SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 20, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6373 The People of the State of New York, Respondent, Ind. 2133/09

-against-

Jason Burgess,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), and Weil, Gotshal & Manges LLP, New York (Katherine M. Brandes of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J. at hearing; Bonnie G. Wittner, J. at jury trial and sentencing), rendered April 27, 2010, convicting defendant of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The verdict was based on legally sufficient evidence. Defendant's conduct went well beyond being merely present at the

scene of a robbery. The evidence supports the inference that defendant intentionally assisted his companions by intimidating and partially encircling the victim (*see e.g. People v Snow*, 303 AD2d 255 [2003], *lv denied* 99 NY2d 658 [2003]; *People v Edmonds*, 267 AD2d 19 [1999], *lv denied* 94 NY2d 862 [1999]).

The court properly denied defendant's suppression motion. Shortly after the police saw three men running, they spoke with the victim, who said in substance that he been robbed by the three men who had just run by. This provided, at least, reasonable suspicion upon which to detain defendant and his two companions when the police saw them again, still in flight, a short distance away. Given the temporal and spatial factors, it was a reasonable inference that these were the same three men whom the victim was accusing of robbery.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91

NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). Where appropriate, the court took curative actions that were sufficient to prevent any prejudice.

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6374 Tower Insurance Company of New York, Index 113336/08
Plaintiff-Appellant,

-against-

NHT Owners LLC, et al.,
Defendants-Respondents,

Robert Riccio,
Defendant.

_____

Law Offices of Max W. Gershweir, New York (Joseph S. Wiener of counsel), for appellant.

Rothkrug, Rothkrug & Spector, LLP, Great Neck (Simon H. Rothkrug of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 24, 2010, which, in this action for a declaratory judgment, denied plaintiff insurer's motion for summary judgment and declared that it was obligated to defend and indemnify defendants-respondents NHT Owners LLC and Mallory Management Corp. in the underlying action against them, and granted said defendants-respondents' cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

A liability policy that requires an insured to provide notice of an occurrence to its insurer "as soon as practicable"

obligates the insured to give notice of the occurrence within a reasonable period of time (*Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 743 [2005]). However, we need not reach the question of whether, under all the circumstances, the insureds' notice of claim, 62 days after the occurrence, was timely, where they conducted an inquiry into the underlying accident, and believed there was no liability (*see Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 [1972]) because the court properly held that the notice of disclaimer, after a 33-day period, was untimely as a matter of law (*see* Ins Law § 3420[d]; *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-69 [2003]*; see e.g. West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 [2002], *lv denied* 98 NY2d 605 [2002]). The insurer's sole ground for the disclaimer of coverage was the insured's delay in notifying it of the occurrence, which was readily apparent at the time of the notice of claim (*see First Fin. Ins. Co.*, 1 NY3d at 69).

We have considered the insurer's remaining contentions and find them without merit.

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6375 Great American Insurance Companies, et al., 103565/08
Plaintiffs, 590789/09

-against-

Bearcat Financial Services, Inc., et al.,
Defendants,

– – – – –

Patrick Hayes,
Third-Party Plaintiff-Appellant,

-against-

Dresdner, Kleinwort, Wasserstein Services, LLC,
Third-Party Defendant-Respondent.

_____

Law Offices of Peter A. Hurwitz, PLLC, New City (Peter A. Hurwitz of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (Ayanna Lewis-Gruss of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered May 3, 2010, which, to the extent appealed from as limited by the briefs, granted the motion of third-party defendant Dresdner to dismiss the third-party complaint, award Dresdner its costs, and impose sanctions on defendant/third-party plaintiff Hayes and his counsel, unanimously affirmed, with costs.

Because the first-party complaint alleges that Hayes is

liable based only on his own wrongdoing, his third-party claim that he is entitled to common-law indemnification from Dresdner does not state a cause of action (*Mathis v Central Park Conservancy*, 251 AD2d 171, 172 [1998]). Accordingly, the third-party complaint was properly dismissed.

Because the third-party claim was plainly defective, the motion court providently exercised its discretion in determining that it was frivolous and imposing sanctions and costs (*see* 22 NYCRR 130-1.1; *Pickens v Castro*, 55 AD3d 443 [2008]).

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

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6376 In re Vermont Department of
Social Welfare on behalf of Lynn L.T.,
Petitioner-Respondent,

-against-

Louis T. T. Sr., also known as Florio V.,
Respondent-Appellant.

_____

Florio V., appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein of counsel), for respondent.

_____

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about January 14, 2010, which denied respondent's objection to an order, same court (Debra Schiraldi Stein, Support Magistrate), entered on or about April 21, 2010, denying his motion to vacate an order of child support, same court (Elrich Eastman, J.), entered on or about December 3, 1985, unanimously affirmed, without costs.

Respondent's objection on the ground of improper service is barred by the doctrine of res judicata because he could have raised it in a prior proceeding (*see Majid v Commissioner of Social Servs.*, 24 AD3d 251 [2005], *lv denied* 7 NY3d 703 [2006]).

Moreover, the objection was barred by the doctrine of laches, as respondent waited over 24 years before raising it (*see Steiner v Steiner*, 204 AD2d 157 [1994]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6377-
6378 Grand Pacific Finance Corp., Index 601164/09
Plaintiff-Respondent,

-against-

97-111 HALE, LLC, et al.,
Defendants-Appellants.

– – – – –

[And Another Action]

_____

Marc M. Coupey, New York, for appellants.

Herrick Feinstein LLP, New York (Scott T. Tross of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered June 10, 2010, which granted plaintiff's motion for summary judgment on the first, second, fourth, fifth, sixth, seventh, and eighth causes of action, appointed a Referee for computation of amounts owed, and granted, in part, plaintiff's motion to strike portions of defendants' surreply, unanimously affirmed, with costs. Order, same court and Justice, entered March 22, 2011, which, to the extent appealed from, granted plaintiff's motion to confirm the Referee's report of amounts due and to enter judgment thereon, unanimously affirmed, with costs.

In this action to recover the amounts due under three loans, plaintiff established its prima facie entitlement to judgment as

a matter of law by providing evidence that it held the three notes and that defendants had failed to make the payments due under the notes (*Superior Fid. Assur., Ltd. v Schwartz*, 69 AD3d 924, 925 [2010]). In addition, defendants admitted in both their answer and amended answer that they had defaulted on the three notes.

Defendants' opposition failed to raise a triable issue of fact sufficient to defeat summary judgment. The notes and related guarantees prohibited defendants from bringing any counterclaims in an action to collect under the notes, and absolutely and unconditionally guaranteed payment of the debt irrespective of any lack of validity or enforceability of any loan document. Thus, regardless of the merit of the counterclaims and cross claims, the guarantees effectively barred the defenses (*Banco do Estado de Sao Paulo v Mendes Jr. Intl. Co.*, 249 AD2d 137,138 [1998]). Moreover, the claims of fraudulent inducement by plaintiff were irrelevant to the two loans originally made by a nonparty, from whom plaintiff acquired the notes, and the third loan was made to defendant Hale Club, which did not claim that it was defrauded.

Supreme Court properly struck and refused to consider those portions of defendants' surreply that went beyond the scope of

the permitted surreply, which was to address only whether the counterclaims and cross claims should be severed (*see Slade v Metropolitan Life Ins. Co.*, 231 AD2d 467, 469 [1996]).

The motion court properly confirmed the Referee's report. At the hearing before the Referee, plaintiff provided detailed calculations of the interest and other sums due and defendants failed to rebut any of that evidence. Defendants were not entitled to discovery before the hearing; any documentation of payment on the loans would have been within their possession or could have been obtained from their financial institutions. The Referee properly accepted copies of the various loan documents since a "reproduction, which accurately reproduces . . . the original . . . is as admissible in evidence as the original" (CPLR 4539; *see also Banco Nacional de Mexico v Ecoban Fin.*, 276 AD2d 284 [2000]).

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

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6380 The People of the State of New York, Ind. 5785/02
Respondent,

-against-

Nathaniel Syville,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered November 19, 2004, as amended January 6, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of 12 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 credibility determinations. The forensic evidence, viewed as a whole, tended to corroborate rather than undermine the victim's testimony.

The court properly exercised its discretion when it denied defendant's requests to introduce two alleged prior inconsistent statements made by the victim (*see People v Duncan*, 46 NY2d 74,

80 [1978], *cert denied* 442 US 910 [1979]; *People v Jackson*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 790 [2006]). The purported inconsistencies were taken out of context and lacked probative value. Since defendant never asserted a constitutional right to introduce either piece of evidence, his present constitutional claim is unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

The portion of the prosecutor's summation to which defendant objected on the ground of speculation drew permissible inferences from the evidence in response to defense counsel's summation, and did not deprive defendant of a fair trial. Defendant's remaining claims regarding the 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 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román JJ.

6381 In re Natasha Latoya T-M.,
Petitioner-Appellant,

-against-

Michael Devonne M.,
Respondent,

Administration for Children
Services of the State of New York,
Respondent-Respondent.

_____

Anne Reiniger, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for ACS, respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Michael D. Scherz of counsel), attorney for the child.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about May 21, 2009, which, inter alia, denied the petition for custody of the subject child and dismissed the proceeding brought pursuant to article 6 of the Family Court Act, unanimously affirmed, without costs.

"It is well established that in reviewing...custody issues, deference is to be accorded to the determination rendered by the factfinder, unless it lacks a sound and substantial basis in the record" (*Yolanda R. v Eugene I.G.*, 38 AD3d 288, 289 [2007]). Here, in denying the petition, the court properly considered the

child's best interests in finding that there existed sufficient evidence of extraordinary circumstances, including petitioner mother's minimal contact with the child over several years and her inability to provide and safeguard the child's mental and developmental needs (*see Matter of Bennett v Jeffreys*, 40 NY2d 543 [1976]). There exists no basis to disturb the court's determination that the child should remain with his paternal grandmother, who had provided him with a stable and nurturing home in the preceding years.

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

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6382 Edward Lassen, Index 307630/08
Plaintiff-Appellant,

-against-

Dunkin' Donuts Incorporated, et al.,
Defendants-Respondents.

_____

Law Offices of Joseph B. Strassman, LLP, Huntington (Joseph B. Strassman of counsel), for appellant.

Quirk and Bakalor, P.C., New York (Richard H. Bakalor of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about June 28, 2010, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries he sustained when he was struck by a motor vehicle operated by an employee of defendants' franchisees. Plaintiff's theory of the case is vicarious liability based on agency. However, the pleadings allege no facts to substantiate the assertion that the motor vehicle operator was defendants' agent (CPLR 3211[7]).

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

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, JJ.

6383 Mary Asantewaa, Index 22126/06
Plaintiff-Respondent,

-against-

City of New York,
Defendant-Appellant.

_____

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

Powers & Santola, LLP, Albany (Michael J. Hutter of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 4, 2010, which granted plaintiff's motion for partial summary judgment on the issue of liability and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny plaintiff's motion and to grant defendant's cross motion to the extent of dismissing that portion of plaintiff's claim premised upon defendant's failure to ensure that she wore a seat belt, and otherwise affirmed, without costs.

Plaintiff was injured when, while a passenger in defendant's ambulance, the ambulance suddenly stopped, causing plaintiff, who was seated on a bench in the rear compartment of the ambulance and not wearing a seatbelt, to fall off the bench. It is well

settled that the operator of an ambulance owes its passengers a duty of reasonable care (*see Bethel v New York City Tr. Auth.*, 92 NY2d 348, 356 [1998]). However, that duty does not require that the operator of the vehicle ensure that an adult passenger has fastened his or her seatbelt (*see e.g. Stewart v Taylor*, 193 AD2d 1078 [1993]). Moreover, the New York City Fire Department's internal rules requiring that members ensure that passengers in emergency vehicles wear seatbelts imposes a greater standard of care upon defendant than that imposed by law, and thus, a violation of said rules cannot serve as basis for plaintiff to impose liability upon defendant (*see Gilson v Metropolitan Opera*, 5 NY3d 574, 577 [2005]; *Rahimi v Manhattan & Bronx Surface Tr. Operating Auth.*, 43 AD3d 802, 804 [2007]).

Contrary to plaintiff's contention that even if her allegations that defendant was liable based on its failure to ensure that plaintiff was wearing a seatbelt are found to be not viable she is still entitled to summary judgment based on her allegations that the ambulance was operated in a negligent

manner, the record presents triable issues of fact in this regard.

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6384 L&R Exploration Venture, et al., Index 101646/02
Petitioners-Respondents,

-against-

Jack J. Grynberg,
Respondent-Appellant.

_____

Frankfurt Kurnit Klein & Selz, P.C., New York (Ronald C Minkoff of counsel), for appellant.

Simon Lesser PC, New York (Leonard F. Lesser of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 20, 2011, which, among other things, granted petitioners' motion for an order of contempt, found respondent in civil contempt, and awarded petitioners the attorneys' fees incurred in a Wyoming action, unanimously affirmed, with costs, and the matter remanded for further proceedings consistent with this decision.

Supreme Court providently exercised its discretion in finding respondent in contempt based upon his wife's commencement of an action in Wyoming asserting the same claims that were stayed in this special proceeding in favor of arbitration (22 AD3d 221 [2005], *lv denied* 6 NY3d 749 [2005]). Petitioners did not waive their right to seek contempt by moving to dismiss the

Wyoming action based on the res judicata effect of the arbitration award. Seeking dismissal in the Wyoming court, rather than seeking another injunction in New York, was the most expeditious way to protect petitioners' rights and achieve a result consistent with the parties' original intent to arbitrate under their 1960 agreement. Because the arbitration already had been conducted, there is no merit to respondent's contention that petitioners were not prejudiced by having to litigate in Wyoming because it cost no more than arbitration. Although petitioners' attorneys' fees in Wyoming were not recoverable as expenses in the absence of actual loss under Judiciary Law § 773 (*see Riedel Glass Works, Inc. v Kurtz & Co., Inc.*, 260 App Div 163, 166 [1940], *affd* 287 NY 636 [1941]), we find that they constituted actual loss as a result of the contempt and were properly awarded for that reason. We further find that petitioners are entitled to costs and expenses in responding to this appeal (*see Bell v White*, 77 AD3d 1241, 1245 [2010], *lv dismissed* 16 NY3d 888 [2011]).

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

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6385 The People of the State of New York, Ind. 4635/08
Respondent,

-against-

Ramon Urena,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered on or about March 16, 2009, unanimously affirmed.

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

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

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

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6386 The People of the State of New York, Ind. 12033/95
Respondent,

-against-

Ramon Lebron,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Edward McLaughlin, J.), entered on or about October 28, 2008,

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

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

ENTERED: DECEMBER 20, 2011

CLERK

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

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6387 Glenda Shearn, et al., Index 260330/10
Petitioners-Appellants,

-against-

Duane Durst, etc., et al.,
Respondents-Respondents.

_____

Anthony & Middlebrook, P.C., Bronx (J. Matthew Anthony of counsel), for appellants.

Ruta Soulios & Straitis LLP, New York (Joseph A. Ruta of counsel), for respondents.

_____

Appeal from order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered August 17, 2010, which dismissed the petition seeking, inter alia, to compel respondents to execute an amendment to a church's certificate of incorporation and to prohibit respondents from utilizing church funds and altering the worship service schedule, unanimously dismissed, without costs, as moot.

Petitioners brought this CPLR article 78 proceeding against respondents, former members of the board of petitioners' church, Crossway Christian Center, not in their capacity as advisors to the reinstated original board, or even in their former capacities as the temporary board, but in their present capacities as officers of the Assemblies of God's New York district office.

Accordingly, the appeal is moot since respondents are in no position to grant the relief requested in either the original petition or in petitioners' appellate brief (*see Matter of Espada 2001 v New York City Campaign Fin. Bd.*, 302 AD2d 299 [2003], *see also Matter of E.W. Tompkins Co., Inc. v Board of Trustees of Clifton Park-Halfmoon Pub. Lib*, 27 AD3d 1046, 1047-1048 [2006], *lv denied* 7 NY3d 704 [2006]).

Were we to consider petitioners' claims on the merits, we would find that, because the intervention of respondents into the affairs of Crossway was valid and allowed under its bylaws, respondents were not obligated to take the actions sought by petitioners.

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6388 Lamar Hardwick, et al., Claims No. 100497
Claimants-Appellants,

-against-

The State of New York,
Defendant-Respondent.

_____

Andrew H. Rosenbaum, New York, for appellants.

Eric T. Schneiderman, Attorney General, Albany (Paul Groenwegen of counsel), for respondent.

_____

Judgment of the Court of Claims of the State of New York (W. Brooks DeBow, J.), entered January 6, 2010, after a nonjury trial, upon a finding that the injured claimant was 75% at fault and defendant 25% at fault, unanimously modified, on the facts, to apportion liability 60% to claimant and 40% to defendant, and otherwise affirmed, without costs.

Since the trial court's apportionment of liability was based on a credibility determination, our review is limited to whether the court arrived at its conclusion by means of a fair interpretation of the evidence (*see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *Green v William Penn Life Ins. Co. of N.Y.*, 74 AD3d 570, 571-73 [2010] [Saxe, J., concurring]; *see also Watts v State of*

New York, 25 AD3d 324 [2006]). The record supports the finding that claimant bears some responsibility for his injuries. However, it does not support the finding that the dangerous condition was open and obvious. Thus, we modify the apportionment accordingly.

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6389 In re Kharyn O.,

A Dependent Child Under the
Age of 18 Years, etc.,

Karen O.,
Respondent-Appellant,

Lutheran Social Services,
Petitioner-Respondent.

_____

Lisa H. Blitman, New York, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg and Laura Dillon of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about March 3, 2010, which terminated respondent mother's parental rights to the subject child following her admission of permanent neglect, and committed the guardianship and custody of the child to petitioner agency and the Commissioner of Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports Family Court's finding that it is in the child's best interests to terminate respondent's parental rights and free the child for adoption (*see*

Family Ct Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The evidence at the dispositional hearing shows that while respondent had made progress since her release from prison in October 2008 and had been compliant with services for several months, she thereafter failed to complete a drug treatment program, failed to visit the child for two months, and was incarcerated in September 2009 for a parole violation. By contrast, the child was doing well in the home of her foster mother, who wished to adopt her. Accordingly, a suspended judgment was not warranted (*see e.g. Matter of Jessica Victoria S.*, 47 AD3d 428 [2008]; *Matter of Savannah V.*, 38 AD3d 354, 355 [2007]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Sweeny, Román, JJ.

6390 534 East 11th Street Housing Development Fund Corporation, Plaintiff-Respondent, Index 116064/08

-against-

Peter Hendrick, Defendant-Appellant.

_____

Finder Novick Kerrigan LLP, New York (Thomas P. Kerrigan of counsel), for appellant.

Edward Joseph Filemyr IV, New York, for respondent.

_____

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 17, 2009, which, to the extent appealed from, granted plaintiff's motion to dismiss defendant's affirmative defenses and third and fourth counterclaims, unanimously modified, on the law, to reinstate the affirmative defenses and the counterclaim for tortious interference, and otherwise affirmed, without costs.

On a motion to dismiss affirmative defenses pursuant to CPLR 3211(b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law (*see e.g. Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2006]; *Santilli v Allstate Ins. Co.*, 19 AD3d 1031, 1032 [2005]). In deciding a motion to dismiss a defense, the defendant is entitled to the

benefit of every reasonable intendment of the pleading, which is to be liberally construed (*Warwick v Cruz*, 270 AD2d 255, 255 [2000]). A defense should not be stricken where there are questions of fact requiring trial (*see e.g. Atlas Feather Corp. v Pine Top Ins. Co.*, 128 AD2d 578, 578–579 [1987]).

While not listed under the sections specifically titled for each defense, defendant pled factual allegations in the body of his answer sufficient to give notice of what he intends to prove under his defenses (*see LoPinto v Roldos*, 235 AD2d 233 [1997]).

Defendant also sufficiently pled a counterclaim for tortious interference with a business relationship. A claim for tortious interference with a prospective business relationship (i.e., an economic advantage) must allege: (1) the defendant's knowledge of a business relationship between the plaintiff and a third party; (2) the defendant's intentional interference with the relationship; (3) that the defendant acted by the use of wrongful means or with the sole purpose of malice; and (4) resulting injury to the business relationship (*see NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88 [2009], *lv denied* 15 NY3d 703 [2010]).

Here, defendant has pled that plaintiff, who knew defendant

had a contract to sell his apartment, interfered with that relationship by refusing, in bad faith, to approve his buyer after defendant refused to take part in a fraudulent scheme to lower a buyer's tax burden so that the apartment could be purchased by a shareholder's son.

Plaintiff relies on the business judgment rule, which provides that so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). However, pre-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where those pleadings suggest that the directors did not act in good faith (*see Bryan v West 81 St. Owners Corp.*, 186 AD2d 514 [1992]).

However, the motion court correctly dismissed defendant's fourth counterclaim, seeking attorney's fees. As there is no allegation that either party was in default of any of the provisions of the proprietary lease, the defendant is not

entitled to recover attorney's fees (*see Salvato v St. David's School*, 307 AD2d 812 [2003]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6392 The People of the State of New York, Respondent, Ind. 3678/06 1282/07

-against-

Christopher Janish, Defendant-Appellant.

_____

The Legal Aid Society, New York (Steven Banks of counsel), and White & Case LLP, New York (Louis F. O'Neill of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered July 22, 2008 (as amended September 23, 2008), convicting defendant, upon his plea of guilty, of enterprise corruption, securities fraud in violation of General Business Law § 352-c (5), grand larceny in the second degree, perjury in the first degree and criminal contempt in the second degree, and sentencing him to an aggregate term of 4 to 12 years, with restitution in the amount of $4,460,886, unanimously affirmed.

Defendant does not dispute that his waiver of his right to appeal was knowing, intelligent, and voluntary. Although he "attempt[s] to avoid the effect of his waiver ... by invoking the

exception ... for challenges to the legality of the sentence" (*People v Callahan*, 80 NY2d 273, 280-281 [1992]), we look at "the actual gist of [his appellate] claim," not "the label [he] assign[s] to" it (*id.* at 281). As in *Callahan*, "it is apparent that his challenge is addressed not to the legality of the sentence ... Rather, defendant's appellate claim [i]s addressed merely to the adequacy of the procedures the court used to arrive at its sentencing determination ..." (*id.*). Therefore, his current claims are waived (*see id.; see also People v Chamberlain*, 35 AD3d 961, 962 [2006], *lv denied* 8 NY3d 920 [2007]; *People v Williams*, 290 AD2d 590, 590-591 [2002]).

Furthermore, regardless of the waiver, defendant's claims are also unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: DECEMBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6393 The People of the State of New York, Ind. 5368/08
Respondent,

-against-

Ariana Coleman,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Heidi Bota 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 (Maxwell Wiley, J.), rendered on or about May 27, 2009,

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

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

ENTERED: DECEMBER 20, 2011

CLERK

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

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Román, JJ.

6394N Jeanne J. Perkins, Index 315467/10
Plaintiff-Respondent,

-against-

Bruce Elbilia,
Defendant-Appellant.

_____

Gordon A. Burrows, White Plains, for appellant.

Chemtob Moss Forman & Talbert, LLP, New York (Nancy Chemtob of counsel), for respondent.

_____

Order, Supreme Court, New York County (Laura Drager, J.), entered on or about May 25, 2011, which denied defendant's motion to admit, pro hac vice, Danielle E. deBenedictis, an attorney admitted to practice in the Commonwealth of Massachusetts, to represent him in this matrimonial action, unanimously reversed, on the law and the facts, without costs, and the motion granted.

The motion court abused its discretion by denying defendant's motion for the pro hac vice admission of an out-of-state attorney to represent him. This State's policy favors "representation by counsel of one own's choosing" (*Neal v Ecolab, Inc.*, 252 AD2d 716, 716 [1998] [internal quotation marks and citation omitted]). The motion was made within days after the commencement of the action; pro hac vice admission would not

adversely affect judicial efficiency or the court's control of its courtroom and calendar (*see Giannotti v Mercedes Benz U.S.A., LLC*, 20 AD3d 389 [2005]). Defendant's submissions satisfied the statutory requirements for pro hac vice admission. The out-of state attorney submitted proof that she is a member in good standing of the bar of the Commonwealth of Massachusetts, that she will be associated with a New York attorney, who will be the attorney of record, and that she is familiar with and will comply with the standards of professional conduct imposed on members of the New York bar (*see* 22 NYCRR 521.11[a], [c] and [e]). In addition, the out-of-state attorney has been negotiating and trying domestic disputes since 1978 and possesses expertise in tax and accounting matters as well as in valuation issues concerning closely held and family businesses, issues which will be raised in this action.

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

ENTERED: DECEMBER 20, 2011

CLERK

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

3890 Harbinger Capital Partners Master Fund I, Ltd., et al., Plaintiff-Respondent-Appellants, Index 602529/08

-against-

Wachovia Capital Markets, LLC., etc., Defendants-Appellants-Respondents,

BDO Seidman, LLP, Defendant-Appellant,

Gregory J. Podlucky, et al., Defendants.

Appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Barbara Kapnick, J.), entered on or about May 12, 2010,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 30, 2011,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: DECEMBER 20, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5528 The People of the State of New York, Ind. 2525/98
Respondent,

-against-

Lamar Baity,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about February 3, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded to Supreme Court for further proceedings on the motion.

Defendant is eligible to be resentenced under the 2009 Drug Law Reform Act (L 2009, ch 56), even though he was released on

parole from custody on his drug conviction, but reincarcerated for a parole violation (*People v Paulin*, 17 NY3d 238).

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

ENTERED: DECEMBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5793 The People of the State of New York, Ind. 1399/06
Respondent,

-against-

Kennedy Brown,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered September 24, 2008, convicting defendant, after a jury trial, of robbery in the first degree, robbery in the second degree (three counts), and criminal possession of a weapon in the second and third degrees, and sentencing him, as a persistent violent felony offender, to concurrent terms of 25 years to life, unanimously affirmed.

The trial court did not deprive defendant of his constitutional right to counsel and to properly prepare a defense when it denied his eve of trial pro se motion to relieve his second appointed counsel and to substitute new counsel. An indigent criminal defendant must demonstrate "good cause" for the appointment of substitute counsel, such as a conflict of interest

or other irreconcilable conflict, and is not entitled to the appointment of successive lawyers at his or her option (*People v Sides*, 75 NY2d 822, 824 [1990]). There were no allegations in defendant's pro se motion that would require the trial court to engage in a minimal inquiry of defendant as to the nature of his disagreement with counsel or its potential for resolution (*see People v Porto*, 16 NY3d 93, 100-101 [2010]). In any event, although the trial court initially stated that it would deny the motion because it had previously told defendant that it would not substitute counsel a second time, it thereafter allowed defense counsel to address the issue on consecutive days. Counsel did not demonstrate good cause for substitution. While he stated that he had not had an adequate opportunity to consult with defendant and asked for a one-week, then a two-day adjournment to prepare for the suppression hearing and trial, he did not indicate any conflict with defendant. Significantly, the trial court afforded defense counsel a sufficient opportunity to consult with defendant, both before and during the suppression hearing, and between the hearing and trial, to provide defendant with meaningful representation.

Defendant failed to preserve his argument that he was deprived of counsel by the court's refusal to grant adjournments

for the periods of time his counsel requested, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see United States v Cronic*, 466 US 648 [1984]; *Matter of Jeffrey V.*, 82 NY2d 121, 126 [1993]). Whether to grant an adjournment lies in the sound discretion of the trial court (*see People v Spears*, 64 NY2d 698, 699-700 [1984]), and the exercise of that discretion in denying or partially granting an adjournment will not be disturbed absent a showing of prejudice (*see People v Struss,* 79 AD3d 773, 774 [2010]; *People v Jones*, 299 AD2d 162 [2002], *lv denied* 99 NY2d 583 [2003]). Defendant was afforded a meaningful opportunity to consult with his attorney and therefore has shown no prejudice *(see e.g. People v Quinones*, 248 AD2d 151, 151-152 [1998], *lv denied* 92 NY2d 859 [1998]). The court granted defense counsel almost a full day to consult with his client in preparation for the hearing; defendant effectively received more than the two-day adjournment he last requested and more than the one-week adjournment he initially sought for trial preparation.

To the extent the record permits review, we find that defendant received effective assistance of counsel under both the federal and state standards (*People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see Strickland v Washington*, 466 US 668 [1984]).

Viewed in totality, defense counsel provided meaningful representation, thoroughly cross-examining witnesses, lodging a number of pertinent objections during both the suppression hearing and the trial, and presenting cogent arguments for suppression and in support of the misidentification defense (*see People v Turner*, 5 NY3d 476, 480 [2005]; *People v Baldi*, 54 NY2d 137, 147 [1981]). Nor does this case fall within the category of those rare cases where a single error in an otherwise competent representation of a defendant is so egregious and prejudicial that it deprives the defendant of a fair trial (*see Turner, 5* NY3d at 480*; People v Brown*, 17 NY3d 742, 743-744 [2011]). In any event, given the overwhelming evidence of guilt, we find that defendant was not prejudiced by any of counsel's alleged omissions (*see Strickland*, 446 US at 694; *People v Caban*, 5 NY3d 143 [2005]).

Defendant failed to preserve his argument that there was insufficient evidence that he was armed with a deadly weapon in the course of the commission of the crime or of immediate flight therefrom, as required for robbery in the first degree (see Penal Law § 160.15[2]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The evidence supports the inference that defendant's

magazine was in his pistol at the time of the robbery, but that the magazine dislodged from the pistol when defendant threw the weapon to the ground as he fled.

Defendant failed to preserve his constitutional challenge to his sentencing as a persistent violent felony offender (Penal Law § 70.08), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits *(see People v Bell*, 15 NY3d 935 [2010], *cert denied* ___ US __, 131 S Ct 2885 [2011]). Further, in view of defendant's extensive criminal history of robberies and the violent nature of this armed robbery, we perceive no basis for reducing the sentence (*see People v Dolphy*, 257 AD2d 681, 685 [1999], *lv denied* 93 NY2d 872 [1999]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5979 Shirley Rose Locario, Claim No. 114700
Claimant-Respondent,

-against-

The State of New York,
Defendant-Appellant.

_____

Eric T. Schneiderman, Attorney General, New York (Richard Dearing of counsel), for appellant.

Levine & Slavit, New York (Leonard S. Slavit of counsel), for respondent.

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Judgment of the Court of Claims of the State of New York (Alan C. Marin, J.), entered on or about October 20, 2010, which, following a trial on the issue of liability, found defendant State partially liable for the injuries claimant sustained as a result of a trip and fall on a sidewalk in front of a state-owned building, unaimously affirmed, without costs.

In 2003, section 7-210 was added to the Administrative Code of the City of New York (Local Law No. 49 [2003] of City of New York § 1). Subject to exceptions that do not apply here, section 7-210 shifted tort liability for the negligent failure to maintain sidewalks in a reasonably safe condition from the City to abutting property owners. The issue on this appeal is whether the State of New York can be held liable under section 7-210 as

an abutting landowner. The State takes the position that its waiver of immunity as set forth in Court of Claims Act § 8 does not encompass liability that has been created by the enactment of a local law.

Court of Claims Act § 8 provides:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the [workers'] compensation law.

As used in section 8, the phrase "limitations of this article" refers to jurisdictional requirements set forth in Article II of the Court of Claims Act.[1] Therefore, under Court of Claims Act § 8, the State's waiver of sovereign immunity is limited only by the statute's procedural requirements and the provisions of the Workers' Compensation Law. We can only construe the Legislature's enumeration of these two specific limitations on the State's waiver of sovereign immunity "as evincing an intent to exclude any others not mentioned" (*cf. Walker v Town of*

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[1]These jurisdictional requirements have nothing to do with the issue before us - the State's tort liability that may arise under a local law.

Hempstead, 84 NY2d 360, 367 [1994], citing McKinney's Cons Laws of NY, Book 1, Statutes § 240 ["where a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned"]). We therefore find that Court of Claims Act § 8 does not provide for an exception to the State's waiver of sovereign immunity on the basis of tort liability created by local law. We employ similar reasoning in our construction of Municipal Home Rule Law (MHRL) § 11(1)(j), another operative statute.

Where pertinent, MHRL § 11(1)(j) provides that a municipality's legislative body shall not be deemed authorized to "adopt a local law *which supersedes a state statute* [emphasis added]" if such local law "[i]n the case of a city, transfers to abutting property owners its liability for failure to maintain its sidewalks and gutters in a reasonably safe condition." Although no other state statute has been superseded, the State argues that MHRL § 11(1)(j)'s "general reference to 'abutting property owners,' without more, is insufficient to demonstrate the requisite consent on the part of the State to waive its immunity in this respect and assume the liability imposed by New York City Administrative Code § 7-210." As noted above, MHRL §

11(1)(j) proscribes the adoption of a local law which transfers the subject liability to abutting property owners only where such local law supersedes a state statute. On its face, MHRL § 11(1)(j) does not expressly prohibit local governments from transferring liability to the State. Using the same rule of statutory construction set forth in McKinney's Statutes § 240, we find that the transfer of liability to the State as an abutting property owner is permissible under MHRL § 11(1)(j).

The State cites *Jattan v Queens Coll. of City Univ. of N.Y.* (64 AD3d 540 [2009]) for the proposition that notwithstanding Court of Claims Act § 8, the State retained immunity from suit based on a cause of action created by local enactment. *Jattan* involved a claim for attorneys' fees that were recoverable in employment discrimination cases under the New York City Human Rights Law (Administrative Code § 8-502[f]) but not under the State Human Rights Law (Executive Law § 297[10]) which limited the recovery of such fees to housing discrimination cases. In that respect, the City Human Rights Law would have superseded the State Human Rights Law. In *Jattan*, the Second Department, however, held that attorneys' fees could not be recovered because "the City of New York does not have the power to waive the State's sovereign immunity by passing an anti-discrimination code

provision applicable to instrumentalities of the State" such as the City University (64 AD3d at 542). The instant case is distinguishable because no state statute has been superseded by Administrative Code § 7-210.

The State cites *Rivers v City of New Britain* (288 Conn 1, 950 A2d 1247 [Conn 2008]). In *Rivers,* the Supreme Court of Connecticut interpreted Connecticut General Statutes § 7-163a, a statute which, similar to MHRL § 11(1)(j), authorized localities to transfer to abutting owners liability with respect to injury caused by snow and ice on sidewalks. The Court found no waiver of the State of Connecticut's sovereign immunity because the statute contained no language that expressly waived sovereign immunity where the State is an abutting owner (*id.* at 12). *Rivers* is distinguishable because unlike the provisions of Court of Claims Act § 8, Connecticut's waiver of sovereign immunity is subject to the authorization of claims against the State by a claims commissioner. Therefore, *Rivers* arises under a

significantly different statutory framework. We have considered the State's remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5995 Fineman Family LLC, Index 602502/09
Plaintiff-Respondent,

-against-

Third Avenue North LLC, et al.,
Defendants-Appellants.

_____

Herrick, Feinstein LLP, New York (David Feuerstein of counsel), for appellants.

Moritt Hock & Hamroff LLP, Garden City (Neil J. Moritt of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Richard B. Lowe, III, J.), entered November 30, 2010, in favor of plaintiff and against defendants in the principal amount of $1,600,000, plus prejudgment interest, costs and disbursements, and bringing up for review an order, same court and Justice, entered September 10, 2010, which granted plaintiff's motion for summary judgment on its breach of contract and breach of the implied covenant of good faith and fair dealing causes of action, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's motion denied, and, in the exercise of our discretion after searching the record, summary judgment granted in favor of defendants dismissing the complaint. The Clerk is directed to enter judgment dismissing the complaint.

In or about February 2006, plaintiff and defendant Third Avenue North LLC formed defendant 119 Third Avenue Associates, LLC (the Company) and entered into an operating agreement for the express purpose of developing certain property into condominiums pursuant to an agreed-upon development plan. The operating agreement provided that, upon plaintiff's request, the Company would loan plaintiff up to $400,000.

In February 2007, the parties entered into an amendment to the operating agreement, which provided Third Avenue North with the option to develop the property as a rental building. Paragraph 2 of the amendment replaced the original provision for a $400,000 advance with a provision entitling plaintiff to obtain an advance of up to $2 million. However, paragraph 6 provided that, in the event Third Avenue North determined "in its reasonable business judgment," that the development plan should conform to the original plan for condominium development, then Third Avenue North "shall so notify [plaintiff] and Par. 2 of this First Amendment shall be deemed deleted and of no force and effect."

By letter dated January 2, 2008, Third Avenue North informed plaintiff that the Company would be proceeding to convert the subject property to condominiums as provided in the original

operating agreement. Thereafter, however, defendants proceeded with a rental plan.

Plaintiff commenced this action on or about August 13, 2009, alleging that defendants breached the amended operating agreement, and the implied covenant of good faith and fair dealing, by refusing to pay it $1.6 million of the $2 million advance agreed to in the amendment. It moved for summary judgment on those claims, arguing that the terms of the operating agreement and amendment unambiguously entitle it to receive the increased advance.

The motion court granted plaintiff's motion, finding that the parties intended, as clearly expressed in their amended agreement, to increase the amount of the advance if the property was developed pursuant to the rental plan, and that defendants could not deprive plaintiff of the right to the larger advance simply by giving notice of an intent to pursue the original condominium plan. We reverse.

Where, as here, an agreement is unambiguous, courts should not consider extrinsic evidence to determine the parties' intent, nor should they add or excise terms (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Here, in determining the parties' intent, the motion court improperly

considered the averments of plaintiff's president (*see Lopez v Fernandito's Antique*, 305 AD2d 218, 219 [2003]). In addition, the court improperly determined that the application of paragraph 6 of the amendment is expressly conditioned on the actual development of the property as condominiums. Under the plain terms of the amendment, plaintiff's right to demand a $2 million advance terminates at the moment Third Avenue North gives notice that it determined, in good faith, that the property should be developed pursuant to the original condominium plan. Contrary to the motion court's finding, the amendment does not provide for revival of the increased advance in the event that the property is actually developed as a rental building. Accordingly, plaintiff is not entitled to summary judgment on its breach of contract claim. (*See RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [2007].)

Nor is plaintiff entitled to summary judgment on its breach of the implied covenant of good faith and fair dealing claim, since it failed to submit any evidence that defendants violated their good faith obligation (*see Train v General Elec. Capital Corp.*, 8 AD3d 192, 193 [2004]). On the other hand, defendants have submitted evidence supporting a finding that they acted in good faith. They demonstrated that, after 15 months of fruitless

efforts to market the property as condominiums, adherence to the original development was not feasible in the current marketplace, particularly in the face of a threatened bank foreclosure. In the provident exercise of our inherent power to search the record, we find that plaintiffs failed to raise a triable issue of fact regarding this, and therefore grant summary judgment in defendants' favor.

In view of the foregoing determination, we need not reach defendants' requests for modification of the judgment.

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

ENTERED: DECEMBER 20, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

6101 Roberto Rodriguez, Index 105416/10
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant,

Charles Johnson,
Defendant.

_____

Office of the General Counsel, New York City Transit Authority, Brooklyn, (Kavita K. Bhatt of counsel), for appellant.

Edward Friedman, Brooklyn, for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered September 14, 2010, which denied the motion of defendant New York City Transit Authority (NYCTA) to dismiss the complaint as against it, unanimously affirmed.

Plaintiff alleges that while he was a passenger on the subway, he witnessed an individual threatening a woman. When he reported this to defendant Johnson, who was the conductor, Johnson took no action. The individual continued threatening the woman, which prompted plaintiff to pull the emergency cord on the subway car. Johnson then called the police and according to plaintiff, when the police responded, Johnson falsely told them that plaintiff had punched and kicked him. Plaintiff was

arrested, charged and subsequently processed through the court system. Plaintiff filed a timely notice of claim and his complaint against NYCTA included causes of action for negligent hiring and supervision of Johnson.

Plaintiff's notice of claim was very detailed, specifying the date and the time that he was traveling on an E train from Manhattan to Queens, and that the conductor "John Doe" called the police and had plaintiff arrested by Police Officer Anthony Rosales. The notice was sufficiently detailed to enable the City to investigate the occurrence (*see generally Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 68 [2007]) and to understand the nature of the claim (*see Brown v City of New York*, 95 NY2d 389, 393 [2000]). Moreover, the notice asserted the claims of negligent hiring and supervision, thus providing defendant, who had the ability to ascertain the identity of the conductor and to examine the conductor's personnel files, the opportunity to investigate those allegations (*compare Shmueli v New York City Police Department*, 295 AD2d 271 [2002] [dismissing claim against

district attorney for negligent hiring where notice of claim failed to assert any facts from which claim could be gleaned]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Renwick, J.P., DeGrasse, Abdus-Salaam, Román, JJ.

6148N 360 West 11th LLC, et al., Index 600141/07
Plaintiffs-Appellants,

-against-

ACG Credit Company II, LLC,
Defendant-Respondent.
- - - - -
[And Other Actions]

_____

Davidoff Malito & Hutcher LLP, New York (Martin H. Samson of counsel), for appellants.

Wollmuth Maher & Deutsch LLP, New York (William F. Dahill of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 4, 2010, which denied plaintiffs' motion for leave to amend the complaint, unanimously affirmed, with costs.

This action arises out of a mortgage-secured loan from defendant, ACG Credit Company II, LLC, and third-party plaintiff, ACG Finance Company, LLC (collectively ACG), to plaintiffs. Plaintiffs' dispute with ACG stems from the latter's declaration of events of default under the underlying loan agreement. By the instant motion, plaintiffs sought leave to amend the complaint so as to add causes of action against ACG's former attorney and current attorneys under Judiciary Law § 487 and two other causes

of action based upon Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1. The targets of the proposed Judiciary Law claims are Daniel Bildner, Esq., Martin West, Esq., William Dahill, Esq. and the firm of Wollmuth, Maher & Deutsch, LLP (WMD).

Leave to amend pleadings is freely given absent prejudice or surprise (*see* CPLR 3025 [b]; *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [2007]). Nevertheless, a court must examine the merit of the proposed amendment in order to conserve judicial resources (*see Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-355 [2005]). Judiciary Law § 487 provides for the recovery of treble damages from a lawyer who is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." Bildner was a shareholder of the law firm that previously represented ACG. The proposed amended complaint contains an allegation that Bildner gave false testimony with respect to services rendered by his firm in support of ACG's still pending counterclaim for attorneys' fees related to the administration and enforcement of the loan agreement. The proposed seventh cause of action sets forth an assertion that plaintiffs "now know these claims were false, as much of the attorney time in question was spent on matters wholly unrelated to plaintiffs' loans." Leave to amend

was properly denied with respect to this claim because it boils down to nothing more than a fee dispute that can be resolved upon the disposition of ACG's counterclaim.

The proposed eighth cause of action contains an allegation that WMD, West and Dahill, who now represent ACG, withheld pertinent information from the court with the intent to deceive. The addition of this claim would be prejudicial because it is likely that WMD, West and Dahill would be called as witnesses if the claim is allowed to proceed. Subject to exceptions that do not apply here, "[a] lawyer shall not act as advocate before a tribunal in an matter in which the lawyer is likely to be a witness on a significant issue of fact . . ." (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7). Therefore, the addition of the proposed eighth cause of action would require the disqualification of counsel and prejudice ACG's right to be represented by attorneys of its choice (*see S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]). The motion was properly denied with respect to the proposed ninth and tenth causes of action because no independent cause of action for

sanctions under § 130-1.1 exists (*Calabro & Assoc., P.C. v Katz*, 26 Misc 3d 137[A], 2010 NY Slip Op 50192[U] [App Term, 1st Dept 2010]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, JJ.

6395 People of the State of New York, Ind. 2120/98
Respondent,

-against-

Freddy Pica,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jenetha G. Philbert of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John W. Carter, J.), entered on or about January 14, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the motion. Defendant had an extensive criminal history and an extremely poor

prison disciplinary record (*see e.g. People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6396 Utica Insurance Company, Index 110204/09
Plaintiff-Respondent,

-against-

RJR Maintenance Group, Inc., et al.,
Defendants,

St. John's University,
Defendant-Appellant.

_____

Harrington, Ocko & Monk, LLP, White Plains (I. Paul Howansky of counsel), for appellant.

Farber Brocks & Zane L.L.P., Mineola (Audra S. Zane of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered September 24, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment declaring that it is not obligated to defend or indemnify defendant RJR Maintenance Group, Inc. (RJR) in an underlying personal injury action, unanimously affirmed, with costs.

The employee exclusion in the subject insurance policy unambiguously states that the insurance did not apply to "bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured, or to any employee of such

contractor" sustained during the course of employment. Accordingly, plaintiff properly disclaimed coverage based upon the status of defendant Edwards (the underlying plaintiff) as an employee of the subcontractor of RJR (the insured) at the time of the alleged accident (*see 385 Third Ave. Assoc., L.P. v Metropolitan Metals Corp.*, 81 AD3d 475, 476 [2011], *lv denied* 17 NY3d 702 [2011]).

Moreover, defendant St. John's University lacked standing to challenge the timeliness of plaintiff's notice of disclaimer of coverage to RJR. "The contemporary rule is that a party has standing to enforce a statutory right if its abuse will cause him injury and it may fall within the 'zone of interest' protected by the legislation" (*Matter of Schwartz v Morgenthau*, 7 NY3d 427, 432 [2006] [internal quotation marks and citation omitted]). Here, however, there is no basis to find that St. John's was in the "zone of interest" protected by Insurance Law § 3420(d). St. John's failed to establish that it was an intended beneficiary of the insurance policy (*see Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 33 [1979], *affd* 49 NY2d 924 [1980]), or that it could otherwise assert RJR's rights under the policy (*cf. Public Serv. Mut. Ins. Co. v AYFAS Realty Corp.*, 234 AD2d 226, 228 [1996], *lv dismissed* 90 NY2d 844 [1997]).

We have reviewed St. John's remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick JJ.

6397 In re Richard M.,
Petitioner-Respondent,

-against-

Princess R.F.,
Respondent-Appellant.

_____

Daniel R. Katz, New York, for appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Jane Pearl, J.), entered on or about September 2, 2010, which denied respondent's motion to vacate an order of filiation declaring petitioner the father of the subject child, unanimously affirmed, without costs.

Family Court correctly found that respondent demonstrated neither a reasonable excuse for her failure to appear in court nor a meritorious defense to the petition (*Matter of Amirah*

Nicole A. [Tamika R.], 73 AD3d 428 [2010], *lv dismissed* 15 NY3d 766 [2010]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6398 The People of the State of New York, Ind. 3758/07
Respondent,

-against-

Michael Gilles, true name Hertz Sanon,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (Carol Berkman, J.), rendered on or about February 6, 2008,

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: DECEMBER 20, 2011

CLERK

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

Saxe, J.P., Catterson, Moskowitz, Acosta, JJ.

6401 The People of the State of New York, Ind. 4181/03
Respondent,

-against-

Victor Brown,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Hannah E. C. Moore of counsel), for respondent.

_____

Judgement, Supreme Court, Bronx County (Troy K. Webber, J. at speedy trial motion; Martin Marcus, J. at plea and sentencing), rendered February 23, 2009, convicting defendant of manslaughter in the first degree, and sentencing him to a term of 18 years, unanimously affirmed.

To the extent that the record on appeal permits review, defendant has not established a violation of his constitutional right to a speedy trial (*see People v Taranovich*, 37 NY2d 442, 445 [1975]). There was a 40-month delay and defendant was incarcerated for approximately half of that time. However, the People have satisfactorily explained the delay, most of which was attributable to the unavailability of an important witness (*see e.g. People v Cruz*, 293 AD2d 412 [2002], *lv denied* 98 NY2d 674

[2002]). In addition, the charges were very serious, and defendant's claim of prejudice is unpersuasive.

Defendant made a valid waiver of his right to appeal, in a colloquy with the court as well as in writing (*see People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248 [2006]). That waiver forecloses review of defendant's contention that the sentence was harsh and excessive. As an alternative holding, we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6402 The People of the State of New York, Ind. 3965/09
Respondent,

-against-

Prince J. Fennell,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about February 2, 2010, unanimously affirmed.

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

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

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6406 The People of the State of New York, Ind. 5473/01
Respondent,

-against-

Herbert Cephas,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered on or about May 19, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, as a matter of discretion in the interest of justice, the motion granted, the order replaced by an order specifying and informing defendant of a proposed sentence of 12 years plus 3 years' postrelease supervision, and the matter remanded for further proceedings.

Substantial justice does not dictate denial of resentencing, and we exercise our discretion to specify an appropriate resentence (*see e.g. People v Milton*, 86 AD3d 478 [2011]). It is undisputed that during defendant's imprisonment on the underlying 2003 conviction, he has been an exemplary prisoner, and has

completed several work programs and substance abuse treatment programs.

The court denied the motion primarily on the basis of defendant's long criminal history. The court noted that defendant had completed programs during his prior incarcerations, yet had still relapsed into drugs and a life of crime.

However, in addition to completing the work and substance abuse programs, defendant has received highly favorable evaluations from corrections officials, including a social worker. Moreover, defendant has been accepted into a residential treatment program with a two-year commitment, providing a level of community drug treatment support that he has never had before. Under the circumstances presented, the positive factors cited by defendant outweighed the extent of his criminal history.

The People claim that the court erred, in several respects, when it found defendant statutorily eligible for resentencing. However, the determination of eligibility did not "adversely affect[] the appellant" (CPL 470.15[1]). Therefore, the People's arguments concerning eligibility are not cognizable on this

appeal (*see People v Concepcion*, 17 NY3d 192 [2011]; *People v LaFontaine*, 92 NY2d 470 [1998]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6409 Frances Leichter, as executrix of the Estate of Solomon Rapoport, Plaintiff-Appellant, Index 105141/06

-against-

Cambridge Development, LLC, etc., et al., Defendants-Respondents.

_____

Law Offices of Annette G. Hasapidis, South Salem (Annette G. Hasapidis of counsel), for appellant.

Ruffo Tabora Mainello & McKay, P.C., Lake Success (Damien Bielli of counsel), for Cambridge Development, LLC, respondent.

Havkins Rosenfeld Ritzert & Varriale LLP, Mineola (Mark J. Volpi of counsel), for The Avondale Group, Inc., respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered on or about December 18, 2009, which, in this personal injury action, granted defendants' motions for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

Solomon Rapoport, who was diagnosed as having mild to moderate Alzheimer's disease, was a resident of defendant Atria, an independent senior living facility. Rapoport slipped and fell while running in Atria's lobby. Defendant Avondale is a home care service company that plaintiff retained to provide medication management services for Rapoport. Plaintiff,

Rapoport's daughter and executrix of his estate, alleges, among other things, that Atria and Avondale negligently supervised and controlled Rapoport.

Defendants made a prima facie showing of entitlement to judgment as a matter of law because they owed no duty to Rapoport. We note that generally, there is no common-law duty to protect an adult from his own risky behavior (*see e.g. Stanislav v Papp*, 78 AD3d 556 [2010]; *Egan v Omniflight Helicopters*, 224 AD2d 653 [1996]).

In opposition to defendants' motions for summary judgment, plaintiff failed to raise an issue of fact. Plaintiff, relying on *Sommer v Federal Signal Corp.* (79 NY2d 540 [1992]), argues that a common-law duty arose based upon the nature of the parties' relationship. However, unlike the facts of *Sommer*, plaintiff failed to adduce any evidence that either defendant agreed, in contract or otherwise, to perform the type of monitoring and supervision of Rapoport that plaintiff alleges. The record reflects that Atria offered only housing, meals, and the opportunity for planned social activities. It was not an assisted living facility, as defined in article 46-B of the Public Health Law (§ 4651[1]), nor did it have medical professionals on staff. Although Avondale employed medical

professionals and offered a variety of senior care services, plaintiff contracted with Avondale only for the limited service of ensuring that Rapoport came to its office daily to take medications prescribed to him by doctors unaffiliated with defendants. Indeed, plaintiff had originally contracted with Avondale to ensure Rapoport was appearing at his meals, but after a brief time, decided that her father did not require such supervision. Because no contract existed between the parties to monitor and supervise Rapoport's health and mental status, there can be no common-law duty that arose from a "relationship initially . . . formed by contract" (*Sommer*, 79 NY2d at 551).

There is no basis to deny the motion based on a lack of discovery from Avondale. Plaintiff has not shown that she made any attempt to obtain discovery from Avondale or that such discovery would lead to material or relevant evidence (*see* CPLR 3212[f]; *Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [2007]).

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: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6410 Another Slice, Inc., Index 105780/10
Plaintiff-Appellant,

-against-

3620 Broadway Investors LLC,
Defendant-Respondent.

_____

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Lawrence Schiro of counsel), for appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered September 27, 2010, which, to the extent appealed from as limited by the briefs, in this dispute between plaintiff commercial tenant and defendant landlord, dismissed the action without prejudice to the parties' right to assert their claims and defenses in the Housing Part of the Civil Court of the City of New York, unanimously reversed, on the law, without costs, and the complaint reinstated.

We agree with both parties that the court properly granted a *Yellowstone* injunction (*see First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]), and that dismissal was improper. *Gold-Land, Inc. v Haskell* (248 AD2d 132 [1998]), on

which the court relied, presents the opposite factual scenario and gives no support for dismissal. In *Gold-Land*, dismissal was appropriate because Supreme Court denied *Yellowstone* relief.

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6411-
6411A-
6411B

In re Isaac Howard M., and another,

Dependent Children Under the Age of 18 Years, etc.,

Fatima M.,
Respondent-Appellant.

-against-

Jewish Child Care Association of New York,
Petitioner-Respondent,

_____

Lisa H. Blitman, New York, for appellant.

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

_____

Orders, Family Court, Bronx County (Monica Drinane, J.), entered on or about June 12, 2009, which, upon respondent-appellant mother's default and after conducting hearings, terminated her parental rights to the children upon findings that she had permanently neglected the subject children, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for purposes of adoption, and order, same court and Judge, entered on or about April 27, 2010, which denied respondent-appellant's motion to vacate her default at the fact-finding and dispositional hearings, unanimously affirmed, without costs.

The court had discretion to deny the mother's request to adjourn the fact-finding hearing where her nonappearance was not explained (Family Court Act § 1048[a]; *see Matter of Doran J.*, 266 AD2d 99 [1999]).

The mother's motion to vacate her default was properly denied where she did not provide either a reasonable excuse for her nonappearance or demonstrate a meritorious defense (*see Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428, 428-429 [2010], *lv dismissed* 15 NY3d 766 [2010]). The mother's claim that she lacked money for transportation does not explain why she failed to notify either the court or her attorney that she could not appear. Moreover, she elected to schedule an appointment for services at the same date and time as the court proceeding. The mother also did not demonstrate that four years after placement, she had completed a drug treatment program or a mental health evaluation.

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6412 John Serna, et al., Index 103414/08
Plaintiffs-Appellants,

-against-

898 Corporation, et al.,
Defendants-Respondents.

_____

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Susan M. Jaffe of counsel), for appellants.

Fixler & LaGattuta, LLP, New York (Paul F. LaGattuta, III, of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 24, 2010, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendants moved for summary judgment in this action for personal injuries suffered by plaintiff when an exterior metal staircase leading from the ground level to the basement of defendants' residential apartment building collapsed under his feet. We find that defendants failed to establish entitlement to judgment as a matter of law. Defendants did not demonstrate that they lacked constructive notice of the defect that caused the staircase to collapse. The deposition testimony and affidavits of defendants' witnesses failed to eliminate all material

questions of fact regarding whether the "rust and corrosion" they observed on the underside of the landing and the frame supporting the staircase was present and visible for a considerable length of time prior to plaintiff's accident. There is no evidence of record that defendants inspected the underside of the exterior staircase for over a year prior to the staircase collapse. Although "the appearance of rust, standing alone, is insufficient to establish constructive notice" (*Garcia v Northwest Apts. Corp.*, 24 AD3d 208 [2005]), corrosion of the structure may have been sufficient to alert defendants to a structural defect. However, given the length of time that the entire staircase went uninspected, the evidence relied on by defendants did not establish that the corrosion would not have been visible upon reasonable inspection of the bottom of the landing and the frame before the accident.

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6413 The People of the State of New York, Ind. 3099/08
Respondent,

-against-

Frank Smith,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rebekah J. Pazmiño of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered November 9, 2009, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 12 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of alleged inconsistencies in testimony. The court properly exercised its discretion in declining to permit defendant to recall the victim for further cross-examination. Defendant sought to recall the victim to lay a foundation for an allegedly inconsistent statement that the

victim made to defendant's cousin shortly after the crime. Defense counsel could have elicited the alleged inconsistency on cross-examination, and bringing back the victim and then the cousin for additional testimony would have delayed the trial. The alleged inconsistency had very limited probative value, and it was cumulative to other impeachment material (*see People v Crawford*, 39 AD3d 426, 427 [2007], *lv denied* 9 NY3d 864 [2007]).

Accordingly, there was no violation of defendant's right to confront witnesses and present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). In any event, any error in declining to permit defendant to recall the victim was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant also claims his trial counsel rendered ineffective assistance by failing to lay a foundation for the alleged inconsistent statement. However, given the minimal impeachment value of the alleged inconsistency, defendant has not satisfied the prejudice prong of an ineffective assistance claim under either the state or federal standards (*see People v Benevento*, 91

NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668, 694 [1984]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6414 The People of the State of New York, Ind. 1422/09
Respondent,

-against-

Sing Man,
Defendant-Appellant.

_____

Patrick J. Brackley, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 8, 2010, convicting defendant, after a jury trial, of leaving the scene of an incident without reporting, and sentencing him to a term of five years' probation with 200 hours of community service and a $5,000 fine, unanimously affirmed.

Defendant did not preserve his challenge to the sufficiency of the evidence of the serious physical injury element of leaving the scene of an incident (Vehicle and Traffic Law § 600[2][c]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. There is no basis for disturbing the jury's credibility determinations, including its evaluation of the victim's testimony about the continuing effects of her injuries. The evidence established,

among other things, that the teenaged victim was still unable to engage in normal physical activity a year and a half after the accident. This supported a finding of a "protracted impairment of health" (Penal Law § 10.00[10]).

Defendant's ineffective assistance of counsel claim is not reviewable on direct appeal because it involves matters outside the record regarding counsel's strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Smith-Merced*, 50 AD3d 259 [2008], *lv denied*, 10 NY3d 939 [2008]; *People v Santiago*, 38 AD3d 303 [2007], *lv denied*, 9 NY3d 881 [2007]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998], *see also Strickland v Washington*, 466 US 668 [1984]). Reasonable strategic concerns would support counsel's decision to forgo certain jury instructions (*see People v Lane*, 60 NY2d 748, 750 [1983]; *People v Leffler*, 13 AD3d 164, 165 [2004], *lv denied*, 4 NY3d 800 [2005]).

The court properly exercised its discretion in limiting defendant's cross-examination of the victim. The court permitted defendant to inquire as to whether any of the victim's absences from school after the accident resulted from factors other than

her injuries, but precluded inquiry into preinjury absences. The victim's school attendance record before the accident had little or no relevance to whether she sustained a serious physical injury as a result of being struck by defendant's car, and that line of inquiry would have invited speculation by the jury.

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6415N Lew Nussberg, etc., Index 650741/09
Plaintiff-Respondent,

-against-

Gary Tatintsian, etc., et al.,
Defendants-Appellants.

_____

Clarick Gueron Reisbaum LLP, New York (Gregory A. Clarick of counsel), for appellants.

Meier Franzino & Scher, LLP, New York (Frank J. Franzino, Jr., of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 12, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' motion to amend their answer, unanimously reversed, on the law, with costs, and the motion granted.

Defendants' proposed counterclaims alleging that plaintiff knowingly sold forged artworks to defendants, resulting in lost profits and other damages, do not plainly lack merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [2010]). Further, plaintiff fails to show that the proposed amendments

would result in prejudice to him that could have been avoided had defendants raised the counterclaims in their original answer (*see Murray v City of New York*, 51 AD3d 502, 503, *lv denied*, 11 NY3d 703 [2008]).

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

ENTERED: DECEMBER 20, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5031 Kenneth Bennett, Index 115015/08
Plaintiff-Appellant,

-against-

Health Management Systems, Inc.,
Defendant-Respondent.

_____

Simon, Eisenberg & Baum, LLP, New York (Sheldon Karasik of counsel), for appellant.

Tarter Krinsky & Drogin LLP, New York (Richard L. Steer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered March 11, 2010, affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
Rolando T. Acosta
Shelia Abdus-Salaam
Nelson S. Román, JJ.

5031
Index 115015/08

_____x
Kenneth Bennett,
Plaintiff-Appellant,

-against-

Health Management Systems, Inc.,
Defendant-Respondent.
_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Marylin G. Diamond, J.), entered March 10, 2010, which granted defendant's motion to dismiss the complaint.

Simon, Eisenberg & Baum, LLP, New York (Sheldon Karasik of counsel), for appellant.

Tarter Krinsky & Drogin LLP, New York (Richard L. Steer and Tara T. Toevs of counsel), for respondent.

ACOSTA, J.

This appeal gives us the opportunity to address the evidentiary showing required at the summary judgment stage in a discrimination case brought pursuant to the New York City Human Rights Law. We hold that defendant has met its evidentiary burden and has shown its entitlement to the extraordinary remedy of judgment as a matter of law.

Background

Plaintiff, Kenneth Bennett, a 47-year-old Caucasian, was hired in 2004 by defendant Health Management Systems, Inc. (HMS), in the Data Processing Operations Unit (DPO). Four years later, he was asked to consider becoming part of the Technical Operations Support (TOS) team on the night shift, and he accepted. Approximately one month into his new position, plaintiff asked to be transferred back to DPO because, he alleged, Cynthia Bowen, the African-American manager of the TOS team, "unfairly and intemperately criticized his performance often and without cause, making it impossible for [him] to master the job." Plaintiff's request was denied, and he was terminated shortly thereafter. According to plaintiff, he was terminated for age and race-related reasons, in violation of state and city human rights laws. Defendant asserted that it terminated plaintiff for poor job performance, including consuming alcohol on the job.

Plaintiff commenced this action against HMS, asserting five causes of action. The first was for breach of contract. The second and third, for age discrimination under Section 296 of the New York State Executive Law (State HRL) and Section 8-107[1][a] of the New York City Administrative Code (City HRL), respectively, alleged that defendant discriminated against him on the basis of age by denying him reassignment to his former unit, and replacing him with an individual who was significantly younger than he. Plaintiff's fourth and fifth causes of action, brought under the State HRL and the City HRL, respectively, alleged that defendant discriminated against him on the basis of race because his supervisors and coworkers in his unit were black and he was white.

Defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7). The court granted the motion solely to the extent of dismissing the breach of contract claim. Defendant filed its answer, asserting various affirmative defenses, including that plaintiff was terminated because of repeated violations of company policies that prohibited the consumption of alcoholic beverages and being under the influence of alcohol while at work.

Several months later, defendant moved for summary judgment dismissing the complaint pursuant to CPLR 3212, arguing that its proffered reason for terminating plaintiff was legitimate and

nondiscriminatory, and could not be shown to be pretextual.

The evidentiary materials submitted by defendant included the affidavit of Claude B. Phipps, Director of Data Processing Operations and Technical Services, who submitted documentation establishing that of the 35 people in the DPO and TOS, 77% were between the ages of 40 and 64 years old, and that 80% of the white employees in DPO and TOS were between the ages of 46 and 63 years old. Phipps also stated that in 2004 plaintiff was found with alcohol on the premises and given an oral warning.

The affidavit of Cynthia A. Bowen, the manager of TOS, explained that there were problems with plaintiff's attendance and job performance from the time he joined TOS. In fact, after approximately one month he was granted a week's vacation and an additional three-week leave of absence to "get his head together." Upon his return, his performance continued to suffer. Bowen believed that the poor performance was due to plaintiff sleeping on the job and leaving his shift early without explanation or permission. She received reports from his coworkers of plaintiff drinking and sleeping on the job. Plaintiff was warned at a meeting with Bowen and Phillips in early May 2008 that his poor performance was jeopardizing his job, and given two weeks to improve, or his employment would be terminated.

Michael O'Rourke, a 47-year old white male, and Senior

Director of Operations, described an incident that occurred in January 2005, while plaintiff still worked in DPO, prompting O'Rourke to write plaintiff up for having alcohol on the premises. O'Rourke had become suspicious after observing plaintiff making frequent trips to his locker, and discovered, upon investigation, that plaintiff had an alcoholic beverage disguised in a Mountain Dew bottle in an open duffel bag in his locker. Plaintiff was then given a final written warning.

Waldemar Rivera, a Technical Operations Support Analyst, stated in his affidavit that he was assigned to train plaintiff when plaintiff was transferred to TOS. He stated that it was "very difficult and frustrating" trying to work with and attempting to train plaintiff, because he often reeked of alcohol, slurred his words, and did not pay attention or take notes. Rivera also stated that plaintiff's confusion seemed to increase over time, and that it appeared that he had difficulty keeping his eyes open. Three other employees also smelled alcohol on plaintiff's breath, and stated that plaintiff had trouble focusing on the job.

In opposition, plaintiff averred that he believed that defendant's refusal to allow him to transfer back to his former unit was "solely for purposes of harassment motivated by hostility to his age and race." He denied receiving any warning that he was guilty of misconduct or poor job performance that, if

left uncorrected, could lead to his termination. He asserted that he was not an alcoholic, and never appeared for work under the influence of alcohol. He admitted that he did take naps during his shift, but asserted that other employees did the same, since it was common practice to do so during the overnight shifts. Plaintiff averred that prior to his transfer, he was supervised by a white male and received a "very good" performance appraisal in November 2007. Plaintiff denied allegations that he failed to take notes during his training, and maintained that he was replaced by a much younger, inexperienced individual.

By order entered March 11, 2010, the court granted defendant's summary judgment motion, finding that there was no evidence in the record to support plaintiff's claim of age discrimination. The court found that plaintiff's affidavit in opposition to the motion did not contain any factual allegations to support his second and third causes of action for age discrimination, since it stated little more than the fact that he was 47 years old at the time of his termination. The court noted that plaintiff made no allegations that derogatory comments were made concerning his age or that younger individuals were treated more favorably, and did not refute the fact that he was replaced by a 54-year-old employee. With regard to plaintiff's fourth and fifth causes of action for racial discrimination, the court noted that plaintiff's claims that his termination raised an inference

of discrimination were based on the fact that both of his supervisors and his unit coworkers were black. However, the court observed that defendant submitted evidence that plaintiff was fired because he performed his job poorly, was found sleeping on the job, had brought a bottle of alcohol to work in violation of company policy, and reeked of alcohol. The court noted that although plaintiff's affidavit in opposition stated that criticism of his work was "unfounded," he offered no facts or evidence to establish that the suspicions and concerns offered by defendant were pretextual. And plaintiff did not deny that he had been caught numerous times sleeping on the job or that he had brought alcohol to work. This appeal followed.

Analysis

I.

Six years after the passage of the New York City Local Civil Rights Restoration Act (Local Law 85 of 2005) (Restoration Act), it is beyond dispute that the City Human Rights Law (City HRL) now "explicitly requires an independent liberal construction analysis *in all circumstances*," an analysis that "must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's 'uniquely broad and remedial purposes,' which go beyond those of counterpart State or federal civil rights laws" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [2009], *lv denied* 13 NY3d 702 [2009] [emphasis added]).

Our Court of Appeals has emphasized that the Restoration Act's amendment of Section 8-130 of the City HRL was enacted to ensure the liberal construction of the City HRL by requiring that *all* provisions of the City HRL be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" *(Albunio v City of New York*, 16 NY3d 472, 477-78 [2011]; *see also Nelson v HSBC Bank*, 87 AD3d 995 [2011] [adopting this Court's holding in *Williams* that considerations of severity or pervasiveness applicable in state and federal harassment cases are impermissible in determining liability in discriminatory harassment cases under the City HRL]; *Loeffler v Staten Island Univ. Hosp.*, 582 F3d 268, 278 [2009] [explaining that "claims under the City HRL must be reviewed independently from and 'more liberally' than their federal and state counterparts"]).

Despite these clear directives, no court has yet undertaken an examination of whether, and to what extent, the three-step burden-shifting approach set forth in *McDonnell Douglas v Green* (411 US 792 [1973]), must be modified for City HRL claims, particularly in the context of the adjudication of summary judgment motions. That examination is overdue, and we begin the process here.

II.

As a preliminary matter, the identification of the

framework for evaluating the sufficiency of evidence in discrimination cases does not in any way constitute an exception to the Section 8-130 rule that all aspects of the City HRL must be interpreted so as to accomplish the uniquely broad and remedial purposes of the law (*see Williams*, 61 AD3d at 67, 68, n4 and 74). Indeed, the Restoration Act had among its explicit purposes *the rejection and overruling* of the doctrine in *McGrath v Toys "R" Us, Inc.* (3 NY3d 421, 433-34 [2004]), which indicated that the City Council would need to amend the City HRL to specifically depart from a federal doctrine if it wanted to do so (*see Williams*, 61 AD3d at 73-74).[1] In any event, for us to create an exemption from the sweep of the Restoration Act for the most basic provision of the City HRL - that it is unlawful "to discriminate" - would impermissibly invade the legislative province.[2] And walling off from examination the doctrines that

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[1]*See also Williams*, 61 AD3d at 67 (when the Restoration Act was enacted, it was made plain that the intention was to legislatively overrule for City HRL purposes cases that had "either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore[d] the text of specific provisions of the law, or both." Among the illustrations of cases that, post-Restoration Act, would no longer "hinder the vindication of our civil rights" were *McGrath* and *Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]).

[2]*See Meegan v Brown*, 16 NY3d 395, 403 [2011] ["While examining the specific language of statutory provisions is part of our inquiry, we must also look to the underlying purpose and the statute's history as '(w)e are mindful that in "the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle."'"]

are appropriate to shape the presentation and evaluation of evidence that "discrimination" has occurred would create just such an exemption.

III.

The *McDonnell Douglas* (411 US 792) burden-shifting approach initially requires only that the plaintiff make a prima facie showing of membership in a protected class and that an adverse employment action had been taken against him. The adverse action must have occurred under circumstances giving rise to an inference of discrimination.[3] Once that minimal showing is made, the burden shifts to the defendant to articulate through competent evidence non-discriminatory reasons that actually motivated defendant at the time of its action (*id.* at 802). If that burden is successfully shouldered then plaintiff must show those reasons to be false or pretextual (*id.*). The basic idea

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[internal quotations and citations omitted]; *Brothers v Florence*, 95 NY2d 290, 299 [2000] ["While interpretation must begin with an examination of the language itself, where a statute does not expressly address the issue, the reach of the statute ultimately becomes a matter of judgment made upon review of the legislative goal"]).

[3] In *McDonnell Douglas* itself, the Court held that the prima facie case could be made out "by showing (i) [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications" (411 US at 802).

behind the *McDonnell Douglas* burden-shifting procedure —- that is, that discrimination rarely announces itself, and that victims of discrimination need a way to prove their case circumstantially —- is sound. But some aspects of the way it has been applied —- especially in the summary judgment context —- can undercut the City HRL's intent to maximize the opportunities for discrimination to be exposed.[4] For instance, the last prong of a plaintiff's prima facie showing -- that adverse action has been taken against plaintiff under circumstances giving rise to an inference of discrimination —- can, if its limited function is not understood correctly, transmute that prong into one that requires a plaintiff to prove his entire case. In the hypothetical situation where a plaintiff makes an initial showing that some of his younger colleagues were not subjected to the adverse action imposed on him, and where it is assumed that the basic showing is indeed true,[5] it can certainly also be true that

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[4]*See Williams* 61 AD3d at 68 [in "telling us that the City HRL is to be interpreted 'in line with the purposes of the fundamental amendments to the law enacted in 1991,' the Council's committee was referring to amendments that were 'consistent in tone and approach: every change either expanded coverage, limited an exemption, increased responsibility, or broadened remedies. In case after case, the balance struck by the amendments favored victims and the interests of enforcement over the claimed needs of covered entities in ways materially different from those incorporated into state and federal law'" (citing Gurian, *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law*, 33 Fordham Urb LJ 255, 288 [2006])].

[5]This illustration is not intended to suggest, and should not be construed as holding, that this particular showing is

those colleagues were not similarly situated to plaintiff because plaintiff engaged in misconduct and they did not. But the explanatory second set of facts, such as the absence of such misconduct by the plaintiff's colleagues, should not be relied on to negate the plaintiff's prima facie case in the first instance, but rather, seen as either: (a) the defendant's articulation through competent evidence of non-discriminatory reasons for its action (stage two in the *McDonnell Douglas* framework); or (b) part of the defendant's ultimate effort to undercut the weight assigned to the plaintiff's evidence and thus disprove the plaintiff's claim that it was more likely than not that discrimination played a role in defendant's actions.

If this caution is not taken, the result will be inconsistent with the intent of *McDonnell Douglas,* and, more importantly, with that of the City HRL. As the Supreme Court said long ago, the burden of establishing a prima facie case of discrimination is "not onerous" (*Texas Dept. of Community Affairs v Burdine*, 450 US 248, 253 [1981]).[6] The reasons were, and

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somehow an essential requisite of the prima case in all or a subset of discrimination matters. On the contrary, the prima facie case method established in *McDonnell Douglas* "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination" (*see Furnco Construction Corp. v Waters*, 438 US 567, 577 [1977]).

[6]Judicial construction of counterpart state and federal civil rights statutes can serve as an aid in interpretation to

remain, obvious. First, discrimination rarely announces itself, so that generally a discrimination plaintiff must ask the fact-finder to infer the defendant's intent from circumstantial evidence that can be difficult to obtain.[7] Second, the defendant, by definition, is in a materially better position to provide evidence as to its actual motivation than the plaintiff. Third, the *McDonnell Douglas* burden of production on a defendant that is triggered by a plaintiff's initial presentation of a prima facie case is itself neither onerous or unfair: all a defendant is being required to do in that circumstance is to come forward with competent evidence of what it knows, that is, the

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the City HRL to the extent that the construction of the counterpart statute is understood as providing a floor of rights under which the City HRL cannot fall, not a ceiling above which the City HRL cannot rise, NYC Local Law 85 of 2005, § 1, and is also not understood as a determination of, or replacement for, the ultimate and necessary question that a court, pursuant to Admin. Code § 8-130, must determine independently: what interpretations of the questions before it best fulfill the City HRL's uniquely broad and remedial purposes.

[7]*See e.g. Dister v Cont. Group, Inc.*, 859 F2d 1108, 1112[1988]["The allocation of burdens and imposition of presumptions in Title VII and ADEA cases recognizes the reality that direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it. Employers of a mind to act contrary to law seldom note such a motive in their employee's personnel dossier. Specific intent will only rarely be demonstrated by 'smoking gun' proof. The *McDonnell Douglas* procedure attempts to compensate for this lack of evidence to ensure that the employee has his or her day in court"] [internal citations omitted]].

reason or reasons for its actions.[8] Finally, the existence of discrimination — a profound evil that New York City, as a matter of fundamental public policy, seeks to eliminate[9] — demands that the courts' treatment of such claims maximize the ability to ferret out such discrimination, not create room for discriminators to avoid having to answer for their actions before a jury of their peers.[10]

Unlike the intended role for a de minimus prima facie showing, the task of challenging a defendant's proffered non-discriminatory reasons can frequently be onerous. It often involves questions such as appropriate comparators and evidence of work performance (and discipline) of others. To conflate this broader obligation with the initial prima facie obligation contravenes the purpose of the *McDonnell Douglas* procedure for

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[8]That it may sometimes be unpleasant for a defendant to be candid does not change the fact that the reason or reasons for conduct are or should be easily available to a defendant.

[9]In the City HRL formulation, "there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences" (Admin. Code § 8-101). The goal is to "eliminate and prevent discrimination" from, as added in 1991, "playing any role" in actions related to the employment, housing, and public accommodations contexts (*id.*).

[10]The Committee Report on the Restoration noted that acts of discrimination cause "serious injury, to both the persons directly involved and the social fabric of the City as a whole, which will not be tolerated" (Report of the Committee of Gen Welfare on Local Law No. 85 (2005) of New York, 2005 NY City Legis Ann, at 537).

the order and requirement of proof, a procedure that is simply a mechanism designed to give a full opportunity for cases of possible discrimination to be heard. In fact, to conflate this obligation improperly merges the proof and role of the prima face case with the proof and role of plaintiff's ultimate burden.

In the context of a summary judgment motion, of course, once a defendant has laid bare its proof, a plaintiff is compelled to do the same. But that is the point: once the defendant has revealed its evidence, the case has moved to a different level of specificity. At the summary judgment stage, a court should not confuse the limited assessment of all the evidence in the case (an issue identification function, not an issue resolution function) with a retroactive critique of the adequacy of the initial prima facie showing. If a court were to tarry at all at the summary judgment stage on the question of whether a prima facie case has been made out, it would need to necessarily ask whether the initial facts described by the plaintiff, *if not otherwise explained*, give rise to the *McDonnell Douglas* inference of discrimination.

Therefore, where a defendant on a summary judgment motion has produced evidence that justifies its adverse action against the plaintiff on non-discriminatory grounds, the plaintiff may not stand silent. The plaintiff must either counter the defendant's evidence by producing pretext evidence (or

otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination. The point of the *McDonnell Douglas* procedure was to recognize the imbalance between the information initially available to a plaintiff and the information possessed by a defendant. In the interests of making real the promise of anti-discrimination law, the *McDonnell Douglas* 3-prong approach requires a defendant to come forward to provide non-discriminatory reasons for its actions, in order to eliminate the presumption of discrimination that the prima facie case had theretofore established. A defendant's production of evidence supporting its position that it acted for non-discriminatory reasons does not mean that a prima facie case had not been created in the first instance, and courts should not treat such evidence as doing so.

IV.

Does it even make sense to examine at the summary judgment stage whether an initial prima facie case has been made out? As the Supreme Court held almost 30 years ago:

> "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'"

(*United States Postal Serv. Bd. of Governors v Aikens*, 460 US

711, 715 [1983] [internal citation omitted]). This reasoning applies in this context as well.

Where a defendant in a discrimination case has moved for summary judgment and has offered evidence in admissible form of one or more non-discriminatory motivations for its actions, a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out in the first place. Instead, the court should turn to the question of whether the defendant has sufficiently met its initial burden as the moving party of showing that there is no evidentiary route that could allow a jury to believe that discrimination played a role in the challenged action. We stop short of holding that there is *never* a circumstance under the City HRL where such an inquiry would be proper, but do conclude that such circumstances will be rare and unusual.[11]

V.

There remain two factors to consider. First, it is essential to remember that the *McDonnell Douglas* evidentiary framework is not the only evidentiary framework applicable to discrimination cases. It is not uncommon for covered entities to have multiple

[11]The granting of a motion based on the absence of a prima facie showing of "circumstances giving rise to an inference of discrimination" would be even more rare given the clarification, *supra*, p. 10, of the limited evidence required for that purpose.

or mixed motives for their action, and the City HRL proscribes such "partial" discrimination since "under Administrative Code § 8-101, discrimination shall play no role in decisions relating to employment, housing or public accommodations" (*see Williams*, 61 AD3d at 78, n 27; *see also* Report of the Committee of Gen Welfare on Local Law No. 85 (2005) of New York, 2005 NY City Legis Ann, at 537, and *Weiss v JP Morgan Chase & Co.*, 2010 WL 114248, 2010 US Dist. LEXIS 2505 [SD NY 2010] [the City HRL "requires only that a plaintiff prove that age was 'a motivating factor' for an adverse employment action"]).

A plaintiff's response to a defendant's showing of non-discriminatory reasons for its actions can take a variety of forms. In some cases, the plaintiff may present evidence of pretext and independent evidence of the existence of an improper discriminatory motive. In other cases, the plaintiff may leave unchallenged one or more of the defendant's proffered reasons for its actions, and may instead seek only to show that discrimination was just one of the motivations for the conduct.[12] In addition, evidence of an unlawful motive in the mixed motive

[12] *Cf.* 42 USC § 2000e(2)(m), which provides that it is "an unlawful employment practice . . . when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Note that the City HRL does not provide for the limitations on relief in mixed-motive cases set forth in 42 USC § 2000e-5(g)(2)(B) (*see* Gurian, *Return to Eyes on the Prize*, 33 Fordham Urb LJ at 312-13).

context need not be direct, but can be circumstantial — as with proof of any other fact (*see Desert Palace, Inc. v Costa*, 539 US 90 [2003]).

On a motion for summary judgment, defendant bears the burden of showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes: under the *McDonnell Douglas* test, or as one of a number of mixed motives, by direct or circumstantial evidence.

VI.

The critical remaining question concerns the proper impact of a plaintiff's evidence that one or more of the non-discriminatory reasons put forward by a defendant is false, incomplete, or misleading -- generally referred to as pretext evidence. A sharply divided Supreme Court ruled that a fact finder's rejection of what the employer has proffered as a legitimate, non-discriminatory reason for its action does not compel judgment for the plaintiff, reasoning that a pretext is not necessarily a pretext for discrimination (*see St. Mary's Honor Ctr. v Hicks*, 509 US 502, 511 [1993]). Several years later, the Supreme Court concluded, in *Reeves v Sanderson Plumbing Prods., Inc.* (530 US 133 [2000]), that a plaintiff's claim of discrimination can indeed survive a defendant's motion for summary judgment by the quantum of evidence that made up

plaintiff's prima facie case, along with evidence that the employer's proffered justification for its action was false. The *Reeves* Court rejected the proposition that additional evidence tending to show that the false explanation was a cover-up for discrimination was needed to survive summary judgment, sometimes termed the "pretext plus" view. It confirmed that a jury is entitled to infer from the evidence of falsity that the cover-up was a cover-up of discrimination, but rejected the position that proving the falsity of a defendant's proffered reason automatically entitled the plaintiff to judgment – sometimes termed the "pretext must" view.

The Supreme Court did not simply caution lower courts that juries should be issued a permissive rather than mandatory instruction as to the inference of discrimination to be drawn from evidence of a false reason for action. It effectively suggested that summary judgment could still be routinely granted in a defendant's favor even where evidence of falsity had been produced by plaintiff: "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law" (*Reeves*, 530 US at 148-49).

Whatever the merits of the Supreme Court's decision as a matter of federal law may or may not be, *Reeves* did not sufficiently consider factors crucial to interpreting the City HRL in a way that is "uniquely broad and remedial." These factors include: (a) the traditional power to be accorded to the inference of wrongdoing that arises from evidence of consciousness of guilt; (b) the importance of deterring a defendant's proffer of false reasons for its conduct; and (c) the impropriety of a court weighing the strength of evidence in the context of a summary judgment motion.

As to consciousness of guilt, it is hardly a new proposition that "[r]esort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct" (*Sheridan v E.I. DuPont de Nemours and Co.*, 100 F3d 1061, 1069 [3rd Cir 1996, en banc], *cert denied* 521 US 1129 [1997] quoting *Binder v Long Is. Light. Co.*, 57 F3d 193, 200 [1995]; *see also Fisher v Vassar Coll.*, 114 F3d 1332, 1390-91 [1997] [Winter, Ch. J., dissenting], *cert denied* 522 US 1075 [1998] [noting that *Binder* did nothing but apply the "universally recognized principle" that consciousness of guilt may be inferred from dishonest behavior concerning facts material to litigation to "false exculpatory statements by employers," and pointing out the equivalently universal principle that a jury that finds that a witness has

lied in a material part of his or her testimony may "disbelieve other material parts of that witness's testimony"]).

This principle is especially important in the employment discrimination context. As the four dissenters noted in *Hicks*, the *McDonnell Douglas* procedure invests the employer (via its decision on how to meet its burden of production) with "the right to choose the scope of the factual issues to be resolved by the factfinder" (*Hicks*, 502 US at 529). Not only is it the case that the procedure "has no point unless the scope it chooses binds the employer as well as the plaintiff" (*id.*), but there is also an independent interest in deterring the presentation of false reasons in the discrimination context.

It is often the case that the dispute involves not a single, easily isolated incident, but rather an ongoing relationship that has context and nuance. It is difficult enough to discern a defendant's motive or motives in those circumstances without giving it a tactical advantage to throwing numerous non-discriminatory justifications against the wall and seeing which stick. It must thus be the defendant's obligation to articulate its true reasons for acting in the way that it did. And the maximum deterrent effect sought by the City HRL can only be achieved where covered entities understand that, whatever the urge may be to cover up their actual motivations before arriving in court, there can be no benefit for doing so once in court (*cf.*

Hicks, 502 US at 543 [Souter, J., dissenting] ["I see no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent"]).

The Supreme Court in *Reeves* was not wrong to state that the strength of a prima facie case can vary. Likewise, the strength of "consciousness of guilt" evidence is not a constant from case to case, and the totality of evidence available to be assessed is case specific. All of these factors are sound reasons why a jury is instructed that it may (not must) infer discrimination when it finds that an employer's explanation of its conduct is unworthy of credence. But the extraordinary remedy of summary judgment presents a different context.

Once there is some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, such as whether a false explanation constitutes evidence of consciousness of guilt, an attempt to coverup the alleged discriminatory conduct, or an improper discriminatory motive co-existing with other legitimate reasons.[13] These will be jury

[13] If one explanation offered by a defendant is able to be construed by a jury as false and therefore evidence of consciousness of guilt, that same jury would be permitted to weigh that evidence when assessing the veracity of the other explanations the defendant has offered.

questions except in the most extreme and unusual circumstances. Proceeding in this way reaffirms the principle that "trial courts must be especially chary in handing out summary judgment in anti-discrimination cases, because in such cases the employer's intent is ordinarily at issue" (*Chertkova v Connecticut General Life Ins. Co.*, 92 F3d 81, 87 [1996], *cert denied* 531 US 1192 [2001]; *see also Patrick v LeFevre*, 745 F2d 153, 159 [1984]).

We recognize that there has been a growing emphasis on using summary judgment in discrimination cases to promote "judicial efficiency."[14] But at least in the context of the City HRL, the Restoration Act provides a clear and unambiguous answer: a central purpose of the legislation was to resist efforts to ratchet down or devalue the means by which those intended to be protected by the City HRL could be most strongly protected[15] *(cf.*

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[14]*See e.g. Shager v Upjohn Co.*, 913 F2d 398, 403 [1990, Posner, J.] ["The growing difficulty that district judges face in scheduling civil trials, a difficulty that is due to docket pressures in general . . ., makes appellate courts reluctant to reverse a grant of summary judgment merely because a rational factfinder could return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter because the plaintiff's case . . . is marginal"]; *Canitia v Yellow Freight Sys. Inc.*, 903 F2d 1064, 1068, *cert denied* 498 US 984 [1990] [1990 Nelson, J., concurring] ["Given the demands now being made on the time of most district courts, it seems to me that a full-scale trial in a case as lopsided as this one would probably be a misallocation of judicial resources"]).

[15]Given the serious questions regarding the actual efficiency gains of summary judgment (*see generally* Rave, *Questioning the Efficiency of Summary Judgment*, 81 NYU L Rev 875 [2006]), we are not convinced that the City's emphasis on ensuring that discrimination cases are resolved before a jury is

Williams, 61 AD3d at 72-73). These concerns warrant the strongest possible safeguards against depriving an alleged victim of discrimination of a full and fair hearing before a jury of her peers by means of summary judgment. In short, evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied.[16]

VII.

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necessarily inconsistent with maximizing the scarce use of judicial resources.

[16]We cannot put this holding in absolute terms - there can be limited exceptions to the rule that emerge on a case-by-case basis - but we write here to underline that the exceptions are intended to be true exceptions (*compare Williams*, 61 AD2d at 73-80 [the rule is that any difference in treatment reflected by harassment is actionable gender-based discrimination, with narrowly drawn affirmative defense to "narrowly target concerns about truly insubstantial cases" designed with the goal of making certain to avoid "improperly giving license to the broad range of conduct that falls between 'severe or pervasive' on the one hand and a 'petty slight or trivial inconvenience' on the other, with emphasis on the need to permit borderline situations to be heard by a jury, and with finding that one could "easily imagine a single comment that objectifies women being made in circumstances where their comment would, for example, signal views about the role of women in the workplace and be actionable"] *and Wilson v N.Y.P. Holdings,Inc.*, 2009 WL 873206, 2009 US Dist LEXIS 28876 [SD NY 2009] [ignoring the *Williams* holding and finding comments like "training females is like 'training dogs'" and "women need to be horsewhipped" to not be actionable]; *Mihalik v Credit Agricole Cheuvreux North America, Inc.*, 2011 WL 3586060 [SD NY 2011] [wrenching the *Williams* reference to a "general civility code" out of context; inaccurately portraying the case as one whose principal concern was that too many victims of harassment were having the opportunity to be heard by juries, not the opposite; and collecting and relying on some of the many cases that nominally acknowledge *Williams* but ignore its teaching, including *Wilson*]). As with *Williams*, it is our intention that a limited and narrow exception is not intended to be simply the new means by which an old status quo is continued.

To summarize, then, for purposes of consideration of summary judgment motions in discrimination cases brought under the City HRL:

(1) If a court were to find it necessary to consider the question of whether a prima facie case has been made out, it would need to ask the question, "Do the initial facts described by the plaintiff, *if not otherwise explained*, give rise to the *McDonnell Douglas* inference of discrimination?"

(2) Where a defendant has put forward evidence of one or more non-discriminatory motivations for its actions, however, a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out. Instead, it should turn to the question of whether the defendant has sufficiently met its burden, as the moving party, of showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes — *McDonnell Douglas*, mixed motive, "direct" evidence, or some combination thereof.

(3) If the plaintiff responds with some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, and thus such evidence of pretext should in almost every case indicate to the court that a motion

for summary judgment must be denied.

Applying these principles to the case at hand, defendant is entitled to summary judgment.

Given the circumstances of this case, it makes sense to proceed directly to looking at the evidence as a whole. Defendant put forward evidence of non-discriminatory motivations, specifically, credible evidence of numerous reports of plaintiff's unsatisfactory work performance, including, but not limited to, plaintiff's poor attendance and lack of job focus, and plaintiff's own admission that he was unable to "master [his] job." Even after plaintiff was given a week's vacation and an additional three-week leave to compose himself, his work performance continued to be below expectations. Relatedly, the Director of DPO advised plaintiff that if his work did not improve, he would be terminated. There is also undisputed evidence that plaintiff frequently slept on the job, and that he had left his shift early on several occasions without explanation. These allegations were corroborated by the affidavits of plaintiff's coworkers, who stated that plaintiff was found asleep under the desk of his cubicle, that he was under the influence of alcohol, and that he was unable to handle his responsibilities. Finally, plaintiff was replaced by a worker older than he. This evidence was sufficient to prove that plaintiff was indeed not the victim of age discrimination.

Plaintiff put forward no evidence that defendant's explanations were pretextual, nor any evidence that a discriminatory motive co-existed with the legitimate reasons supported by defendant's evidence.

Defendant's proof is equally unrebutted when it comes to plaintiff's claims of race discrimination. Plaintiff did not, for example, produce any evidence that there were black coworkers who were similarly situated to plaintiff in terms of poor performance or non-performance, let alone evidence that a similarly situated black coworker was treated more leniently, and he did not produce any of the innumerable other types of evidence that can point to race playing a role in his employer's decision-making.

Because plaintiff's claims fail under the more protective City HRL, they fail under the State Human Rights Law as well. We have reviewed plaintiff's remaining claims and they have no merit.

Accordingly, the order of the Supreme Court, New York County (Marylin G. Diamond, J.), which granted defendant's motion to dismiss the complaint, should be affirmed, without costs.

All Concur.

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

ENTERED: DECEMBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5800 Kevin Gilliland, et al., Index 308831/09
Plaintiffs-Respondents,

-against-

Acquafredda Enterprises, LLC, et al.,
Defendants-Appellants.

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Rothkrug Rothkrug & Spector, LLP, Great Neck (Simon H. Rothkrug of counsel), for appellants.

Simon, Eisenberg & Baum, LLP , New York (Robert F. Moraco of counsel), for respondents.

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about April 23, 2010, affirmed, with costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
James M. Catterson
Rolando T. Acosta
Dianne T. Renwick, JJ.

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Kevin Gilliland, et al.,
Plaintiffs-Respondents,

-against-

Acquafredda Enterprises, LLC, et al.,
Defendants-Appellants.
_____x

Defendants appeal from the order of the Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about April 23, 2010, which granted plaintiffs' motion for preliminary relief enjoining defendants from, inter alia, performing any construction or demolition on the subject premises or otherwise preventing plaintiffs from access to the beachfront from Casler Place pending final determination of this action.

Rothkrug Rothkrug & Spector, LLP, Great Neck (Simon H. Rothkrug of counsel), for appellants.

Simon, Eisenberg & Baum, LLP, New York (Robert F. Moraco and Eric M. Baum of counsel), for respondents.

RENWICK, J.

The speaker in Robert Frost's metaphorical poem "Mending Wall" ruminates over his neighbor's stolid assumption that "good fences make good neighbors."[1] Nonetheless, the adage's message has been sanctioned by tradition. Good fences may indeed make good neighbors. However wise Frost's thoughts on neighbor relations might be, the practicality of his aphorism remains an open question today, as highlighted by the facts of this case involving a contentious dispute among "neighbors" over a fence.

The parties are the owners of properties situated on Casler Place in the Schuyerville section of the Bronx. The properties are part of the neighborhood peninsula of Throgs Neck, which is bounded on the west by Westchester Creek and extends south into the Long Island Sound. Casler Place is a short street that runs from Pennyfield Avenue east to the shore of the Long Island Sound. Defendants own the property on both sides of the street at the eastern end of Casler Place, fronting the beach. The not-so-neighborly conflict erupted in 2008 when defendants erected a fence running from north to south across Casler Place, thereby preventing access to the shore. At issue here are the parties' respective property rights, i.e. plaintiffs' rights to access the

[1] Robert Frost published "Mending Wall" in 1914; it appeared in his second collection of poetry, North of Boston.

shore through the area where the fence stands, and defendants' right to maintain that fence upon property they claim to own.

The parties' properties, among many others, were once vested in a common owner. In 1928, a large tract of Schuyerville was owned by Locust Point Estate, Inc., a real estate venture which subdivided the property into separate residential parcels. On January 18, 1928, Locust Point recorded a declaration creating easements for six private streets, including Casler Place, in an area described as being "bounded . . . on the West by Old Fort Schuyler Road [now known as Pennyfield Avenue] . . . and on the East by the original high water line of Long Island Sound." The Declaration provides that Locust Point "creates, establishes and sets apart private roads and easements for ingress and egress . . . and hereby grants and conveys to said grantees, their successors, heirs and assigns forever permanent easements of light, air and access in, on and over the six parcels of land." These six streets were all described as bounded "on the West by the easterly side of Old Fort Schuyler Road [now known as Pennyfield Avenue], and on the East by the high water line of Hammonds Cove on Long Island Sound."

In 1986, the homeowners of Casler Place petitioned the City of New York to dedicate Casler Place as a legal city street mainly because the cost of repairing the street presented a

severe hardship. By letter dated May 7, 1986, the City dedicated "Casler Place from Pennyfield Avenue to a point 245 feet east of the east building line of Pennyfield Avenue to public use as a public way." The end of Casler Place east of the described boundary did not become a public street.

By summons and complaint dated October 27, 2009, plaintiffs, all of whom own property or reside on or near Casler Place, commenced this action against defendants Susan and Thomas Acquafredda. Plaintiffs alleged that in 2006, defendants began constructing two multi-family homes at 3093-3095 Casler Place. By 2008, defendants were allegedly constructing seawalls and a fence going across Casler Place, which "interfered with and prevented plaintiffs access to the public beach area at the end of Casler Place." Plaintiffs further alleged that at least part of the construction was on land not owned by defendants, and that plaintiffs and the public had a right of access to the public beach by virtue of an easement by grant and an easement by prescription.

Plaintiffs now seek a declaration "that plaintiffs have an easement to access the beach area at the end of Casler Place, and that defendants do not have the right to obstruct plaintiffs' access, and perform construction work on said beach area." Additionally, plaintiffs seek money damages and an injunction

preventing defendants from performing further construction or demolition.[2] Two days after commencing the action, plaintiffs moved, by order to show cause, for, inter alia, a preliminary injunction pursuant to CPLR 6301, seeking to prevent defendants from performing construction or demolition at Casper Place, blocking access to the beachfront property.

In support, plaintiffs submitted the affidavit of Turano, the president of a title insurance company, who states that the purpose of the 1928 Declaration was to allow the public the right to traverse Casler Place to enter the beachfront property. Turano further states that defendants' fence stands 239 feet east of Pennyfield Avenue and, as such, is on the public portion of Casler Place which is not owned by defendants. Plaintiffs also submitted the affidavit of architect Kovach, who attests that the fence lies "only 238 feet, 8 inches east from the east building line of Pennyfield Avenue." Kovach states that "approximately 7 linear feet of property directly behind that fence, on which defendants had significant work performed, including dredging up of beach front property and the installation of a concrete seawall, was property of the public street that is Casler Place."

In further support of their motion, plaintiffs submitted

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[2] Plaintiffs also allege that the construction activity constitutes nuisance.

their own affidavits. Rose Lillian Laurino, who lived on Dare Place from 1935 until 1955 and has resided on Casler Place since then, avers that she has used the Casler Place entrance to the beach continuously since 1935, and submitted photographs of herself in the 1940s and 1950s using the beach. Marija Gegovic, who resides on Pennyfield Avenue, states that she has been using Casler Place to access the shore for 20 years. Joseph Petriella and Melanie Petriella (husband and wife) state that they too have been doing so since 2004. Mathew Hohl avers that he has been using the end of Casler Place to access the beach since 1998; and, that she purchased her home, at least in part, because her real estate broker revealed that everyone on the block had easement rights to use the beach. Teresa and Kevin Gilliland state that they have been using the access since 1999.

In addition, plaintiffs submitted a deed dated September 9, 1993, by which defendants Susan and Thomas Acquafredda originally took title to their property (then lot 501, now 488) on Casler Place. Plaintiffs also submitted a deed dated October 10, 2007, by which defendants purported to convey lot 491 at 3095 Casler Place oddly to themselves. Finally, plaintiffs submitted photographs of the area before construction, during construction, and of the infamous fence.

Defendants opposed the motion by principally arguing that

the easement created by the 1928 Declaration was solely intended for access to a public highway. In support of this narrow interpretation of the easement, defendants rely primarily upon the "Whereas clause" of the 1928 Declaration. The Declaration states, in pertinent part, that the grantor conveys "parts of [the] property to various grantees and desires to create private roads or easements over part of the property in order to give such grantees means of ingress or egress over such private roads to a public highway." Defendants contend that the 1986 Dedication of Casler Place as a public highway is consistent with this narrow interpretation because the disputed land (the easternmost 45 feet of Casler Place leading up to the Long Island Sound shoreline) was expressly excluded from the Dedication.

Defendants argue that they and their predecessors in title evinced this narrow intent by "always maintain[ing] a chain-link fence across Casler." Defendants submitted the affidavit of defendant Susan Aquafredda, who stated that she has maintained complete and exclusive access over the fence since 1993, as evidenced by pictures.[3] Aquafredda notes that the picture of

[3] In reply, plaintiffs submitted affidavits from each of the plaintiffs which clarified that, although defendants replaced the fence in 1998, the fence did not restrict access to the shore until defendants modified it in 2008. Until then, they noted, the fence contained two access gates in it.

the fence after 1998 shows that the City installed a fire hydrant in front of the fence as well as a sign that states "End," which, Aquafredda argues, indicates "a clear acknowledgment of [her] possession, ownership and use of the entire area easterly of [her] fence." Finally, Acquafredda asserts that she owns the property upon which the fence stands, and submitted the aforementioned 1993 deed, and a survey dated September 21, 1994, purportedly indicating as much.

By order entered on or about April 23, 2010, Supreme Court granted plaintiffs a preliminary injunction, enjoining defendants from performing any construction or demolition work at the subject premises which blocks and prevents plaintiffs from accessing the beachfront property.[4] First, the court found that plaintiffs established a likelihood of success on the merits because the 1928 Declaration was unambiguous as to the scope of the easement, as extending from Fort Schuyler Road to the high water line of the Long Island Sound. Second, the court found that the 1986 Dedication of Casler Place as a public road was irrelevant because the City only intended to assume maintenance and responsibility over the road. Third, the court found that

[4] The order also enjoined defendants from selling or leasing the premises, and required defendants to maintain a certain protective fence atop the seawalls. The court directed plaintiffs to post an undertaking in the amount of $10,000.

plaintiffs established irreparable harm based on their inability to get to the shore. Finally, the court found that the equities tipped in plaintiffs' favor because "a good part of the problem with respect to access on the Casler Place strip is defendants' own making. She put up the wall." This appeal ensued, and we now affirm.

A party seeking a preliminary injunction must demonstrate, by clear and convincing evidence (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see* CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). The decision to grant or deny a preliminary injunction lies within the sound discretion of the trial court *(id.)*. Thus, this Court will not disturb a trial court's grant of a preliminary injunction absent an improvident exercise of discretion (*see Matter of Witham v Finance Invs., Inc.*, 52 AD3d 403 [2008]).

In this appeal, defendants only address the first of the preliminary injunction's three-pronged requirements, and make no argument that the balance of the equities favors them or that plaintiffs will not suffer irreparable harm absent the preliminary injunction. As to the first prong, plaintiffs were required to prove, by clear and convincing evidence, that they

will likely prevail on their claim of a right to access the shoreline by virtue of an express easement, an easement by prescription, or otherwise.

Preliminarily, we find that the evidence casts serious doubts as to defendants' claim of title to the disputed area leading to the Long Island shoreline. Defendants claim that the deed dated October 10, 2007 -- in which they both act concomitantly as the grantors and grantees -- expands their property to include the northern half of the actual street known as Casler Place. However, as plaintiff points out, the September 9, 1993 deed, which originally granted defendants title to their property, described their property as beginning at "the northerly side" of Casler Place, and did not include any of the street itself. Of course, a grantor cannot convey what the grantor does not own. Thus, a deed from an entity that does not possess title or other conveyable interest is inoperative as a conveyance. (Real Property Law § 245*; Green v Collins, 86 NY 246 [1881]; see e.g. Cornick v Forever Wild Dev.,* 240 AD2d 980, 981 [1997]). In view of these principles, the inescapable conclusion is that the anomalous transaction, the 2007 deed, appears to be a fraudulent conveyance.

In any event, irrespective of the legality of this transfer, we are not persuaded that the express easement in question should

be interpreted so narrowly as to limit it solely to a right-of-way to the nearest public highway. Easements by express grant are construed to give effect to the parties' intent, as manifested by the language of the grant (*Dowd v Ahr*, 78 NY2d 469, 473 [1991] citing 2 Warren's Weed, New York Law of Real Property, Easements, § §3.02, 17.03 [4th ed]). Thus, the language of the easement is controlling, and if a grant is specific in its terms, it is decisive of the limits of the easement (*Herman v Roberts*, 119 NY 37 [1890]; *Matter of City of New York*, 267 NY 212 [1935]).

In the instant dispute, the language of the grant supports plaintiff's broader interpretation that the easement extends to the shore. As noted above, in the granting provision of the 1928 Declaration, the grantor "creates, establishes and sets apart private roads and easements for ingress and egress." Further, it "grants and conveys to said grantees ... forever permanent easements of light, air and access in, on and over all those strips and parcels of land, including Casler Place bounded on the west by Fort Schuyler Road and on the east by the high water line of Hammonds Cove on Long Island Sound." It is this language – the so-called "metes and bounds" description – that is the critical portion of the easement, and not, as defendant suggests on appeal, the "Whereas clause."

Since the pertinent language is certain and unambiguous --

that the easement extends to the shore -- it is not necessary, as defendant suggests, to resort to an examination of the "Whereas clause" (*see Lawrence v 5 Harrison Assoc. Ltd.*, 295 AD2d 131 [2002] [rejecting defendant's argument that easement was limited according to language in "Whereas clause" describing its intent, where the easement "clearly described in [the] conveyance" was not so limited]). Indeed, where, as here, the intention as to the extent of an easement is affirmatively evidenced by certain and unambiguous language in the grant, a contrary intent may not be implied (*Alt v Laga*, 207 AD2d 971 [1994]). Plain language sometimes yields to the construction called for by the circumstances, in order to afford reasonable facilities for the enjoyment of an easement. However, no departure should be made from the terms of a conveyance where, as here, it would take from one party rights expressly granted and reserved and give them to others (*see Mandia v King Lumber and Plywood Co.*, 179 AD2d 150, 158 [1992] [where "language in which the grant of the easement is couched is very broad," nothing restricted or qualified its use for other purposes than for a means of entrance and exit to property].

Nor do we find any merit to defendants' argument that the easement created by the 1928 Declaration was extinguished by the 1986 Dedication by the City. As noted, defendant argues that

"[b]y petitioning the City, and accepting the City's declaration that the portion of Casler Place in front of [plaintiffs'] homes be a public way, the [e]asement came to an end," and Casler Place effectively became a public street owned by the City. Defendants, however, conveniently ignore the fact that the 1986 Dedication only pertained to the first 245 feet of Casler Place from Pennyfield Avenue. Thus, plaintiffs' predecessors in interest cannot be deemed to have somehow conveyed those portions of Casler Place east of the 245 feet to the City of New York by virtue of the petition and subsequent Dedication.

But the express easement was not the only ground available for granting a preliminary injunction. Plaintiffs also demonstrated a likelihood of success of the merits of their alternative claim that they possess an easement by prescription over the area where defendants' fence now stands for access to the shore. "An easement by prescription is generally demonstrated by proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period" (*Almeida v Wells*, 74 AD3d 1256, 1259 [2010]; *see also 315 Main St. Poughkeepsie, LLC v WA 319 Main, LLC*, 62 AD3d 690, 691 [2009]; *Frumkin v Chemtop*, 251 AD2d 449 [1998]).

Here, plaintiffs' affidavits, which were fully described above, established that plaintiffs and their predecessors in

interest had openly and notoriously used the area where defendants' fence now stands for access to the shore since at least 1935. That evidence was sufficient to demonstrate that the right-of-way was openly, notoriously and continuously used to access the disputed area for the requisite 10-year period, thus giving rise to a presumption that the use was hostile and under claim of right *(see Kessinger v Sharpe*, 71 AD3d 1377, 1378 [2010]; Gorman v Hess, 301 AD2d 683 [2003]; *Solimini v Pytlovany*, 144 AD2d 801 [1988]). Thus, plaintiffs met their initial burden on the motion on this ground as well. Moreover, defendants' conclusory allegations, that they never allowed any property owner to use the area over the fence for access to the shore, was insufficient to deny a preliminary injunction.

As was the speaker in "Mending Wall," we are asked to walk the walk and examine the legal merits of plaintiffs' claim that defendants' wall exceeds the boundaries between unneighborly and illegal conduct. We are indeed convinced, within the context of a preliminary injunction, that plaintiffs have demonstrated a likelihood of success on the merits in their cause of action. "Something there is that doesn't love a wall." It is called an easement.

Accordingly, the order of Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about April 23, 2010, which granted

plaintiffs' motion for preliminary relief enjoining defendants from, inter alia, performing any construction or demolition on the subject premises or otherwise preventing plaintiffs from access to the beachfront from Casler Place pending final determination of this action, should be affirmed, with costs.

All concur.

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

ENTERED: DECEMBER 20, 2011

CLERK