unsafe, as such a height differential would be insufficient to cause a pedestrian to stub his toe and fall.

Plaintiff opposed, arguing that the photographs provided by defendant at the 50-h hearing were misleading, causing him to misidentify the specific tree well where he fell as being located on Exhibit "B." Lynda Negron averred in an affidavit that she was the unknown witness who assisted plaintiff after his fall. She stated that the photograph of engineer Schwartzberg, and not Exhibit "B" depicted the tree well where plaintiff fell. She

personally witnessed plaintiff fall, and she inspected the area after his accident, observing that the concrete perimeter surrounding the tree was raised, defective, and in need of repair.

Kenneth Robles, Jr., also provided an affidavit in which he stated that he received a telephone call from Negron, advising him that his grandfather had fallen. He immediately reached the scene, where he was advised that his grandfather had not moved from the area of his fall. This area is depicted in the photographs taken by expert Schwartzberg, an area Robles inspected on the accident date, observing that it contained a raised, defective concrete perimeter.

The motion court denied defendant's motion. On appeal, defendant argues that the complaint should have been dismissed because plaintiff's notice of claim was defective in that it gave a vague and incorrect accident location and prejudiced defendant. Alternatively, defendant argues that plaintiff's change in the location of his accident is a feigned issue of fact, insufficient to defeat its motion for summary judgment. I disagree.

The test of the sufficiency of a notice of claim is whether it provides information sufficient to enable the municipal agency to investigate the allegations contained therein. In determining

whether there has been compliance with the requirements of General Municipal Law § 50-e, the courts must focus on whether, based on the claimant's description, the relevant "municipal authorities can locate the place, fix the time and understand the nature of the accident" (*Brown v City of New York*, 95 NY2d 389, 393 [2000]).

Since the purpose of a notice of claim is to permit defendant to investigate, prejudice warranting dismissal accrues "where a municipal defendant is able to show that it actually conducted a timely investigation at the wrong site due to the erroneous description" (*Williams v City of New York*, 229 AD2d 114, 117 [1st Dept 1997]). Prejudice, however, will not be presumed, it must be shown by defendant (*id.*).

Here, the notice of claim was not incorrect. The problem occurred when plaintiff, at his §50-h hearing, incorrectly identified the tree well he fell over. Nevertheless, plaintiff's expert's report and his bill of particulars, both served after his §50-h hearing, but before his deposition, describe with metes and bounds the tree well he subsequently identified as the correct tree well. Thus, the only incorrect identification of the accident site was made by plaintiff in marking Exhibit "B" at his §50-h hearing, and in subsequently reaffirming that fact at

his deposition. As observed by the motion court, none of the photographs offered to plaintiff at his hearing depicted the entire courtyard, and they lacked points of orientation. Given the foregoing, and insofar as all the tree wells in the courtyard are nearly identical, plaintiff's misidentification appears to be an inadvertent error (*see Ortiz v New York City Hous. Auth.*, 214 AD2d 491 [1st Dept 1995]).

Although plaintiff misidentified the location of the accident in a photograph shown to him at his §50-h hearing, the bill of particulars and an expert's report served prior to his deposition provided the exact location of the tree well at issue. And although defendant's expert photographed both the location provided in plaintiff's bill of particulars and the location marked on Exhibit "B," he did not perform measurements to the concrete perimeter identified in plaintiff's bill of particulars, as he did for the perimeter depicted in the Exhibit "B" photographs.

Given that the condition that allegedly caused plaintiff to trip and fall was not transitory, it is difficult for defendant to claim prejudice, since it seems that defendant made an affirmative decision not to investigate the location identified by plaintiff in his bill of particulars and expert's report

(*compare Reyes v City of New York*, 281 AD2d 235 [1st Dept 2001] [City could not locate the correct location of the accident and plaintiff failed to respond to the City's request for a supplemental description of the accident location]).

The majority states that Negron's and Robles's affidavits should have been precluded because neither witness was disclosed before plaintiff filed the note of issue. Plaintiff, however, testified at his deposition that Robles came to his aid at the scene of the accident and the deposition transcript indicates that defendant knew that Robles was present in the waiting room during the deposition. Thus, defendant knew about Robles before filing for summary judgment.

Plaintiff's change of accident location was not a feigned issue of fact, as defendant suggests. Plaintiff's expert identified the location and defect claimed by plaintiff a mere 18 days after the accident. Defendant did not move for summary judgment until many years later.

Defendant's remaining arguments, in my opinion, have no merit. Accordingly, inasmuch as I believe there are issues of fact concerning, among other things, whether the defect at issue was de minimis, or an open and obvious condition, I would affirm the order denying defendant's motion for summary judgment.

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

ENTERED: JANUARY 14, 2014

CLERK

Friedman, J.P., Andrias, Richter, Manzanet-Daniels, Feinman, JJ.

11120 The People of the State of New York, Ind. 1287/11
Respondent,

-against-

David Ventura,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered March 15, 2012, as amended March 20, 2012, convicting defendant, after a jury trial, of intimidating a witness in the second degree and assault in the third degree, and sentencing him to an aggregate term of 2½ years, unanimously reversed, on the law, and the matter remanded for a new trial.

During a recess after defendant's summation, the court advised counsel that one of the jurors had spoken to someone in the clerk's office because there was something the juror wanted to discuss. The court sent a court officer to find out the nature of the juror's concern. The court officer returned and had an off the record conversation with the judge, who then advised counsel that the juror had been invited to a breakfast at

which the NY County District Attorney was a speaker. The court explained that the court officer had confirmed that the juror did not have a personal relationship with Mr. Vance and that the juror understood "she can't go because she's on this jury." The court denied defense counsel's request to make an inquiry of the juror. In fact, the record fails to establish which juror had the conversation with the court officer.[1]

On appeal, defendant admits that the court properly delegated to the court officer the task of finding out the nature of the juror's concern. However, defendant argues that the court officer went beyond this ministerial role and usurped a judicial function by inquiring into the nature of the juror's personal relationship with the District Attorney. We need not reach this issue because, as defendant correctly argues, the record here provides an independent ground for reversal.

In *People v Buford* (69 NY2d 290 [1987]), the Court of Appeals set forth the basic framework to be followed when the trial court is considering disqualifying a juror because of conduct that occurs during the trial. As the Court noted, the court should conduct an inquiry of the juror, in which counsel

[1] The trial judge indicated he did not know which juror was involved.

should be permitted to participate if they desire, and evaluate the nature and importance of the information and its impact on the case. Although the Court of Appeals acknowledged that "[a]n in camera inquiry may not be necessary in the unusual case involving an obviously trivial matter where the court, the attorneys, and defendant all agree that there is no possibility that the juror's impartiality could be affected and that there is no reason to question the juror," here defense counsel wanted the juror questioned (*id.* at 299 n 4). We conclude that there should have been an inquiry, in which defense counsel could participate, because the disclosure indicated a possible issue related to that juror's continued ability to serve in an impartial manner (*see People v Shaw*, 43 AD3d 685 [1st Dept 2007]). Because the court did not itself conduct any inquiry, and relied only on the sparse information gathered by the court officer, many questions are unresolved. Thus, the trial court's decision that the juror was not grossly unqualified rests on speculation (*see People v Dotson*, 248 AD2d 1004 [4th Dept 1998], *lv denied* 92 NY2d 851 [1998]).

For example, we do not know why the juror felt this was important enough to bring it to the court's attention. Here, the juror's disclosure occurred immediately after the defense

summation in which, among other arguments, defense counsel contended that the case had been overcharged by the District Attorney, mentioning Cyrus Vance by name. We do not know if there was a connection, in the juror's mind, between the summation remarks and the breakfast, nor do we know why the juror decided that it was not possible to attend the breakfast because "she's on the jury." It is unclear whether the juror came to this conclusion independent of anything the court officer said. An inquiry by defense counsel, or the trial court, would have clarified these questions.

Although the trial court stated this is "not a two person breakfast," the court came to this conclusion because the officer told the court it was a breakfast run by an organization and not because of any information that was given directly to the court by the juror. We do not know anything about the nature of the organization. As defense counsel pointed out, we do not even know if this was a breakfast for people who were supporters of the District Attorney. Nor do we know whether the breakfast was being sponsored by some law enforcement organization.

The People argue that no further inquiry was necessary because the court officer had "confirmed" that the juror did not have a personal relationship with the District Attorney.

However, defense counsel was entitled to probe this and the court should have obtained this information from the juror directly, rather than relying on the hearsay statement of the officer (*see e.g. People v Sanchez*, 99 NY2d 622 [2003]). Although the trial court based its finding, in part, on the fact that none of the jurors indicated in voir dire that they could not be fair and impartial, the problem here does not involve a juror's failure to disclose information in voir dire.[2] Rather, the juror brought the issue to the court's attention towards the end of the trial. In the absence of an inquiry, or any information about which juror had the concern, we do not know when the breakfast invitation arrived or whether it impacted the juror's ability to assess the case in an evenhanded manner. As this Court concluded in *People v McClenton* (213 AD2d 1, 6 [1st Dept 1995], *appeal dismissed* 88 NY2d 872 [1996]), it might have been that removal of the juror would have been unnecessary if a specific inquiry had been made by the court or counsel, but in the absence of such an

[2] The People's brief incorrectly states that the juror's statement that she did not know the District Attorney "paralleled" the voir dire statements that she had no personal or business relationship with any prosecutors. However, since the record indicates the court did not disclose the identity of the juror, it is impossible to confirm whether the juror was being truthful in voir dire.

inquiry, we cannot be certain that the defendant was fairly convicted.

Contrary to the People's claim, this issue is preserved because defense counsel asked which juror was involved and also asked to make an inquiry. Once the court rejected counsel's requests and proceeded to find, without a further inquiry, that the juror could be fair and impartial, the issue was resolved adverse to defendant and preservation was adequate (*see People v Reyes*, 76 AD3d 864 [1st Dept 2010], *lv denied* 17 NY3d 821 [2011]). Contrary to the People's suggestion on appeal, counsel did not have to "reframe" the argument once the court officer indicated the juror had no personal relationship with the District Attorney (*see People v Mezon*, 80 NY2d 155, 161 [1992] ["The law does not require litigants to make repeated pointless protests after the court has made its position clear"]). The gravamen of defense counsel's request was that he wanted to make an inquiry, something that the court made perfectly clear it was not going to allow. Furthermore, this error is not subject to harmless error analysis (*see Shaw*, 43 AD3d at 685).

People v Mejias (21 NY3d 73 [2013]), cited by the People, is distinguishable. In that case, the court took corrective action in response to a juror note that might have suggested

premature deliberation by giving an additional instruction to the jurors. The court also questioned the jury, as a whole, whether its members had engaged in premature deliberations. Here, there was no written note and the court did not take any corrective action, but merely relied on the information conveyed by the court officer.

Also distinguishable is *People v Rodriguez* (100 NY2d 30 [2003]), which involved a juror's failure to disclose information during voir dire. In that case, the court, in response to the defendant's CPL 330.30 motion, held a hearing and heard testimony about the purported friendship between the Assistant District Attorney, who was not prosecuting the case, and the juror. Here, the record before the trial court was insufficient and thus we cannot, as the People argue, give deference to the court's conclusions.

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

ENTERED: JANUARY 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11467 The People of the State of New York, Ind. 6037/10
Respondent,

-against-

Lavonte Thomas,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered September 30, 2011, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of four years, unanimously affirmed.

The verdict was not against the weight of the evidence. Defendant's accomplice liability could reasonably be inferred from the chain of events (*see People v Cabey*, 85 NY2d 417 [1995]), which supports the inference that defendant intentionally took part in the robbery by leading the victim, a pizza deliveryman, into a trap. Defendant's conduct and that of the other participant in the crime "made little sense unless defendant was a participant and not a spectator" (*People v Marte*, 7 AD3d 405, 406 [1st Dept 2004], *lv denied* 3 NY3d 677 [2004]).

The court's response to the deliberating jury's deadlock note was "simply encouraging rather than coercive" (*People v Ford*, 78 NY2d 878, 880 [1991]). Rather than giving a full *Allen* charge (*see Allen v United States*, 164 US 492 [1896]), the court merely asked the jury, which had been deliberating for only three hours, to keep trying to reach a verdict if possible. There was no language that can be viewed as coercive, or disparaging of the jury's failure to reach a verdict. Accordingly, the absence of language instructing the jurors to maintain their conscientiously held beliefs does not require reversal.

Defendant's argument that the prosecutor "impeached" her own witness during summation is without merit. The prosecutor was entitled to make record-based arguments to explain a discrepancy between the respective recollections of the victim and a detective. Defendant's remaining challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis

for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: JANUARY 14, 2014

CLERK

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

11468 In re Delroy S.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about October 4, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree, criminal possession of a weapon in the fourth degree, petit larceny, and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 18 months, unanimously modified, on the facts, to the extent of vacating the findings as to petit larceny and criminal possession of stolen property and dismissing those counts of the petition, and otherwise affirmed, without costs.

The court should have suppressed appellant's statement on

the ground that it was the product of custodial interrogation without *Miranda* warnings. Under the circumstances, a reasonable 11 year old would not have felt free to leave (*see Matter of Ricardo S.*, 297 AD2d 255 [1st Dept 2002]). Nevertheless, the error was harmless beyond a reasonable doubt (*see People v Crimmins*, 36 NY2d 230 [1975]). Independent of the statement, which added little to the presentment agency's case, there was overwhelming evidence that both established appellant's guilt of the assault and weapon charges and disproved his justification defense. In what began as a fistfight, appellant stabbed his unarmed opponent in the back at a time when appellant clearly had the ability to retreat safely rather than using deadly physical force. We have considered and rejected appellant's arguments concerning his justification defense.

The evidence did not support the inferences that appellant committed the delinquent acts of petit larceny and criminal possession of stolen property in the fifth degree.

Probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), particularly in light of the seriousness of the assault.

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

ENTERED: JANUARY 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11470 The People of the State of New York, Ind. 491/10
Respondent,

-against-

Maurice Rodgers,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Daniel P. Fitzgerald, J.), rendered on or about September 24, 2010,

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

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

ENTERED: JANUARY 14, 2014

CLERK

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

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11471 David Poplaski, Index 115636/06
Plaintiff,

-against-

The City of New York, et al.,
Defendants.
- - - - -
Consolidated Edison Co.
of New York, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Nico Asphalt, Inc.,
Third-Party Defendant-Appellant
-Respondent,

Triumph Construction Corp.,
Third-Party Defendant-Respondent
-Appellant.
- - - - -

[And a Fourth-Party Action]

_____

McMahon, Martine & Gallagher, LLP, Brooklyn (Roderick Coyne of counsel), for appellant-respondent.

Rubin Fiorella & Friedman LLP, New York (Jeff R. Thomas of counsel), for respondent-appellant.

Stephen T. Brewi, New York, for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered January 23, 2013, which denied third-party defendants' motions for summary judgment dismissing the complaint

and all cross claims as against them, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment dismissing the third-party complaint.

The third-party defendants, a re-grading contractor and a re-paving contractor, established prima facie that the work they performed did not cause or create the defect that plaintiff claims caused his accident (*see Jones v Consolidated Edison Co. of N.Y., Inc.*, 95 AD3d 659 [1st Dept 2012]). Con Edison has failed to raise an issue about a height differential between its grate and the surrounding roadway that allegely caused the rear wheel of plaintiff's scooter to lose traction.

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

ENTERED: JANUARY 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11474 The People of the State of New York, Ind. 2003/11
Respondent,

-against-

Anthony McGowan,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 14, 2010, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 20 years, 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 jury's determinations concerning credibility and identification. In addition to the victim's testimony, recorded phone calls made by defendant while he was

incarcerated pending trial provided persuasive evidence of defendant's guilt.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11475-
11475A-
11476 In re Rachel S.D., and Another,

Children Under the
Age of Eighteen Years, etc.,

Luis N.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

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

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for the children.

_____

Order of disposition, Family Court, Bronx County (Kelly O'Neill Levy, J.), entered on or about January 23, 2013, which, upon a fact-finding determination that respondent neglected and abused the subject child, Genesis N.D., and derivatively neglected the subject child, Rachel S.D., placed the children with petitioner until the next permanency hearing, and directed respondent to comply with certain conditions, unanimously affirmed, without costs, insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise

dismissed as moot, as the placement terms of the order have expired. Order of fact-finding, same court and Judge, entered on or about June 22, 2012, unanimously affirmed, without costs. Appeal from order of protection, same court and Judge, entered on or about January 23, 2013, unanimously dismissed, without costs, as abandoned.

The court properly determined that petitioner proved by a preponderance of the evidence that appellant abused and neglected Genesis, and derivatively neglected Rachel, based on Rachel's statements to a doctor at the hospital where Genesis was treated and to an ACS caseworker. The court found that these statements were amply corroborated by Genesis's hospital records and by the doctor's testimony concerning those statements and as to 22-month old Genesis's injuries, which included significant head and body trauma from appellant's picking her up by her legs, swinging her into furniture, and kicking her in the back into a wooden garbage can (*see Matter of Nicole V.*, 71 NY2d 112, 118 [1987]).

The court properly drew a negative inference against appellant based on his failure to testify, which did not violate

his Fifth Amendment rights because Family Court proceedings are civil in nature (*see Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137, 141 [1983]; *Matter of Leah M. [Anthony M.]*, 81 AD3d 434 [1st Dept 2011]).

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

ENTERED: JANUARY 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11477-
11477A-
11478 In re Rachel S.D., and Another,

Children Under the
Age of Eighteen Years etc.,

Sandy D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), attorney for the children.

_____

Order of disposition, Family Court, Bronx County (Kelly O'Neill Levy, J.), entered on or about January 23, 2013, which, upon a fact-finding determination that respondent mother neglected and abused the subject child, Genesis N.D., and derivatively neglected the subject child, Rachel S.D., placed the children with petitioner until the next permanency hearing, and directed respondent to comply with certain conditions, unanimously affirmed, without costs, insofar as it brings up for review the fact-finding determination, and the appeal therefrom

otherwise dismissed as moot, as the placement terms of the order have expired. Order of fact-finding, same court and Judge, entered on or about June 22, 2012, unanimously affirmed, without costs. Appeal from order of protection, same court and Judge, entered on or about January 23, 2013, unanimously dismissed as abandoned, without costs.

The court properly determined that petitioner proved by a preponderance of the evidence that the mother abused and neglected Genesis, and derivatively neglected Rachel, based on Rachel's statements to a doctor at the hospital and to an ACS caseworker that the mother hit Genesis in the face with a closed fist, pulled Genesis's hair, and spanked Genesis, after which the child was beaten by her father. The court correctly found that Rachel's statements were amply corroborated by Genesis's hospital records and the doctor's testimony concerning those statements and as to Genesis's injuries (*see* Family Court Act § 1046[a][i], [ii]; *Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *Matter of Nhyashanti A. [Evelyn B.]*, 102 AD3d 470 [1st Dept 2013]).

Moreover, the mother admitted that she did not seek medical care for Genesis after the beating. The court properly

determined that the mother was aware of Genesis's father's propensity for violence in that she was a victim of his domestic abuse, and that she made no effort to restrain him from beating the 22-month old Genesis in her presence.

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

ENTERED: JANUARY 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11479-
11480 Index 603234/04

Lisa Mayer, et al.,
Plaintiffs-Respondents,

-against-

Alberto Vilar,
Defendant-Appellant,

Gary Tanaka, et al.,
Defendants.

_____

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (David C. Burger of counsel), for appellant.

Begos Brown & Green LLP, Bronxville (Patrick W. Begos of counsel), for respondents.

_____

Supplemental judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 17, 2012, awarding plaintiffs damages for breach of contract and vacating a stay of execution, and second supplemental judgment, same court and Justice, entered October 23, 2012, awarding attorneys' fees pursuant to General Business Law § 349, unanimously affirmed, with costs.

In light of the lengthy period since the seizure of defendants' assets in May 2005 and plaintiffs' unrebutted assertions of dire financial circumstances, among other factors, the court properly exercised its inherent power to vacate its own

stay of execution of the judgments to be entered (*see Wellbilt Equip. Corp. v Red Eye Grill*, 308 AD2d 411 [1st Dept 2003]). We note, further, that defendant defaulted at the scheduled trial resulting in the vacatur order, which precludes his right to appeal the vacatur (*see Matter of Nyree S. v Gregory C.*, 99 AD3d 561, 562 [1st Dept 2012], *lv denied* 20 NY3d 854 [2012]).

Defendant failed to provide the transcript and exhibits from the damages trial establishing plaintiffs' losses of certain properties and insurance policies (*see Matter of Taschereau*, 93 AD3d 532 [1st Dept 2012], *lv denied* 19 NY3d 808 [2012]). Contrary to the contention in his appellate reply brief, the trial determined issues of fact and not of law, rendering the submission of the evidence a necessary element of his appeal. The evidence sufficiently established the causation and the amount of damages (*see generally Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 188-189 [1st Dept 2000]).

Notwithstanding defendant's assertion that plaintiffs' counsel attempted to subvert a federal restraint by bringing a separate turnover action, the contingency fee award is reasonable; notably, the fee arrangement preceded the October

2009 federal restraint, defendant's federal conviction and the resulting order of restitution.

We have considered defendant's other contentions and find them unavailing.

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

ENTERED: JANUARY 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11481 Gloria Deanna Dickerson, Index 108081/11
Plaintiff-Appellant,

—against—

United Way of New York City,
Defendant-Respondent,

Lawrence Mandell, et al.,
Defendants.

_____

Gloria Deanna Dickerson, appellant pro se.

Proskauer Rose LLP, New York (Katharine H. Parker of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 28, 2012, awarding defendants' costs and disbursements, and bringing up for review an order, same court and Justice, entered on or about March 12, 2012, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's claim that defendants committed fraud by paying a retirement benefit to her estranged husband, without her consent, while she and her husband were in the midst of divorce proceedings, is barred by the doctrine of res judicata since there is a judgment on the merits from a prior federal action between the same parties involving the same subject matter (*see*

Dickerson v United Way of N.Y. City, 2008 WL 1752392 [SD NY 2008], *affd* 351 F Appx 506 [2d Cir 2009], *cert denied* ___ US ___, 131 S Ct 105 [2010]; *rehearing denied* ___ US ___, 131 S Ct 698 [2010]). The gravamen of plaintiff's allegations in both actions is that the payment was improper because the retirement benefit constituted joint marital assets subject to equitable distribution. Since both actions arose out of the same transaction and seek essentially the same remedy, the motion court properly dismissed the complaint (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]). The fact that plaintiff's theories of recovery in this action, sounding in negligence, fraud, and breach of fiduciary duty, differ from the theory of recovery in the federal action, which was based on an alleged violation of ERISA laws, is of no moment since the claims arose out of the same transaction (*id.*).

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

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

ENTERED: JANUARY 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11482 The People of the State of New York, Ind. 6307/10
Respondent,

-against-

Geoffrey Smith,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered July 19, 2011, convicting defendant, upon his plea of guilty, of attempted murder in the second degree, assault in the first degree (three counts), and criminal possession of a weapon in the second degree (two counts), and sentencing him to a term of eight years, followed by five years of post release supervision, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing.

Defendant negotiated a plea bargain under which the maximum sentence he would receive was ten years plus five years postrelease supervision. At sentencing, the court indicated that it had considered all information submitted to it. This included

a presentence report that recommended that defendant be sentenced as promised, even though he was eligible for youthful offender treatment (CPL 720.10).

During the pendency of this appeal, the Court of Appeals determined that CPL 720.20(1) requires "that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forego it as part of a plea bargain" (*People v Rudolph*, 21 NY3d 497, 501 [2013]). Although it is clear that the court did not believe that defendant was entitled to youthful offender treatment, it did not make an explicit determination on the record when it sentenced defendant to concurrent eight year terms. Because defendant is entitled under *Rudolph* to an express determination by the court as to whether youthful offender treatment should be granted, his sentence must be vacated (*id;*

see People v Tyler, 110 AD3d 745 [2d Dept 2013]). Since we are ordering a new sentencing proceeding, we find it unnecessary to address defendant's other arguments.

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

ENTERED: JANUARY 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11483 Laura Brown, Index 150038/10
Plaintiff-Appellant-Respondent,

-against-

The Blennerhasset Corporation,
Defendant-Appellant,

Paul Tayoun, et al.,
Defendants-Respondents.

_____

Braverman Greenspun, P.C., New York (Tracy Peterson of counsel), for appellant.

Gleason & Koatz, LLP, New York (John P. Gleason of counsel), for appellant-respondent.

Jones Morrison, LLP, Scarsdale (Daniel W. Morrison of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered October 17, 2012, which, inter alia, granted defendants Paul Tayoun and Sherry Tayoun's motion for summary judgment dismissing the claim for private nuisance as against them, and granted plaintiff's cross motion for leave to serve an amended complaint to the extent of allowing plaintiff to assert a claim for breach of the warranty of habitability against defendant The Blennerhasset Corporation, unanimously affirmed, without costs.

Supreme Court properly granted the Tayoun defendants' motion. Even when viewing the evidence in a light most favorable

to plaintiff, her own expert opined that the Tayoun defendants' heavy walking "is not going to be stopped by a simple carpet or pad" because such frequencies "penetrate right through a carpet and pad," and are attributable to the structure of the building itself (*see Rimany v Town of Dover*, 72 AD3d 924, 925 [2d Dept 2010], *lv denied* 15 NY3d 705 [2010]).

Contrary to plaintiff's argument, Supreme Court did not draw an arbitrary distinction between mechanical noise and noise made by people, but properly found, as a matter of law, that the Tayouns' conduct, which allegedly caused plaintiff's interference, was, as a matter of law, not substantial or unreasonable because it was premised upon noises that are incidental to normal occupancy, including heavy footsteps, snoring, and using a dishwasher (*see Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 569 [1977]; *Levine v Macy & Co.*, 20 AD2d 761 [1st Dept 1964]; *Waters v McNearney*, 8 AD2d 13, 17 [3d Dept 1959], *affd* 8 NY2d 808 [1960]).

Supreme Court providently exercised its discretion in granting plaintiff's cross motion allowing her to serve an amended complaint insofar as it asserted a claim for breach of the implied warranty of habitability against The Blennerhasset Corporation (Real Property Law § 235-b). The proposed amended

complaint adequately alleges that Blennerhasset deprived plaintiff of her right to quietly enjoy her apartment by failing to take effective steps to abate allegedly excessive noise emanating from the neighboring Tayoun defendants' apartment (*see Armstrong v Archives L.L.C.*, 46 AD3d 465 [1st Dept 2007]; *Matter of Nostrand Gardens Co-Op v Howard*, 221 AD2d 637, 638 [2d Dept 1995]). Further, because that claim is premised upon the very same subject matter alleged by the original complaint, Blennerhasset will not suffer any prejudice (*see McGhee v Odell*, 96 AD3d 449, 450-451 [1st Dept 2012]; *Valdes v Marbrose Realty*, 289 AD2d 28, 29 [1st Dept 2001]).

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

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

ENTERED: JANUARY 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11484 The People of the State of New York, Ind. 1744/10
Respondent,

-against-

Rasheem Brown,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at suppression hearing; Daniel P. FitzGerald, J. at nonjury trial and sentencing), rendered January 7, 2011, convicting defendant of criminal facilitation in the fourth degree, and sentencing him to a term of 30 days, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility

determinations, including its evaluation of the purported inconsistencies in testimony that defendant asserts on appeal (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

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

ENTERED: JANUARY 14, 2014

CLERK

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

11485 Lilith Dove, Index 107932/11
Plaintiff-Respondent,

-against-

Manhattan Plaza Health Club, et al.,
Defendants-Appellants.

_____

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for appellants.

Hogan & Cassell, LLP, Jericho (Michael D. Cassell of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered April 17, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff slipped and fell on water located on the tile floor around the indoor pool of defendants' health club. Defendants showed that the presence of such water was "necessarily incidental" to the use of the pool (*Conroy v Saratoga Springs Auth.* 259 App Div 365, 367 [3d Dept 1940], *affd* 284 NY 723 [1940]; *Jackson v State of New York*, 51 AD3d 1251 [3d Dept 2008]).

In opposition, plaintiff failed to raise a triable issue of

fact. The mere presence of water does not raise such an issue and plaintiff has not asserted a violation of a code, rule, regulation or industry standard. Moreover, there is no evidence as to how long the water existed on the floor, nor was the amount of water above and beyond what one might ordinarily expect to encounter around a pool (*see Jackson*, 51 AD3d at 1253). That water on the floor was a recurring situation is simply consistent with being "necessarily incidental" to the use of the pool.

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

ENTERED: JANUARY 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11486N Gama Aviation Inc., et al., Index 651710/10
Plaintiffs-Appellants,

-against-

Sandton Capital Partners, LP, et al.,
Defendants-Respondents,

Sandton Patners LLC,
Defendants.

- - - - -

KB Acquisition, LLC,
Counterclaim Plaintiff-Respondent,

-against-

Gama Aviation Inc., et al.,
Counterclaim Defendants-Appellants,

Gama Holdings Limited,
Additional Counterclaim Defendant-Appellant.

_____

Boies, Schiller & Flexner LLP, Armonk (Richard E. Weill of counsel), for appellants.

Peter K. Rydel, New York, for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 19, 2013, granting defendants' motion to compel plaintiffs-counterclaim defendants and additional counterclaim defendant Gama Holdings Limited (collectively Gama) to produce certain financial documents for 2011 and 2012, and all tax returns filed since January 1, 2010, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs,

the motion denied, and defendants directed to return the documents previously produced pursuant to this Court's interim order dated July 23, 2013 (2013 NY Slip Op 84656[U] [1st Dept 2013]), and no paper or electronic copies may remain in counsel's possession.

We substitute our discretion for that of the motion court (*see Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 745 [2000]), since there is no indication in the record that the documents sought are relevant to Gama's claim for lost profits. Gama articulated a narrow claim based on the grounding of a specific aircraft in October 2010, after the aircraft was booked for between 250 and 300 flight hours over the course of the following 12 months, which was expected to produce revenue of over $1 million. Although pre-2011 financial information and tax returns were produced, defendants have not demonstrated that any of the information provided has any bearing on the specific claim for lost profits.

With respect to the requested tax returns, defendants failed to show that there is an indispensable need for them, or that the information sought is unavailable through other sources (*see Nanbar Realty Corp. v Pater Realty Co.*, 242 AD2d 208, 209-10 [1st Dept 1997]). Gama's prior disclosure of pre-2011 data did not operate to waive all objections or privacy interests in the post-

2010 data, nor did this earlier production confer relevance on the post-2010 returns (*see Pyron v Banque Francaise du Commerce Exterieur*, 256 AD2d 204, 205 [1st Dept 1998]).

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

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

ENTERED: JANUARY 14, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

7836-
7837 The People of the State of New York,
Respondent,

-against-

Javone Major,
Defendant-Appellant.

Ind. 5779/08

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

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered December 1, 2009, reversed, on the law and the facts, the motion to suppress granted, and the indictment dismissed.

Opinion by Richter, J. All concur except Mazzarelli J.P., who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.
Leland G. DeGrasse
Helen E. Freedman
Rosalyn H. Richter, JJ.

7836-
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Ind. 5779/08

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The People of the State of New York,
Respondent,

-against-

Javone Major,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered December 1, 2009, convicting him, after a jury trial, of criminal possession of marijuana in the third degree, and imposing sentence.

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

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

RICHTER, J.

On the morning of November 6, 2008, Detective Raymond Mongelli was driving in a marked police car in the vicinity of Lenox Avenue in upper Manhattan. Mongelli, who was in uniform, noticed a black Lexus with heavily tinted windows, a violation of the Vehicle and Traffic Law. The Lexus turned west from Lenox Avenue onto 115th Street, and Mongelli activated the patrol car's lights and siren and signaled the Lexus to pull over. The Lexus stopped partway down the block on the north side of the street, and Mongelli stopped his vehicle about 20 feet behind.

Detective Mongelli approached the Lexus and asked the driver, who was alone in the car, for his license and registration. The driver, who appeared nervous, told Mongelli that he did not have a license, but provided the detective with his name and date of birth. Mongelli returned to his patrol car, checked the driver's information on his computer console, and learned that the driver had a revoked license. As he was checking the computer, Detective Mongelli looked up and saw defendant standing at the open window of the Lexus. The detective observed defendant take a small black plastic bag from the driver of the Lexus and walk away from the car toward the opposite sidewalk on the south side of the street. Mongelli did not hear any communication between the driver and defendant, and

he could not see what was inside the bag.

Mongelli called for backup, got out of his police car, and told defendant to stop. Defendant did not respond and continued to walk away from the Lexus. After reaching the south sidewalk, defendant walked eastbound toward the direction of Detective Mongelli and the patrol car. Mongelli walked diagonally toward defendant, ordered him to stop several more times, and then told defendant to "turn the bag over."

Meanwhile, two uniformed backup officers arrived on the scene in a marked patrol car with lights flashing and siren sounding. The backup officers got out of their vehicle and approached defendant from the east. Defendant, who could see the two backup officers coming toward him, stopped and threw the plastic bag onto the trunk of a nearby parked car. The bag opened as it landed, and inside, Detective Mongelli was able to see a clear ziplock bag that, based on his training, appeared to be marijuana. Defendant was then placed under arrest.

Defense counsel did not timely move to suppress the physical evidence, the case proceeded to trial and defendant was convicted of criminal possession of marijuana in the third degree. In a previous appeal, we concluded that defendant was deprived of effective assistance of counsel due to counsel's failure to file a suppression motion, or to provide good cause for such failure

(96 AD3d 677 [2012]). We found that the actions of the police in stopping defendant and seizing the plastic bag were of questionable propriety, and raised a colorable basis for suppression. The appeal was held in abeyance and the matter was remitted for a suppression hearing. Defense counsel filed a motion to suppress, a hearing was held and the court denied the motion. We now reverse.

The Court of Appeals has identified a gradual four-level test for evaluating police-citizen street encounters (*People v DeBour*, 40 NY2d 210, 223 [1976]). The first level permits an officer to approach and request information based on an objective credible reason not necessarily indicating criminality (*id.*). Level two permits a greater intrusion and allows for a "common-law right to inquire," which must be based on "a founded suspicion that criminal activity is afoot" (*id.*). The third level is a forcible stop and detention, and must be based on a "reasonable suspicion" that a person has committed, is committing or is about to commit a crime (*id.*). Finally, at the fourth level, an arrest may be made if a police officer has probable cause to believe that the person to be arrested has committed a crime, or an offense in the officer's presence (*id.*).

Applying these standards, we find that the evidence should have been suppressed. After pulling the driver of the Lexus over

for a traffic infraction, Detective Mongelli observed his nervous demeanor, and learned that his license had been revoked. The detective then saw defendant arrive at the Lexus, receive a black bag from the driver, and walk away. These observations provided, at most, a founded suspicion of criminal activity. Defendant's sudden appearance at the Lexus gave the detective reason to believe that the driver, having been stopped by the police, had summoned defendant to dispose of an item that the driver did not want the police to find (*see People v Nobles*, 63 AD3d 528, 529 [1st Dept 2009], *lv denied* 13 NY3d 798 [2009] [founded suspicion of criminality present where police stopped a livery cab for a traffic violation and observed the defendant passenger nervously push a bag he had been carrying on his body away from himself]).

In response to this founded suspicion that criminal activity was afoot, Detective Mongelli was permitted to conduct a common-law inquiry. But the police actions here went beyond a level two intrusion and constituted a level three stop and detention. Defendant was approached by Mongelli, who was in uniform, and loudly ordered to stop multiple times. Two other uniformed officers arrived in a police car with lights and siren engaged, and approached defendant from a different direction. Under these circumstances, we conclude that a seizure had occurred because "a reasonable person would have believed . . . that the [officers']

conduct was a significant limitation on his or her freedom" (*People v Bora*, 83 NY2d 531, 535 [1994]; *see Matter of Brandon D.*, 95 AD3d 776 [1st Dept 2012] [appellant seized where it was apparent he was not free to leave]). Furthermore, the detective's command to "turn the bag over" constituted at least a level three intrusion, requiring reasonable suspicion.

It is well established that a citizen has a right not to respond to law enforcement inquiries and to walk away from the police (*Illinois v Wardlow*, 528 US 119, 125 [2000] ["when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business"]; *People v May*, 81 NY2d 725, 728 [1992]; *People v Howard*, 50 NY2d 583, 586 [1980], *cert denied* 449 US 1023 [1980]). In *People v Moore* (6 NY3d 496 [2006]), the Court of Appeals reaffirmed this principle and described an individual's "right to be let alone" as the distinguishing factor between the level of intrusion permissible under the common-law right to inquire and the right to make a forcible stop. The Court reasoned that "[i]f merely walking away from the police were sufficient to raise the level of suspicion to reasonable suspicion . . . the common-law right of inquiry would be tantamount to the right to conduct a forcible stop and the suspect would be effectively seized whenever only a common-

law right of inquiry was justified" (*id.* at 500). The Court concluded that to elevate a level two inquiry to a level three stop, the police must obtain additional information or make additional observations of suspicious behavior sufficient to establish reasonable suspicion (*id.* at 500-501). Because no such additional information or observations existed here, the police lacked reasonable suspicion to justify the seizure that occurred.

The People unpersuasively argue that defendant's walking away at a fast pace upon being approached by Detective Mongelli provided the requisite reasonable suspicion. Although a defendant's flight can be considered in conjunction with other attendant circumstances in determining whether an officer had reasonable suspicion (*People v Martinez*, 80 NY2d 444, 448 [1992]), there is no reasonable view of the evidence here that defendant "actively fled" (*People v Moore*, 6 NY3d at 501). Defendant did not run away from the detective, increase his pace, or dart behind a car or into a building. Nor did defendant suddenly change his direction upon the sight of the police. In fact, defendant walked toward the direction of Detective Mongelli and his patrol car.

Thus, this case stands in contrast to those cases where flight was found because the defendant engaged in furtive or evasive conduct (*see e.g. People v Emiliano*, 81 AD3d 436 [1st

Dept 2011], *lv denied* 17 NY3d 794 2011] [running away from the police]*; People v Austin*, 100 AD3d 1010 [2d Dept 2012], *lv denied* 21 NY3d 1002 [2013] [ducking behind a building]; *People v Flores*, 88 AD3d 902 [2d Dept 2011], *lv denied* 18 NY3d 858 [2011] [changing direction and increasing pace]). In light of the Court of Appeals jurisprudence on this issue, we cannot hold that defendant's walking at a hurried pace along the sidewalk, without more, was sufficient to constitute flight because that would impermissibly conflate a level two common-law inquiry with a level three forcible stop (*see Moore* at 500-501). Thus, the seizure that occurred here was not supported by reasonable suspicion, and the evidence should have been suppressed.

Contrary to the dissent's view, *People v Martinez* (80 NY2d 444 [1992], *supra*) does not support a finding of reasonable suspicion here. In *Martinez*, the defendant was seen removing an item known to be used in concealing drugs. Moreover, the defendant in *Martinez* ran with the police in pursuit. Here, although we find that Detective Mongelli had a founded suspicion of criminality, he did not see an item that he explicitly associated with a drug transaction. Moreover, defendant here did not run from the police, but actually walked toward their direction. Thus, the police did not have reasonable suspicion or even come close to it. As the Court of Appeals noted in *Moore*,

conduct that triggers level two of the *DeBour* test only allows the police "to follow defendant while attempting to engage him — but not to seize him in order to do so" (6 NY3d at 500).

Although we find that the conduct here was sufficient to establish a founded suspicion of criminal activity, the dissent makes more of defendant's receipt of the plastic bag than we think is warranted on this record. The conduct here may be unusual, but no one saw any indication that the bag, or even the car, contained contraband (*see People v Robbins*, 83 NY2d 928, 930 [1994] [no reasonable suspicion where the defendant grabbed at his waistband after exiting stopped livery cab and then fled]). Finally, to the extent that *People v Oeller* (191 AD2d 355 [1st Dept 1993], *affd* 82 NY2d 774 [1993]), cited by the dissent, suggests that defendant's walking at a fast pace would be sufficient by itself to elevate the encounter to reasonable suspicion, we question its continued viability in light of the subsequent Court of Appeals ruling in *Moore*.

Accordingly, the judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered December 1, 2009, convicting defendant, after a jury trial, of criminal possession of marijuana in the third degree, and sentencing him, as a second drug offender previously convicted of a violent felony, to a term of two years to be followed by two years' postrelease

supervision, should be reversed, on the law and the facts, the motion to suppress granted, and the indictment dismissed.

All concur except Mazzarelli J.P. who dissents in an Opinion.

MAZZARELLI, J.P. (dissenting)

The facts leading up to defendant's arrest are not in dispute. Detective Raymond Mongelli pulled over Jamaine Glover because the car Glover was driving had illegally tinted windows. After Glover, who appeared nervous, could not produce a driver's license, Mongelli returned to his police cruiser to check Glover's license status on his mobile computer terminal. The computer revealed that Glover's license had been revoked. While still sitting in his cruiser, the officer looked up and noticed defendant approach Glover's open driver-side window and receive a small black plastic bag that Glover had handed him. Mongelli called for backup, got out of his cruiser, and followed defendant, who upon receipt of the bag had immediately begun walking away from Glover's car and towards the opposite side of the street. The officer told defendant, at least twice and in a loud voice, to stop, but defendant walked away briskly and appeared to be nervous. Mongelli then told defendant to turn over the bag. At around this time, two other police officers arrived on the scene. Defendant then complied with Mongelli's command to hand over the bag, by tossing it onto the trunk of a parked car. The bag opened and Mongelli recognized its contents as marijuana.

The majority acknowledges that defendant's acceptance of the bag

from Glover gave rise to founded suspicion that criminal activity was afoot, the second "level" of police-citizen encounters described in *People v DeBour* (40 NY2d 210 [1976]). Further, "flight alone" may not create reasonable suspicion that criminal activity has been, is being, or is about to be committed (the third *DeBour* level) (*see People v Holmes*, 81 NY2d 1056, 1058 [1993]). However, this case does not involve flight alone. Rather, it involves flight attendant to behavior that, while perhaps not reaching the line that separates founded suspicion of criminal activity, which justifies only a common-law inquiry, from reasonable suspicion, which permits police to seize a suspect, came exceedingly close to it.

On point is *People v Martinez* (80 NY2d 444 [1992]). In *Martinez*, police patrolling in a neighborhood known for drug activity observed the defendant remove a metal "Hide-a-Key" box from the steel grate of a store window. The officers knew that such boxes are often used to stash drugs. They approached the defendant, who, realizing they were police officers, turned and ran a few steps into a grocery store. After the defendant handed off the box to his codefendant, the officers recovered it and discovered that it contained crack cocaine. The Court of Appeals affirmed the denial of the defendant's motion to suppress the drug evidence. The Court did not find that the defendant's

taking the Hide-a-Key box gave rise to anything other than, at most, a founded suspicion that criminal activity was afoot, and observed that the defendant had every right to refuse a police inquiry and to flee the scene without creating reasonable suspicion (80 NY2d at 448). However, it went on:

> "[D]efendant's flight may be considered in conjunction with other attendant circumstances, namely, the time, the location, and the fact that defendant was seen removing an instrument known to the police to be used in concealing drugs. When coupled with defendant's immediate flight upon the officer's approach, the [removal of the Hide-a-Key box] in this narcotics-prone neighborhood establishes the necessary reasonable suspicion such that pursuit by the officers was justified" (*id.* [internal quotation marks omitted]).

Where the attendant circumstances are much more equivocal, flight is insufficient to escalate the encounter. Thus, in *People v Moore* (6 NY3d 496 [2006]), cited by the majority, police approached the defendant after having received a radio call of a dispute involving an individual with a gun, which was based on an anonymous tip. Although the defendant matched the physical description of the purported gunman, there was no dispute, or even other people on the scene, when the officers arrived one minute after receiving the call. Upon their approach, the defendant walked away, and, even before they attempted an inquiry, the police drew their guns. The defendant then turned away and continued to walk, at which point the police patted him

down and discovered a gun. The Court reversed the denial of the defendant's motion to suppress the gun, finding that the defendant's decision to walk away was consistent with his "right to be let alone" (6 NY3d at 500). In contrast to this case, there was no other factor to couple to the act of flight. Indeed, the Court discounted the anonymous tip, finding that it was not predictive of any behavior and did not accurately portray the alleged criminal activity (*id.* at 499).

The facts of this case are much closer to *Martinez* than they are to *Moore*. The circumstances under which Glover handed over the bag left little doubt that the bag contained something which would have deepened Glover's predicament had Mongelli discovered it. Contrary to the majority's conclusion, it simply defies logic to believe that, while the obviously nervous Glover was waiting for Mongelli to confirm that he was driving on a revoked license, an offense which could subject his car to a search, he took the opportunity to hand an entirely innocent object to a person who just happened to appear at his car. As such, defendant's conduct hovered very close to the line which separates an officer's founded suspicion that criminal activity is afoot from reasonable suspicion that the defendant is in the process of committing a crime. When he ignored Mongelli's command to stop and submit to an inquiry, Mongelli gained a

sufficient predicate to seize defendant and order him to turn over the bag.

To the extent that the majority contends that defendant's act of continuing to walk after Mongelli directed him to stop did not constitute "flight," I disagree. The majority provides no support for its implication that flight must involve "furtive or evasive conduct." Indeed, defendant's walking away from the scene, under the circumstances, was sufficient to create reasonable suspicion. In *People v Oeller* (191 AD2d 355 [1st Dept 1993], *affd* 82 NY2d 774 [1993]), a police officer observed the defendant pass money to another individual in exchange for an unidentified object that the officer, based on his experience and the specific location, believed to be a package of drugs. The officer approached both men, and the other individual "turned away" from him, while the defendant turned to face the officer. At this point the officer ordered the defendant to remove his hands from his pockets, which he did, revealing several vials of cocaine. This Court found that the exchange between the defendant and the individual gave rise to reasonable suspicion and itself justified a stop. However, this Court went on to state:

> "In any event, even assuming, arguendo, that the police only had a common-law right of inquiry, upon their approach, the other

> participant in the drug transaction turned and left before the police could question either. This flight, *whether at a walk or faster pace*, only served to heighten the police suspicion. This, combined with the exchange of currency for an object 'in an area rampant with narcotics activity', 'negat[ed] all but the most implausible explanations for the transaction'" (191 AD2d at 356, quoting *People v McRay*, 51 NY2d 594, 604 [1980] [emphasis added]).

I disagree with the majority that *Oeller* was overruled by *Moore*. To be sure, the Court of Appeals in *Moore*, while holding that the defendant's merely walking away from the police was insufficient to create reasonable suspicion, observed that the level of suspicion may have been raised had the defendant "actively fled" (6 NY3d at 501). Again, however, the anonymous, unpredictive tip which gave rise to the right to inquire in that case was, by itself, highly equivocal. Something highly suggestive of criminal activity was required to create reasonable suspicion of such. By contrast, here, as well as in *Oeller*, the predicate information out of which the right to make a common-law inquiry arose was already strong. Accordingly, not much more was required to justify a seizure. I believe that defendant's continuing to walk after Detective Mongelli directed him to stop, at a brisk pace and with a nervous appearance, provided the necessary additional information. Further, that defendant may have walked in the general direction from which Mongelli was

approaching is irrelevant, as it is clear that defendant was attempting to avoid being engaged by Mongelli.

Whether a police stop is justified is determined not by a mechanical application of each isolated action taken by a citizen and police officer in an encounter, but by the totality of the circumstances (*see People v Benjamin*, 51 NY2d 267, 271 [1980]). In suppressing the drugs recovered from defendant, the majority disregards this notion, because it fails to view defendant's flight in the context of his highly suspect act of receiving a plastic bag from Glover during a police-directed traffic stop. Because I believe that defendant's walking away from Detective Mongelli clearly justified a seizure of defendant based on reasonable suspicion of criminal activity, I would affirm the order of the motion court.

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

ENTERED: JANUARY 14, 2014

CLERK