SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 12, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Catterson, Richter, Román, JJ.

6057 In re Imani O., and Another,

Children Under the Age
of Eighteen Years, etc.,

Marcus O.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Dora M. Lassinger, East Rockaway, for appellant.

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

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

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Order of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about June 28, 2010, which, upon a fact-finding determination, entered on or about May 12, 2010, that respondent-appellant father neglected the subject children, released the children to their mother's custody with six months of supervision by petitioner Administration for Children's Services, and issued an order of protection against the father until he enters a domestic violence program, unanimously

reversed, on the law, without costs, the finding of neglect vacated, and the petition dismissed.

The lower court incorrectly found that appellant had neglected his children by perpetrating an act of domestic violence upon the mother in the children's presence. In reaching this conclusion, the court relied upon two domestic incident reports (DIR), an oral report transmittal (ORT), the mother's hospital records, and portions of the caseworker's progress notes. The only witnesses were a caseworker, who never interviewed the mother at the time of the incident, and appellant. Although the lower court determined that the assault occurred in the presence of the children, there was no admissible evidence to support this finding.

Only "competent, material and relevant evidence may be admitted" at the fact-finding hearing (Family Ct Act § 1046 [b][iii]). The mother did not testify at the fact-finding hearing, and the lower court properly granted appellant's motion to exclude her statements as hearsay (*see Matter of Imani B.*, 27 AD3d 645 [2006]; *see generally Matter of Leon RR.*, 48 NY2d 117, 122 [1979]). However, the lower court then improperly relied upon hearsay statements from a police officer in the ORT. That police officer had responded to the subject domestic dispute at appellant's home on August 27, 2007, and filed his ORT on August

31. The narrative portion of the ORT states that "there is a history of domestic violence" between the mother and appellant "in the presence of the children," ages three months and two years old. Even though the police officer is under a duty to report suspected child abuse or maltreatment (Social Services Law § 413), to render his entire statement admissible under the business records exception to the hearsay rule, all the participants in the chain must be under a duty to report and be acting within the scope of that duty (*Leon RR*, 48 NY2d at 122-123). Here, the ORT does not explain or identify the source of the officer's statement that the children previously were present during domestic disputes between the mother and appellant. The ORT also does not specify if the children were present for the incident on August 27 – the basis for petitioner's allegation of neglect – and their presence at any other incident is of no legal significance. Further, there is no way of knowing if the police officer obtained this information from someone who also was under a duty to report, or from the mother, who had no such duty. Since neither the officer nor the mother was called at the hearing, the statement is inadmissible hearsay (*see generally Matter of Christy C.[Jeffrey C.]*, 74 AD3d 561, 562 [2010] [the Family Court improperly relied upon statements by the mother and father contained in a police DIR that did not fall within an

exception to the hearsay rule]). The reference in the ORT to a bruise on the top of the three-month-old child's scalp also cannot be used to prove the neglect charge because the officer acknowledged that it was "unknown if [the] child sustained this injury as a result of getting in the middle of the assault." The officer's source for this statement also is unknown.

Moreover, although the lower court stated that a finding of neglect was proper based on the mother's statements, those statements previously had been excluded on hearsay grounds. Beyond the inadmissible hearsay contained in the police officer's ORT and the mother's excluded out-of-court statements, petitioner did not provide any other evidence that the children were present during the domestic dispute, a necessary finding in order to determine that appellant had neglected his children (*see Matter of Daphne G.*, 308 AD2d 132 [2003]).

The father's argument that the court erred in denying his

request for assignment of new counsel, effectively requiring him to proceed pro se, is unpreserved and, in any event, without merit.

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

ENTERED: JANUARY 12, 2012

CLERK

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

6379 In re Javonne Perry, Index 103430/10
Petitioner,

-against-

John B. Rhea, etc.,
Respondent.

A CPLR article 78 proceeding having been transferred to this Court by order of Supreme Court, New York County (Michael D. Stallman, J.), entered July 26, 2010,

And said proceeding having been argued by counsel for the respective parties, and due deliberation having been had thereon, and upon the stipulation of the parties hereto entered January 4, 2012,

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

ENTERED: JANUARY 12, 2012

CLERK

Andrias, J.P., Friedman, Catterson, Moskowitz, Román, JJ.

4712 Jacinto C. Calcano, Index 303454/09
Plaintiff-Respondent,

-against-

Juan I. Rodriguez,
Defendant-Appellant.

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Marjorie E. Bornes, New York, for appellant.

Anthony J. Cugini, Jr., Riverdale, for respondent.

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered August 16, 2010, which granted plaintiff's motion for summary judgment on the issue of liability, reversed, on the law, without costs, and the motion denied.

There is no disagreement among the members of this panel as to what the record before us shows. Uncontroverted evidence establishes that defendant made an illegal U-turn in the subject incident. However, triable issues of fact remain as to whether the motor vehicle accident resulted in part from any failure of plaintiff to exercise due care (by driving at an excessive speed or by failing to observe defendant's vehicle) and, if so, in what proportion. On these facts, plaintiff was not entitled to summary judgment as to liability.

Binding precedent of the Court of Appeals holds that the plaintiff in a negligence action cannot obtain summary judgment

as to liability if triable issues remain as to the plaintiff's own negligence and share of culpability for the accident (*see Thoma v Ronai*, 82 NY2d 736, 737 [1993], *affg* 189 AD2d 635 [1993]; *see also Johnson v New York City Tr. Auth.*, 88 AD3d 321, 329-332 [2011] [Friedman, J., dissenting in part]). In the incident underlying *Thoma*, the defendant's van struck the plaintiff, a pedestrian, as she was crossing an intersection. This Court affirmed the denial of the plaintiff's summary judgment motion, stating: "Although defendant did not dispute plaintiff's averment that she was lawfully in the crosswalk when he struck her with his van as he turned left, summary judgment was properly denied since a failure to yield the right of way does not ipso facto settle the question of whether the other party was herself guilty of negligence" (189 AD2d at 635-636).

The Court of Appeals affirmed this Court's order in *Thoma* with the following explanation: "The submissions to the nisi prius court . . . demonstrate that [plaintiff] may have been negligent in failing to look to her left while crossing the intersection. Plaintiff's concession that she did not observe the vehicle that struck her raises a factual question of her reasonable care. Accordingly, plaintiff did not satisfy her burden of demonstrating the absence of any material issue of fact

and the lower courts correctly denied summary judgment" (82 NY2d at 737).

As this Court recognized in a unanimous decision issued two years ago (*see Lopez v Garcia*, 67 AD3d 558 [2009]), *Thoma* stands for the proposition that a plaintiff moving for summary judgment on the issue of liability in an action for negligence must eliminate any material issue, not only as to the defendant's negligence, but also as to whether the plaintiff's own comparative negligence contributed to the incident. The Second Department consistently recognizes that *Thoma* governs this issue (*see Mackenzie v City of New York*, 81 AD3d 699 [2011]; *Bonilla v Gutierrez*, 81 AD3d 581 [2011]; *Roman v A1 Limousine, Inc.*, 76 AD3d 552, 552-553 [2010]; *Cator v Filipe*, 47 AD3d 664, 664-665 [2008]; *Albert v Klein*, 15 AD3d 509, 510 [2005]). Although this Court departed from the *Thoma* holding in *Tselebis v Ryder Truck Rental, Inc.* (72 AD3d 198 [2010]), the Second Department has expressly noted that it "disagree[s] [with] and decline[s] to follow th[e] holding" of *Tselebis* as inconsistent with *Thoma* (*Roman*, 76 AD3d at 553). Needless to say, it is not this Court's prerogative to overrule or disregard a precedent of the Court of Appeals. Accordingly, like the Second Department, we

respectfully decline to follow *Tselebis*.[1]

The concurrence appears to recognize that *Tselebis* represents a significant departure from prior law and practice in resolving summary judgment motions in negligence cases. Nevertheless, instead of following the precedent of the Court of Appeals, this Court (prior to *Tselebis*) and the Second Department, the concurrence seek to preserve *Tselebis* in some way, even while acknowledging its difficulties. Thus, the concurrence asserts that, while plaintiff is entitled to summary judgment on the issue of defendant's negligence, defendant is entitled to a trial on liability at which he may argue that, in view of plaintiff's comparative fault (as to which issues remain), "[defendant's] conduct was not a substantial factor in the happening of the accident" -- which, if the jury so found, would mean that defendant is *not* liable, notwithstanding his proven negligence. The concurrence's approach, while presumably entailing a highly confusing jury instruction, would not yield any significant benefit in terms of judicial economy or fairness to the parties. Further, neither party has asked for this

[1]While we recognize that there are personal injury cases in which it may be appropriate to grant partial summary judgment as to liability to a plaintiff who has not established his or her own lack of negligence, those are actions such as those governed by Labor Law § 240(1), in which comparative fault is not an issue.

result, either before the motion court or on appeal. More importantly, however, the concurrence's approach simply cannot be squared with *Thoma*, which instructs us simply to deny summary judgment to a negligence plaintiff who cannot eliminate all issues as to his or her comparative fault.

Implicitly recognizing the inconsistency of its approach with *Thoma*, the concurrence attempts to distinguish *Thoma* on the ground that, there, the "Court of Appeals did not address the question of the defendant's fault." That distinction does not bear scrutiny. In *Thoma*, just as in this case, there was no issue concerning the defendant's negligence because, as stated in this Court's affirmed majority opinion, the record established the defendant's negligence as a matter of law. To reiterate, in *Thoma* we acknowledged that "defendant did not dispute plaintiff's averment that she was lawfully in the crosswalk when he struck her with his van as he turned left" (189 AD2d at 635) -- and nevertheless we affirmed the denial of the plaintiff's summary judgment motion based on the existence of an issue as to her own fault. The Court of Appeals affirmed our determination, also based on the existence of "a factual question as to [the plaintiff's] reasonable care" (82 NY2d at 737). Had any triable issue existed as to the defendant's negligence, there would have been no need for either this Court or the Court of Appeals to

base the denial of summary judgment to plaintiff on the existence of an issue regarding comparative fault. Indeed, absent a record establishing the defendant's negligence as a matter of law, there would have been no occasion for any discussion at all of the comparative fault issue.

In sum, the Court of Appeals held in *Thoma* that a motion for summary judgment as to liability by a negligence plaintiff who cannot eliminate an issue as to his or her own comparative fault should simply be denied. This holding is binding on us, and we, like the Second Department, should follow it. Accordingly, we reverse the order appealed from and deny plaintiff's motion for summary judgment as to liability.

All concur except Catterson and Moskowitz, JJ. who concur in a separate memorandum by Catterson, J. as follows:

CATTERSON, J. (concurring)

I am compelled to concur with the majority because I believe that the plaintiff's motion for summary judgment should only have been granted in part and the matter remanded for a trial on liability rather than damages.

It is beyond cavil that summary judgment may be granted only absent issues of material fact. Andre v. Pomeroy, 35 N.Y.2d 361, 362 N.Y.S.2d 131, 320 N.E.2d 853 (1974). In cases where a question as to a plaintiff's comparative negligence is raised, the factual issue to be resolved is the *extent* of the plaintiff's culpable conduct, in other words, whether the defendant's negligence was, indeed, a *substantial* factor in events that led to the plaintiff's injuries. See Derderian v. Felix Contr. Corp., 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 169, 414 N.E.2d 666, 670 (1980).

Hence, it is my view that our previous ruling in Tselebis v. Ryder Truck Rental, Inc. (72 A.D.3d 198, 895 N.Y.S.2d 389 (1st Dept. 2010)) was incorrectly decided on the basis that CPLR 1411 mandates summary judgment on liability because the plaintiff's culpable conduct is no longer a bar to recovery. 72 A.D.3d at 200, 895 N.Y.S.2d at 391. That position assumes that in any action where a defendant is found negligent as a matter of law, his or her negligence will be, a priori, a substantial factor in

the plaintiff's injuries. This is clearly not always the case.

CPLR 1411 simply adopts the rule of pure comparative fault, that is, theoretically a plaintiff who is 99% at fault could still recover 1% of damages. Indeed, CPLR 1411 contemplates the possibility that, where an issue of fact arises about the plaintiff's culpable conduct, occasionally a jury may find that the defendant's negligence was *not* a substantial factor causing the plaintiff's injuries. "In some cases, of course, the jury may find that plaintiff's culpable conduct was the sole cause of injuries." Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B CPLR C1411:1.

It is well established that the movant for summary judgment has the burden to prove that no issues of material fact exist for trial. Andre, 35 N.Y.2d at 364-365, 362 N.Y.S.2d at 133-134. Here, the plaintiff argues, and the defendant does not dispute, that the defendant made an illegal U-turn across traffic as the plaintiff approached. Thus, the plaintiff argues, the defendant was negligent as a matter of law. Williams v. Simpson, 36 A.D.3d 507, 829 N.Y.S.2d 51 (1st Dept. 2007); see also Barbaruolo v. DiFede, 73 A.D.3d 957, 900 N.Y.S.2d 671 (2d Dept. 2010); Rodriguez v. Schwartz, 257 A.D.2d 655, 684 N.Y.S.2d 579 (2d Dept. 1999).

The defendant, however, equally correctly asserts that even

if the plaintiff had the right of way, he was still obliged to be vigilant for oncoming traffic as he traveled down the street. Furthermore, the defendant claims that the plaintiff was traveling in excess of the 30 mph speed limit. Lopez v. Garcia, 67 A.D.3d 558, 889 N.Y.S.2d 174 (1st Dept. 2009); Hernandez v. New York City Tr. Auth., 52 A.D.3d 367, 368, 860 N.Y.S.2d 75, 77 (1st Dept. 2008); Albert v. Klein, 15 A.D.3d 509, 789 N.Y.S.2d 684 (2d Dept. 2005).

In my view, the defendant correctly contends that the plaintiff's testimony raises an issue of triable fact as to his exercise of due care. At his deposition, the plaintiff stated that he never saw the defendant's car prior to the impact. This testimony raises the question of whether he saw what there was to be seen.

Moreover, this case is a useful illustration of why the ruling in Tselebis cannot stand. The motion court, adhering to Tselebis, asserted that the plaintiff's culpability is merely relevant to *diminish* recovery in a damages trial; hence summary judgment may be granted as to the defendant's liability. However, the issues of fact raised by the plaintiff's possible culpable conduct in this case will necessarily impact the answer as to whether the defendant's negligence as a matter of law was the substantial cause of the plaintiff's injuries.

In my view, the plaintiff was entitled to *partial* summary judgment; that is, a ruling that the defendant was negligent as a matter of law with the concomitant instruction to the jury in a subsequent liability trial. Only in that fashion can the plaintiff retain his right to a finding that the defendant was negligent while allowing the defendant to argue that even if negligent, his conduct was not a substantial factor in the happening of the accident. Thoma v. Ronai (82 N.Y.2d 736, 602 N.Y.S.2d 323, 621 N.E.2d 690 (1993)) does not compel a different result. In Thoma, the Court of Appeals did not address the question of the defendant's fault. Indeed, in this case, the "defendant has not challenged the lower [c]ourt's factual determination, and has not disputed the [c]ourt's determination that he was negligent." Hence, the defendant's negligence is uncontested and the court could award the plaintiff partial summary judgment against the defendant on that issue.

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

ENTERED: JANUARY 12, 2012

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5445 Assouline Ritz1 LLC, et al., Index 602552/06
Plaintiffs-Respondents,

-against-

Edward I. Mills & Associates,
Architects, PC, et al.,
Defendants-Appellants.

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Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Larry F. Gainen of counsel), for appellants.

Marin Goodman, LLP, New York (Fredric B. Goodman of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered February 22, 2011, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the cause of action for professional malpractice, unanimously affirmed, with costs.

Plaintiffs retained defendant Edward I. Mills & Associates, Architects, PC (collectively with the two individual defendants, EIM), an architectural firm, as a zoning consultant in connection with their contemplated purchase and improvement of property in Tribeca. In August 2004, plaintiffs entered into an agreement to purchase the five-story building that was then located at 16 Warren Street (16 Warren) for $5 million. Plaintiffs agreed to acquire this property with the intention of conducting a gut

renovation, constructing six additional floors, and converting the resulting 11-story building to luxury condominiums for resale. Plaintiffs formulated this plan in reliance on EIM's advice that the applicable zoning laws permitted the addition of six new floors to 16 Warren. According to the principal of one of the two plaintiffs, "[b]ut for [EIM's] assurances that we could add six stories to this building as of right, we would not have entered into a contract to purchase this property."

After plaintiffs' purchase of 16 Warren closed in December 2004, the New York City Department of Buildings objected to the planned renovation on the ground that (as EIM concedes) the City's Zoning Resolution in fact did not permit the addition of six floors to the existing building. After learning of the zoning problem in or about March 2005, plaintiffs sought to purchase the air rights of adjoining properties, which would have enabled them to proceed with the plan. By June 2005, however, it became clear that it would not be possible to purchase the necessary air rights, and plaintiffs decided to go forward with a new plan, consistent with the Zoning Resolution, to demolish the existing five-story building completely and replace it with a new 11-story building.

In 2006, plaintiffs commenced this action against EIM. After discovery, EIM moved for summary judgment dismissing the

complaint. For purposes of the motion, EIM did not dispute that an issue existed as to whether it had committed professional malpractice, but argued, inter alia, that the malpractice, if any, had not proximately caused plaintiffs recoverable damages. EIM further argued that, even if there were evidence of damages, plaintiffs' failure to attempt to sell the property after learning of the zoning problem established as a matter of law that they had not taken reasonable steps to mitigate the loss. The court denied the motion as to the cause of action for professional malpractice, the only claim at issue on this appeal by EIM. We affirm.

Plaintiffs will be entitled to recover expenses they prove that they actually incurred as a proximate result of their reliance on EIM's mistaken advice in purchasing 16 Warren (*see Barnett v Schwartz*, 47 AD3d 197, 207-208 [2007] [clients who proved the negligence of their attorneys in negotiating and closing a lease and purchase option agreement were entitled to recover from the attorneys "rent payments on property completely unsuitable for its intended use" that the clients would not have

incurred "but for the (attorneys') negligence"]).[1] Plaintiffs' right of recovery is subject to reduction, however, insofar as EIM proves (1) that plaintiffs failed to make reasonably diligent efforts to mitigate their damages and (2) the extent to which such efforts would have diminished the loss (*see Wilmot v State of New York*, 32 NY2d 164, 168-169 [1973]; *Eskenazi v Mackoul*, 72 AD3d 1012, 1014 [2010]; *LaSalle Bank N.A. v Nomura Asset Capital Corp.*, 47 AD3d 103, 107 [2007]; *Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 115 [1991], *affd on other grounds* 80 NY2d 377 [1992], quoting *Den Norske Ameriekalinje Actiesselskabet v Sun Print. & Publ. Assn.*, 226 NY 1, 7 [1919]).

From the foregoing, it emerges that plaintiffs will be entitled to recover the cost of purchasing and owning 16 Warren through the time they learned that EIM's zoning advice had been erroneous and thereafter until sufficient time had passed for them to sell the property to mitigate their damages, *less* the net amount they would have realized in such a sale. At trial, it will be plaintiffs' burden to prove the costs they incurred in

[1]In an order preceding the one appealed from, the court dismissed the portion of the complaint seeking to recover profits that would have been realized had plaintiffs been able to implement their original plan to add six floors to the existing building. The order dismissing the lost profits claim is not under review on this appeal.

purchasing and owning the property, and it will be EIM's burden to prove the amount that would have been realized in a resale of the property after the zoning problem was revealed.[2] Contrary to EIM's argument, plaintiffs' failure to resell the property in mitigation of their damages does not bar them from any recovery, it simply reduces the amount of their recovery.

Plaintiffs apparently take the position that they are entitled to recover all costs incurred in pursuing the alternative plan they chose for developing 16 Warren (total demolition of the existing structure and construction of a new luxury building) after they learned that their original plan (gut renovation and addition of six floors) was barred by the Zoning Resolution. For example, in an interrogatory response, plaintiffs averred that their damages as of September 30, 2009, were $14,826,632.28, a figure that apparently included all costs of acquiring, owning, and redeveloping the property through that date.[3] However, plaintiffs' decision to continue to hold the property and to pursue an alternative plan for redeveloping it

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[2]We reject EIM's contention that the record establishes as a matter of law that plaintiffs would have realized a profit if they had sold the property as soon as reasonably possible after learning of EIM's error.

[3]It should also be noted that plaintiffs would have incurred a substantial portion of these expenses under the original plan if EIM's zoning advice had been correct.

cannot be deemed an attempt to mitigate the damages caused by EIM's negligence. Rather, this course of action represents an attempt to realize the anticipated benefit of the original plan through other means. The expenses plaintiffs voluntarily incurred in continuing to pursue redevelopment after they learned of EIM's error cannot be deemed to have been proximately caused by EIM's negligence. Stated otherwise, EIM's malpractice did not render it liable to underwrite the cost of plaintiffs' decision to continue redeveloping the property after they learned that EIM's zoning advice had been mistaken. In giving that advice, EIM did not render itself an insurer of the project.

We do not fault plaintiffs for having chosen to continue to hold 16 Warren and to redevelop it after they learned that the original redevelopment plan formulated in reliance on EIM's advice could not be followed. However, EIM has no obligation to finance plaintiffs' continuation of the venture. In choosing to continue redeveloping 16 Warren after EIM's error came to light (and thereby nearly tripling their investment in the property), plaintiffs opted to risk additional funds on the possibility that the enterprise would ultimately be profitable rather than to treat their previous investment as damages to be mitigated by selling the property as soon as reasonably possible. While such a sale may well have entailed a significant loss -- plaintiffs'

expert estimates that a sale of the property in 2005 would have resulted in a loss of about $1.66 million -- that is the loss that plaintiffs are entitled to recover from EIM.

We have considered EIM's remaining argument for reversal and find it unavailing.

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

ENTERED: JANUARY 12, 2012

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5885-
5886 Thor Properties, LLC, Index 650514/09
Plaintiff-Appellant-Respondent,

-against-

The Chetrit Group LLC, et al.,
Defendants-Respondents-Appellants.

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Matalon ◆ Shweky ◆ Elman PLLC, New York (Joseph Lee Matalon of counsel), for appellant-respondent.

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

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Order, Supreme Court, New York County (James A. Yates, J.), entered May 5, 2010, which granted that part of defendants' motion seeking summary judgment dismissing the complaint, denied that part of defendants' motion seeking summary judgment on their first counterclaim, granted that part of plaintiff's motion to dismiss defendants' counterclaims, and denied plaintiff's motion for summary judgment on its affirmative claims as academic, unanimously affirmed, with costs.

In 2007, the parties agreed to acquire jointly the Florida Westin Diplomat Hotel and a number of related facilities, including a country club, golf course, parking garage and vacant land, through a non-party acquisition vehicle named Komar Five Associates, LLC (Komar). Komar's bid for the property was successful, but between execution of the purchase agreement for

the property and the closing, the parties' relationship soured and they agreed to part ways. The parties arranged for defendants to purchase plaintiff's shares in Komar via a letter agreement dated July 16, 2007 (the settlement agreement). Under the terms of the settlement agreement, the parties agreed that plaintiff would receive immediate reimbursement of its share of the deposit and an additional $12.5 million.[1] Accordingly, defendants were to pay upon execution of the settlement agreement $6,666,666.66 representing plaintiff's deposit. That amount was "non refundable in any and all circumstances." Defendants were to pay an additional $6.25 million immediately. Those funds were to be non-refundable, except in the event title fails to close for any reason other than Komar's default:

> "In addition, the undersigned agrees to pay you the sum of . . . $12,500,000.00 . . . as follows:
>
> (i) the sum of . . . $6,250,000.00 . . . by wire transfer of immediately available funds to the account listed on Exhibit A which sum shall be non refundable except if title fails to close for any reason other than Komar's default."

Finally, the parties agreed that in the event title closed or the property was assigned to a third party, plaintiff would receive another $6,250,000:

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[1] The $12,500,000.00 represented the price the parties negotiated for Thor's interest in the venture that defendants were to purchase.

> "(ii) the sum of . . . $6,250,000.00 . . . (the "Escrow Funds") by wire transfer of immediately available funds to Thor to the account listed on Exhibit A or to any other account designated by Thor on the earlier to occur of (a) the closing of title to the Property (the "Closing") or (b) the assignment of the Agreement to any third party which is not owned and/or controlled by one or more members of the Chetrit family (in which event the aforesaid sum of . . . $6,250,000.00 . . . shall be due and payable upon receipt by the undersigned of the consideration for the assignment to such third party)."

Although the first payment of $6.66 million was not refundable under any circumstances and the second payment of $6.25 million was refundable "if title fails to close for any reason other than Komar's default," nothing in the settlement agreement discussed whether or not this third installment of $6.25 million was refundable.

Eventually, Komar refused to close, allegedly because new zoning restrictions affected the profitability of the project. In a related lawsuit, we held that Komar did not demonstrate a lawful excuse for its failure to close and upheld the decision of the motion court awarding the seller the contract deposit as liquidated damages for Komar's breach (*see Diplomat Props., L.P. v Komar Five Assoc., LLC.*, 72 AD3d 596 [2010], *lv denied* 15 NY3d 706 [2010]).

In this lawsuit, plaintiff claims that it is entitled to the

third payment of $6.25 million, because Komar willfully failed to close thereby causing the failure of the condition precedent and consequently depriving plaintiff of its right to the final payment. Plaintiff cites the "prevention" or "hindrance" doctrine whereby a "defendant cannot rely on the condition precedent to prevent recovery where the non-performance of the condition was caused or consented to by itself" (*O'Neil Supply Co. v Petroleum Heat & Power Co.*, 280 NY 50, 56 [1939]; *see also Arc Elec. Constr. Co. v Fuller Co.*, 24 NY2d 99, 103-04 [1969]). However, the prevention doctrine, a variant of the implied covenant of good faith and fair dealing, is only applicable when it is consistent with the intent of the parties to the agreement *(see HGCD Retail Servs., LLC v 44-45 Broadway Realty Co.*, 37 AD3d 43, 53 [2006]). Here, the parties' settlement agreement clearly provided that the first payment was completely nonrefundable, the second payment was refundable if title failed to close through no fault of Komar, and plaintiff only became entitled to the third payment if title closed or an assignment occurred. Neither happened. Accordingly, plaintiff never became entitled to the third payment.

Plaintiff's argument that the parties incorporated the language concerning Komar's purposeful default from section B(i) into section B(ii) governing the third payment is contrary to the

terms of the agreement. The parties clearly were capable of expressing the circumstances under which the right to payment vested. Had the parties meant to entitle plaintiff to the funds discussed in section B(ii) upon Komar's default, they certainly were capable of crafting language to that effect.

In addition, plaintiff argues that, regardless of the language in the settlement agreement, under the prevention doctrine, defendant cannot rely on the failure to close as an excuse not to pay plaintiff, because defendant is responsible for that failure. This argument misses the mark. By leaving out the words "except if title fails to close for any reason other than Komar's default" from section B(ii), the parties in essence contracted around the prevention doctrine. Thus, the parties considered the possibility of default and accorded liability (to defendants) for only one half of the $12.5 million. Imposition of the prevention doctrine to award the full $12.5 million to plaintiff would be inconsistent with a plain reading of the agreement.

The motion court also properly dismissed defendants' counterclaim for rescission of contract based on mutual mistake. To void a contract for mistake, the mistake must be mutual, substantial and must exist at the time the parties enter into the

contract (*see 260/261 Madison Equities Corp. v 260 Operating*, 281 AD2d 237 [2001]). This Court previously found that there was neither a prior agreement with the relevant municipality limiting development, nor any guarantee that development would be permitted (*Diplomat Props.*, 72 AD3d 596). Because it was always uncertain whether the City would permit or deny further development of the property, any assumption about the ability to develop property could not have existed at the time the parties entered into the agreement.

A party will not be relieved of its contractual obligations on the basis of an intervening contingency when it would have been reasonable to provide for such contingency in the contract (*see Kel Kim Corp. v Central Mkts.*, 70 NY2d 900 [1987]; *P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200 [1996]). The ability to secure favorable zoning rulings is a well known risk in any property development project, and if expansion of the property was the key to profitability, as defendants claim, they should have explicitly handled that contingency in the settlement agreement.

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

ENTERED: JANUARY 12, 2012

CLERK

Andrias, J.P., Saxe, Sweeny, Acosta, Manzanet-Daniels, JJ.

6285 The People of the State of New York, Respondent, Ind. 6741/95

-against-

Osiris Cabrera, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Charles H. Solomon, J.), entered on or about June 9, 2009, which, after a hearing to redetermine defendant's sex offender risk level pursuant to the stipulation of settlement in *Doe v Pataki* (3 F Supp 2d 456 [1998]), adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court appropriately exercised its discretion in adjudicating defendant a level two offender and in determining that a downward departure from the presumptive risk level was not warranted. The People demonstrated by clear and convincing evidence that defendant, a 35-year-old man at the time of the crime, lured a special education child into a store, where he then proceeded to sodomize and rape her as she pleaded with him

to stop. Defendant does not dispute that the Board properly assessed him 10 points for "Use of Violence," 25 points for "Sexual Contact with Victim," 20 points for "Age of Victim," 20 points for "Relationship with Victim," and 10 points for not having accepted responsibility. Defendant's cumulative score of 85 points placed him above the 75-point threshold for a level two offender. There was no basis for a discretionary downward departure, particularly in light of the seriousness of the underlying sex crime (*see People v Lineberger*, 81 AD3d 439 [2011]).

Defendant insists that he was entitled to a downward departure based on evidence that he has not reoffended in 12 years. The court, having considered all the facts and circumstances of the case, properly rejected this argument in rendering its decision. SORA was intended to address not only the offender's likelihood of reoffense, but the threat to the public safety (*see* Correction Law § 168-l[5]). Accordingly, even if an offender poses a lesser likelihood of recidivism, no departure is warranted where "the harm would be great" if he did reoffend (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, 2 [2006 ed.]). The nature of the offense, and the categories in which defendant was assessed points – in particular, the age of the victim, the nature of the

sexual contact with the victim, and the use of violence – demonstrate that the harm would be significant if defendant did reoffend. Defendant's conduct is exactly the type of conduct that the guidelines deem particularly harmful (*see* SORA Commentary at 2 ["the child molester" inflicts greater harm than the offender who "rub[s] himself against women in a crowded subway car"]). The fact that he has not since reoffended does not warrant a downward departure (*see People v Perkins*, 32 AD3d 1241, *lv denied* 7 NY3d 718 [2006]). Further, defendant's failure to take responsibility for the offense suggests he is a poor prospect for rehabilitation (*see* SORA Commentary at 15). In his police statement, defendant described the fourteen-year-old victim as a "street girl" and a "dirty little slut," and maintained that any sexual contact between them was consensual. There is no evidence that defendant has since accepted responsibility for his actions.

The court was also correct in rejecting as bases for a downward departure defendant's age (*see People v Harrison*, 74 AD3d 688, *lv denied* 15 NY3d 711 [2010]), and his "stable lifestyle." Defendant's "stable lifestyle" was already taken into account by the risk assessment instrument. Further, defendant committed the crime while at work, an indication that

employment did not serve as a deterrent for his criminal behavior.

We have considered and rejected defendant's additional arguments.

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6523 The People of the State of New York, Respondent, Ind. 762/07

-against-

Kenneth Woodley, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered December 6, 2007, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second felony offender, to a term of 12 years, unanimously affirmed.

The court properly exercised its discretion in denying defense counsel's request for a CPL article 730 competency examination, which was made for the first time on the eve of trial. Nothing in the record casts doubt on defendant's competency (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878, 881 [1995]). On the contrary, throughout the trial defendant demonstrated his understanding of the charges, familiarity with criminal

proceedings and ability to assist in his defense (*see People v Russell*, 74 NY2d 901 [1989]). The court gave appropriate, but not excessive weight to a finding of malingering in a prior case, and there was no reason to believe defendant had gone from feigned to genuine incompetency in the intervening years. Defense counsel's assessment of defendant's competency was not dispositive (*see Morgan*, 87 NY2d at 880). Furthermore, defendant's pre-pleading memorandum discussed defendant's psychiatric history, but tended to confirm that he was competent.

Similarly, there is nothing to indicate that defendant was incompetent to waive his right to be present at trial (*see People v Rios*, 126 AD2d 860, 862 [1987]). Despite the court's warnings that he had a right to be present and that the trial would proceed in his absence, defendant asked to be removed and refused to return to the courtroom.

Defendant's challenge to the court's jury charge is

unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6524 In re Paul Murphy, Index 101005/10
Petitioner-Respondent,

-against-

New York State Division of
Housing and Community Renewal,
Respondent-Appellant,

SouthBridge Towers, Inc.,
Respondent.

_____

Eric T. Schneiderman, Attorney General, New York (Brian A. Sutherland of counsel), for appellant.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (David Hershey-Webb of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered November 5, 2010, which, among other things, granted the CPLR article 78 petition to annul respondent New York State Division of Housing and Community Renewal's (DHCR) determination, dated October 14, 2009, denying petitioner's appeal from respondent housing company's rejection of his application for succession rights to an apartment, unanimously affirmed, without costs.

Supreme Court properly determined that petitioner submitted ample evidence to establish that he occupied the subject apartment with his parents as a "primary residence" in 1998 and 1999, the two years immediately before his parents permanently

vacated the apartment (9 NYCRR 1727-8.2[a]). It was arbitrary and capricious for DHCR to deny his appeal solely on the ground that no annual income affidavits were filed in 1998 and 1999. While the regulation at issue mandates that tenants of record file annual income affidavits, listing as an occupant the family member seeking succession rights (9 NYCRR 1727-8.2[a][2][a]), the relevant inquiry is primary residency during the relevant time period (*Matter of Martino v Southbridge Towers, Inc.*, 68 AD3d 412, 412 [2009]; *Matter of Renda v New York State Div. of Hous. & Community Renewal*, 22 AD3d 382, 382 [2005]). Accordingly, the failure to file the requisite annual income affidavit is not fatal to succession rights, provided that the party seeking succession proffers an excuse for such failure (*Matter of Gilbert v Perine*, 52 Ad3d 240, 241 [2008]; *Matter of Callwood v Cabrera*, 49 AD3d 394, 395 [2008]) and demonstrates residency with other documentary proof listed within 22 NYCRR 1727-8.2(a)(2)(b). Here, petitioner's mother offered such an excuse which was supported by the record. Moreover, petitioner submitted a host of other documents evincing that the subject apartment was in fact his primary residence for the relevant time period, namely

1998-1999. Respondent's determination, denying petitioner succession rights to the subject apartment, was thus arbitrary and capricious.

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

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6525 In re Tanisha Shabazz A., etc.,

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

Latisha G., etc.,
Respondent-Appellant,

SCO Family Services,
Petitioner-Respondent.

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Elisa Barnes, New York, for appellant.

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

Pierre Janvier, Bronx, attorney for the child.

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about September 8, 2010, which, upon fact-findings of permanent neglect and abandonment, terminated respondent mother's parental rights to the subject child and committed the child's custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of abandonment is supported by clear and convincing evidence, including petitioner agency's case record and testimony, which at best shows only "[s]poradic and minimal attempts to visit and communicate with the child" during the

relevant time period (*Matter of Latoya P.*, 305 AD2d 263 [2003], *lv denied* 100 NY2d 508 [2003] [internal quotation marks omitted]; *see* Social Services Law § 384-b[4][b], [5][a]).

Petitioner demonstrated, by clear and convincing evidence, that the child was permanently neglected within the meaning of Social Services Law § 384-b(7)(a). Contrary to respondent's contention, petitioner made diligent efforts to strengthen and encourage the parent-child relationship by, among other things, formulating a service plan, scheduling visits with the child, and referring respondent to parenting training, mental health services, family therapy and individual counseling (§ 384-b[7][f]). Despite these efforts, respondent failed to stay in contact with the agency and comply with its plan, visit the child on a regular basis, and attend any of the referred

services (*see Matter of Byron Christopher Malik J.*, 309 AD2d 669 [2003]).

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

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6526 The People of the State of New York, Ind. 3532/07
Respondent,

-against-

Richard Proano,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about May 27, 2010,

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

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

ENTERED: JANUARY 12, 2012

CLERK

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

Mazzarelli, J.P., Andrias, Saxe, Freedman, JJ.

6527 In re Jesse Clark, Index 106917/10
Petitioner-Appellant,

-against-

Dr. Dora Schriro, Commissioner
of the New York City Department
of Correction, et al.,
Respondents-Respondents.

Koehler & Isaacs LLP, New York (Liam L. Castro of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered January 6, 2011, which denied the CPLR article 78 petition seeking, inter alia, to compel respondents to promptly afford petitioner a disciplinary hearing before the New York City Office of Administrative Trials and Hearings, and granted respondents' cross motion to dismiss the petition, unanimously affirmed, without costs.

Supreme Court properly found that since respondents were not required to provide petitioner with a hearing within a specifically prescribed period, but only within a "reasonable time" (New York City Charter § 1046[c]), their failure to do so for more than a year after charging petitioner with misconduct did not constitute failure to fulfill a nondiscretionary duty or

perform a purely ministerial act. Accordingly, the petition did not plead an action for mandamus to compel (*see Matter of Garrison Protective Servs. v Office of Comptroller of City of N.Y.*, 92 NY2d 732, 736 [1999]).

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6531-
6532

In re Adena I.,

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

Claude I.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

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

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about October 25, 2010, which, after a hearing, found that respondent had neglected the subject child, unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about February 16, 2011, which placed the child in the custody of the Commissioner for Social Services for the City of New York until the completion of the next permanency hearing, unanimously dismissed, without costs.

The finding of neglect was supported by a preponderance of the evidence. Under the circumstances presented, the court

properly found that the child's physical, mental or emotional condition was in imminent danger of becoming impaired (*see* Family Ct Act § 1012 [f][I]; *see also Matter of Kayla W.*, 47 AD3d 571, 572 [2008]). Respondent's appeal from the dispositional order is dismissed, since its placement terms have expired (*see Matter of Pedro C. [Josephine B.]*, 1 AD3d 267 [2003]).

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6533 The People of the State of New York, Respondent, Ind. 644/07

-against-

Jose Pabellon, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (George R. Villegas, J.), rendered July 1, 2009, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first and second degrees and criminal possession of a weapon in the second degree (two counts), and sentencing him to an aggregate term of 15 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 court properly excluded from the courtroom defendant's aunt, who had previously been warned about her conduct in threatening witnesses, and who had been accused of doing so again. This was not a violation of defendant's right to a public trial.

Defendant's principal argument is that the court should have made an inquiry of the allegedly threatened witnesses themselves instead of relying on the prosecutor's representations. However, defense counsel's expression of "concern" about excluding the aunt "based on an accusation" was too vague to alert the court to this precise issue. This is particularly significant because the court could have cured the alleged defect immediately had defendant made a contemporaneous objection. Accordingly, that particular aspect of defendant's public trial claim is unpreserved and we decline to review it in the interest of justice.

As an alternative holding, we also reject it on the merits. The prosecutor's detailed description of the threats made by the aunt was sufficient to establish that her presence in the courtroom, during any testimony, posed a danger of witness intimidation. Furthermore, defense counsel did not dispute the alleged witness tampering other than characterizing it as an "accusation." Assuming, without deciding, that the requirements of *Waller v Georgia* (467 US 39 [1984]), including the requirement

of an overriding interest, apply to a closure that is limited to the exclusion of a particular spectator from an otherwise open courtroom, we find that all the prongs of the *Waller* test were satisfied.

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, JJ.

6534 LoDuca Associates, Inc., Index 602673/09
6534A Plaintiff-Appellant,

-against-

PMS Construction Management Corp.,
Defendant-Respondent,

City of New York, et al.,
Defendants.

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Tunstead & Schechter, Jericho (Michael D. Ganz of counsel), for appellant.

Hollander & Strauss, LLP, Great Neck (Michael R. Strauss of counsel), for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered September 15, 2010, which granted defendant PMS Construction Management Corp.'s motion to dismiss the second, third, and fourth causes of action, and order, same court and Justice, entered December 10, 2010, which, to the extent appealable, denied plaintiff's motion for leave to renew, unanimously affirmed, without costs.

Plaintiffs seeking to invoke one of the exceptions to the enforceability of a "no damages for delay" clause face a "heavy burden" (*see Dart Mech. Corp. v City of New York*, 68 AD3d 664 [2009]). Possible causes for delay specifically mentioned in the

contract are, by definition, "contemplated" (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309-10 [1986]; *Universal/MMEC, Ltd. v Dormitory Auth. of State of N.Y.*, 50 AD3d 352, 353 [2008]).

The causes of action were properly dismissed, as the alleged cause of the delays - primarily design defects based on faulty architectural drawings - was "precisely within the contemplation of the exculpatory clauses" (*Gottlieb Contr. v City of New York*, 86 AD2d 588, 589 [1982], *affd* 58 NY2d 1051 [1983]). Moreover, even if defendant knew or should have known of the alleged defects by reason of information it had prior to the contract, such facts constitute merely "inept administration or poor planning," which does not negate application of the "no damages for delay" provisions (*see Commercial Elec. Contrs., Inc. v Pavarini Constr. Co., Inc.*, 50 AD3d 316, 317-18 [2008]; *T.J.D. Constr. Co. v City of New York*, 295 AD2d 180 [2002]).

It is true that, as argued by plaintiff, the length of the delay is relevant to the issue of whether an exception to the general rule enforcing "no damages for delay" clauses applies (*see Bovis Lend Lease LMB v GCT Venture*, 6 AD3d 228, 229 [2004]). However, the length of the delay does not transform a delay caused by an event specifically contemplated by the "no damages

for delay" clause into something uncontemplated (*see Dart Mech. Corp.*, 68 AD3d at 664 [32-month delay not actionable where several contract provisions indicated that delay was contemplated]).

The motion for leave to renew was properly denied since the new evidence offered by plaintiff demonstrated merely the alleged severity and scope of the alleged design defects and ensuing delays, but not that they were uncontemplated.

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

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6535 In re Alyssa F., and Another,

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

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

Denzel F.,
Respondent-Respondent.

_____

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

Susan Jacobs, Center for Family Representation Inc., New York, and Leader & Berkon LLP, New York (David A. Paul of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about January 3, 2011, which dismissed the neglect petitions after an inquest, unanimously affirmed, without costs.

The court properly found that the quantum of proof did not demonstrate by a preponderance of the evidence that the children were at actual or potential risk of imminent harm to their

physical, mental or emotional condition (Family Court Act § 1012[f][i][b]).

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

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6536 The People of the State of New York, Ind. 1518/08
Respondent,

-against-

Jesus Medero,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Barbara F. Newman, J.), rendered on or about October 7, 2009,

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

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

ENTERED: JANUARY 12, 2012

CLERK

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

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6538 The People of the State of New York, Respondent, Ind. 4676/08

-against-

Anonymous,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered October 14, 2009, as amended January 6, 2009, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, unanimously affirmed.

The sentencing court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). The record establishes that defendant's plea was knowing, intelligent, and voluntary. The fact that defendant's attorney advised against taking the plea does not warrant a different conclusion. The attorney was concerned that defendant would fail to comply with the plea conditions and would thus face an enhanced sentence, a prediction

that proved accurate. However, during the plea allocution the court carefully warned defendant of the risks involved in the plea agreement and the enhanced sentence defendant would receive if he failed to meed the conditions. We have considered and rejected defendant's remaining challenges to the plea.

To the extent the existing record permits review, it establishes that defendant received effective assistance of counsel under the state and federal standards in connection with his plea, as well as at the plea withdrawal motion and sentencing (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *Strickland v Washington*, 466 US 668 [1984]). Defendant faults his counsel for, among other things, failing to support defendant's plea withdrawal motion and failing to advocate for a lesser enhanced sentence than the one called for by the plea agreement. However, we find that each of the actions that defendant now claims his attorney should have taken would have been futile. Accordingly, counsel's failure to take these actions was an objectively reasonable strategy, and, in any event, the alleged omissions did not cause defendant any prejudice.

Defendant's valid waiver of his right to appeal forecloses

review of his excessive sentence claim. In any event, regardless of whether defendant made a valid waiver of his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6539-
6540 Timothy Parrott, et al., Index 602400/08
Plaintiffs-Respondents-Appellants,

-against-

Logos Capital Management, LLC, et al.,
Defendants-Appellants-Respondents.

_____

Jenner & Block LLP, New York (Stephen L. Ascher of counsel), for appellants-respondents.

Wiggin and Dana LLP, New York (R. Scott Greathead of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about May 26, 2011, which granted in part and denied in part defendants' motion for summary judgment, unanimously affirmed, with costs to be paid by defendants.

This action against the corporate defendants, Logos Capital Management, LLC and Quix Partners, LLC, the investment advisor for and general partner of two hedge funds of which the individual defendant, Peter Sasaki, is the managing partner, arises from two one-page investment agreements between plaintiffs and Sasaki, both of which were drafted by Sasaki. Defendants maintain that Sasaki is not personally liable pursuant to the agreements while plaintiffs' affidavits state that it was the parties' intent that Sasaki be personally bound. The prefatory clauses do not state that Sasaki intended to execute the

agreements on behalf of or as an agent for the defendant companies Logos and Quix; instead, the clauses state that Sasaki, sole owner of defendant Logos, sought to partner with plaintiffs to build the business of Logos and Quix. Sasaki was individually named throughout the agreements and was granted "the right of first refusal" should plaintiffs decide to sell their shares. Thus, since the agreements do not specify whether Sasaki executed the agreements in his individual capacity or as an agent on behalf of the corporate defendants, there is an ambiguity that requires the admission of parol evidence and raises an issue of fact precluding an award of judgment as a matter of law (*Rivera v St. Regis Hotel Joint Venture*, 240 AD2d 332 [1997]).

Further, the evidence that Sasaki threatened to close down the investment companies and the Funds should plaintiffs attempt to exercise their contractual rights to sell their interests to any institutional investor on any terms, raises an issue of fact with respect to plaintiffs' claims for anticipatory repudiation and breach of the implied duty of good faith and fair dealing (*see Computer Possibilities Unlimited v Mobil Oil Corp.*, 301 AD2d 70, 77 [2002], *lv denied* 100 NY2d 504 [2003]).

However, the motion court properly dismissed plaintiffs' claims for conversion and unjust enrichment, as "the existence of a valid, written contract governing the subject matter generally

precludes recovery in quasi contract for events arising out of the same subject matter" *(Adelaide Prods., Inc. v BKN Intl. AG*, 38 AD3d 221, 225 [2007]). Plaintiffs' claim for tortious interference with prospective business relations was also properly dismissed, as, at a minimum, plaintiffs were unable to demonstrate that a contract would have been entered into with a prospective buyer "but for" defendant's conduct (*see Bankers Trust Co. v Bernstein*, 169 AD2d 400, 401 [1998]).

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6541 Velda Clarke, Index 117611/09
Petitioner,

-against-

New York State Office of
Children and Family Services,
Respondent.

_____

Sethi & Mazaheri, LLC., New York (Rehan Nazrali of counsel), for petitioner.

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

_____

Determination of respondent, dated August 26, 2009, after a hearing, to suspend and revoke petitioner's license to operate a group family day care home, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Marylin G. Diamond, J.], entered August 6, 2010), dismissed, without costs.

Substantial evidence supports respondent's findings that petitioner violated relevant regulations, including refusing to cooperate and allow access to the home (18 NYCRR 416.15[a][10]), and by not having the proper number of caregivers present for each child under the age of two years old (18 NYCRR 416.8[d][2]), and that such violations placed the children's health, safety and

welfare in imminent danger (*see Matter of Seemangal v New York State Off. of Children & Family Servs.*, 49 AD3d 460 [2008]). There exists no basis to disturb the credibility determinations of the Administrative Law Judge (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]

The determination to revoke petitioner's license does not shock our sense of fairness (*see Seemangal* at 461; *cf. Matter of Grady v New York State Off. of Children & Family Servs.*, 39 AD3d 1157, 1158 [2007]).

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

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6543 The People of the State of New York, Respondent, Ind. 3399/09

-against-

Calvin Hudson, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered December 9, 2009, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). This case escalated from a shoplifting into a robbery when a codefendant used force to retain stolen merchandise. The testimony and surveillance videotape support the inference that defendant physically interfered, or tried to interfere, with the store manager's efforts to recover the property from the codefendant, and that in doing so defendant intentionally participated in the

codefendant's use of force.

The court, which instructed the jury that the element of intent may be inferred from circumstances, properly declined to deliver a full circumstantial evidence charge containing language about exclusion of alternative reasonable hypotheses of innocence. No such instruction was necessary, because the case was based on both direct and circumstantial evidence (*see People v Roldan*, 88 NY2d 826 [1996]; *People v Daddona*, 81 NY2d 990 [1993]). Defendant's guilt was established through direct evidence of his conduct, and the inference of accessorial liability could be drawn from that conduct.

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6544 In re Bluestar Properties Inc., Index 116072/10
Petitioner-Appellant,

-against-

New York State Division of
Housing and Community Renewal,
Respondent-Respondent.

_____

Graubard Miller, New York (Peter A. Schwartz of counsel), for appellant.

Gary R. Connor, New York (Christina S. Ossi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered May 31, 2011, denying the petition, which sought to annul respondent's determination that a building-wide rent reduction was warranted on the ground of a reduction in services, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent, as "[t]he administrative agency charged with enforcing a statutory mandate[,] has broad discretion in evaluating pertinent factual data and inferences to be drawn therefrom, and its interpretation will be upheld so long as not irrational or unreasonable" (*Matter of 333 E. 49th Assoc., LP v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 40 AD3d 516, 516 [2007], *affd* 9 NY3d 982 [2007]). Here,

the prior owner of the subject premises, in answering the service complaint, acknowledged that access to the community room was a required service that was provided to the tenants in the past and represented to respondent that this service would continue to be available to the tenants. Since the prior owner did not dispute that providing access to the community room to the building's tenants was a required service, respondent's determination that Rent Stabilization Code (9 NYCRR) § 2523.4(f)(1) was inapplicable had a rational basis in the record.

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

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6545 The People of the State of New York, Dkt. 41829C/07
Respondent,

-against-

Edward Gutierrez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered November 13, 2007, convicting defendant, after a nonjury trial, of attempted assault in the third degree and harassment in the second degree, and sentencing him to a conditional discharge, unanimously affirmed.

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

court acquitted defendant of other charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557, 563 [2000]).

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

ENTERED: JANUARY 12, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6546N- 6547N- 6547NA & M-5034- M-5206

In re John Whitfield,
Petitioner-Appellant,

-against-

Patricia J. Bailey, etc.,
Respondent-Respondent.

Index 110706/08

_____

John Whitfield, appellant pro se.

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

_____

Order, Supreme Court, New York County (Joan Madden, J.), entered June 24, 2010, which granted petitioner's motion to hold respondent in civil and criminal contempt to the extent of directing respondent to produce for in camera inspection "the file relating to the 1989 conviction of Richard Doyle on charges of petit larceny," order, same court and Justice, entered October 5, 2010, which, after an in camera inspection, directed respondent to provide petitioner the inspected documents, except for the one containing information about Doyle's prior convictions, with specified redactions, and order, same court and Justice, entered November 30, 2010, which denied petitioner's motion for reimbursement of his litigation costs, unanimously affirmed, without costs.

In the interest of justice, we nostra sponte grant

petitioner leave to appeal from the aforesaid orders, which were "made in a proceeding against a body or officer pursuant to article 78" and therefore not appealable as of right (CPLR 5701[b]) (*see Matter of Peckham v Calogero*, 54 AD3d 27, 30-31 [2008], *affd* 12 NY3d 424 [2009]).

Petitioner failed to show by clear and convincing evidence that respondent willfully and deliberately violated a "clear and unequivocal mandate" of the court (*see Collins v Telcoa Intl. Corp.*, 86 AD3d 549 [2011]). The September 2009 order directed respondent to submit for in camera inspection "the documents sought in petitioner's FOIL request"; contrary to petitioner's contention, it did not, by its terms, require that the entire case file on Doyle's 1989 conviction for petit larceny be submitted. In this regard, petitioner's FOIL request itself was somewhat equivocal; it sought both the entire file and only the specific records and documents it enumerated. Moreover, in addition to the documents, respondent submitted an affirmation by the assistant district attorney who retrieved the Doyle file, who certified that the documents constituted a complete copy of all documents in the possession of the District Attorney's Office that were responsive to petitioner's request.

Petitioner was not entitled to have the court issue the subpoenas he requested in his reply papers on the motion for

contempt. Respondent had no opportunity to be heard on the matter (*see* CPLR 2307). In any event, petitioner failed to make the requisite showing "that the record requested actually contain[ed] the information he . . . [sought] to obtain" and that the subpoena was not "part of a fishing expedition or to ascertain the existence of evidence" (*Bostic v State of New York*, 232 AD2d 837, 839-840 [1996], *lv denied* 89 NY2d 807 [1997]).

Respondent's initial denial of petitioner's FOIL request was not "so unreasonable" as to justify an award of costs to petitioner under § 89(4) of the Public Officers Law (*see Matter of Maddux v New York State Police*, 64 AD3d 1069, 1070 [2009], *lv denied* 13 NY3d 712 [2009]; *see also Matter of Whitfield v Bailey*, 80 AD3d 417, 419 [2011]). Respondent relied not only on the regulations of the Department of Corrections, but also, reasonably, on Public Officers Law § 87(2), which authorizes an agency to deny access to records that, if disclosed, would constitute an "unwarranted invasion of personal privacy" (subd [b]) or "endanger the life and safety of any person" (subd [f]).

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

M-5034 &
M-5206 - ***John Whitfield v Patricia J. Bailey***

Motion to dismiss appeal and cross motion for sanctions denied.

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

ENTERED: JANUARY 12, 2012

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

5749-
5750 The People of the State of New York, Respondent,

-against-

Malik Howard,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Hilbert Stanley,
Defendant-Appellant.

Ind. 1873/06

_____

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

Steven Banks, The Legal Aid Society, New York (Adrienne Hale of counsel), for Hilbert Stanley, appellant.

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Robert E. Torres, J.), rendered November 25, 2009, and June 19, 2008, affirmed.

Opinion by Richter, J. All concur except Moskowitz and Freedman, JJ. who dissent in part in an Opinion by Freedman, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
David Friedman
Karla Moskowitz
Helen E. Freedman
Rosalyn H. Richter, JJ.

5749-
5750
Ind. 1873/06

_____x

The People of the State of New York,
Respondent,

-against-

Malik Howard,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Hilbert Stanley,
Defendant-Appellant.

_____x

Defendant Malik Howard appeals from the judgment of the Supreme Court, Bronx County (Robert E. Torres, J.), rendered November 25, 2009, convicting him, after a jury trial, of robbery in the first degree, and imposing sentence, and defendant Hilbert Stanley appeals from the judgment, same court and Justice, rendered June 19, 2008, convicting him, after a jury trial, of robbery in the first degree, and imposing sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rebekah J. Pazmiño and Eunice C. Lee of counsel), for Malik Howard, appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne Hale of counsel), for Hilbert Stanley, appellant.

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein, Joseph N. Ferdenzi and Peter D. Coddington of counsel), for respondent.

RICHTER, J.

In the early morning hours of April 21, 2006, Domingo Lopez was walking home from his job as a waiter. A car approached him at a slow speed but Lopez did not pay any attention at first because he thought they were looking for parking. Suddenly, Lopez heard people running behind him. As he turned around, Lopez saw defendants Malik Howard and Hilbert Stanley get out of the car and come towards him. Howard stood in front of Lopez, and Stanley positioned himself behind Lopez. Howard put a gun to Lopez's head and neck and took Lopez's wallet and $60 in cash from his pocket. Stanley placed an object against Lopez's back; Lopez could not be certain whether it was a gun or "something else." After taking Lopez's property, defendants returned to their car and fled. A short time later, defendants were pulled over by the police and apprehended. A black BB gun was recovered from the trunk of their car. When shown that gun at trial, Lopez testified that it appeared to be the type of gun pointed at his head and neck during the robbery.

After a jury trial, both defendants were convicted of robbery in the first degree (Penal Law § 160.15[4]). Under that subdivision, "[a] person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime . . . he or another participant . . .

[d]isplays what appears to be a pistol . . . or other firearm." However, it is an affirmative defense that the object displayed "was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged" (Penal Law § 160.15[4]). If the defendant proves the affirmative defense by a preponderance of the evidence, the crime is reduced to robbery in the second degree (*People v Lopez*, 73 NY2d 214, 219 [1989]).

Defendants maintain that because the object displayed by Howard during the robbery was actually a BB gun and not a firearm, the affirmative defense was established as a matter of law, and the convictions should be reduced to second-degree robbery. Defendants also claim that Lopez's testimony about Stanley's placing an object against his back was insufficient to support a first-degree robbery conviction. However, defendants neither asked the court to instruct the jury on the affirmative defense nor objected to its absence in the court's charge. Likewise, defendants did not argue that the People's proof failed to satisfy the "display" element of first-degree robbery. Thus, as defendants concede, these claims are unpreserved (*see People v Gray*, 86 NY2d 10 [1995]; *see also People v Williams*, 15 AD3d 244, 245 [2005], *lv denied* 5 NY3d 771 [2005]), and we decline to review them in the interest of justice.

As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also conclude that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). To satisfy the "display" element of first-degree robbery, there must be a showing that the defendant "consciously displayed something that could reasonably be perceived as a firearm . . . and that the victim actually perceived the display" (*People v Lopez*, 73 NY2d at 220). Furthermore, "an object can be 'displayed' without actually being seen by the victim even in outline. All that is required is that the defendant, by his actions, consciously manifest the presence of an object to the victim in such a way that the victim reasonably perceives that the defendant has a gun" (*id.* at 222 [citations omitted]).

Here, Lopez testified that the two defendants surrounded him, Howard in front of him putting a gun to his head and neck and Stanley behind him placing an object against his back. Under these circumstances, Lopez could reasonably have perceived Stanley's object to be a gun, particularly since Lopez saw Howard holding a gun and at the same time felt Stanley place something against his back (*see People v Groves*, 282 AD2d 278 [2001], *lv denied* 96 NY2d 901 [2001]).

The fact that Lopez acknowledged that the object Stanley

placed against his back could have been something other than a gun is of no legal consequence. In *People v Simmons* (186 AD2d 95 [1992], *lv denied* 81 NY2d 976 [1993]), this Court affirmed a first-degree robbery conviction where the evidence showed that the defendant "simply thrust his hand forward in his pants as if armed" (186 AD2d at 96). We held that the fact that the victim believed the bulge in the defendant's pants could have been some weapon other than a gun did not constitute a failure of proof. We concluded that "Penal Law § 160.15(4) requires only that the object displayed reasonably appears to be a gun, not that it is in fact a gun or that it could be nothing but a gun" (*id.* at 97).

The Second Department reached a similar conclusion in *People v Washington* (229 AD2d 601 [1996], *lv denied* 88 NY2d 1072 [1996]). There, the victim testified that during the robbery, the defendant put his hand in his jacket pocket and pressed a hard object to her side. She further testified that she thought the object was "probably a gun or a knife, I'm not really sure" (229 AD2d at 602). In affirming the conviction, the Court stated that "[c]learly, part of the complainant's perception of the object was that it was a gun, and that portion of her perception is legally sufficient to support a finding that the defendant displayed what appeared to be a firearm" (*id.*; *see also People v Taylor*, 203 AD2d 77 [1994], *lv denied* 83 NY2d 915 [1984] [display

element satisfied regardless of whether bulge in jacket could have been explained otherwise]).

Citing to *People v Lopez*, the dissent argues that the victim's testimony here was insufficient to establish the display element of first-degree robbery. *Lopez*, however, actually supports the convictions here. The Court in *Lopez* explained that the victim's perception "need not be visual, but may be limited to touch or sound, as when the defendant approaches in the dark or from behind so that the victim may only feel or hear what appears to be a gun" (73 NY2d at 220 [internal citation omitted]). That is precisely what happened here.

The dissent relies on several cases where courts, in the interest of justice, have reduced convictions to second-degree robbery where the affirmative defense, although not requested, was established by the evidence at trial (*see People v Edwards*, 121 AD2d 254 [1986], *lv denied* 69 NY2d 710 [1986]; *People v Lyde*, 98 AD2d 650 [1983], *lv denied* 61 NY2d 910 [1984]; *People v Williams*, 61 AD2d 992 [1978]). In those cases, however, only one gun was used during the crime and there is no indication that another firearm was displayed. Here, the object displayed from behind by Stanley, together with the victim's reasonable belief that it could be a gun, provided an independent basis for a conviction of first-degree robbery. Thus, we see no basis to

exercise our interest of justice jurisdiction.

Although the People's summation focused on the gun placed against Lopez's head and neck by Howard, the People did not limit themselves to a theory that it was the only firearm displayed. Indeed, the People twice referred to Stanley's coming behind the victim and pressing an object against him. Nor did the court's charge to the jury contain any such limitation. In fact, the court instructed the jury that "you have heard testimony concerning a firearm which the People have been unable to produce in court as an exhibit because it was not recovered." Since the BB gun found in defendants' car was introduced into evidence, the court clearly was referring to the object placed against Lopez's back. Although the dissent points out that no second gun was recovered, the fact that the weapon was not recovered and introduced into evidence does not defeat a conviction for first-degree robbery (*see People v Padua*, 297 AD2d 536 [2002], *lv denied* 99 NY2d 562 [2002]; *People v Brown*, 108 AD2d 922, 923 [1985], *lv denied* 64 NY2d 1131 [1985]).

People v Grant (__ NY3d __, 2011 NY Slip Op 7304 [2011]), relied upon by the dissent, is inapposite. *Grant* addresses the sufficiency of a robbery conviction under subdivision 3 of Penal Law § 160.15 (uses or threatens the immediate use of a dangerous instrument). Here, defendants were convicted under subdivision 4

(displays what appears to be a firearm).

Howard contends that his counsel was ineffective for failing to move for dismissal of the first-degree robbery charge. However, in light of the evidence about Stanley's actions, any such motion would have been unavailing (*see People v Barrington*, 34 AD3d 341 [2006], *lv denied* 8 NY3d 878 [2007]). Stanley claims that his counsel was ineffective for failing to pursue the affirmative defense at trial. This claim is not reviewable on direct appeal because it involves matters of strategy outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendants 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]).

Defendants' motions to suppress identification testimony were properly denied. The showup identification did not create a substantial likelihood of irreparable misidentification. Viewing the circumstances as a whole, we conclude that the showup took place within the constitutionally permissible range of temporal and spatial proximity to the crime (*see People v Brisco*, 99 NY2d 596, 597 [2003]). These are factors upon which "the Court of Appeals has declined to draw a bright-line rule and has left the

appropriate time period to be determined on a case-by-case basis" (*People v Greene*, 39 AD3d 268, 270 [2007], *lv denied* 9 NY3d 865 [2007]). Although defendants also cite aspects of the manner in which the showup was conducted, these factors were generally inherent in the nature of most showups, and we do not find them unduly suggestive under the circumstances of the case (*see e.g. People v Gatling*, 38 AD3d 239 [2007], *lv denied* 9 NY3d 865 [2007]).

The court properly exercised its discretion in declining to impose any sanction for the nonproduction of an officer's memo book. The officer testified that his memo book did not contain any entries relevant to his testimony, and there is no evidence to the contrary.

Accordingly, the judgment of the Supreme Court, Bronx County (Robert E. Torres, J.), rendered November 25, 2009, convicting defendant Howard, after a jury trial, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 14 years and five years post-release supervision, should be affirmed, and the judgment of the same court and Justice, rendered June 19, 2008, convicting defendant Stanley, after a jury trial, of robbery in the first degree, and

sentencing him, as a second violent felony offender, to a term of 15 years and five years post-release supervision, should be affirmed.

All concur except Moskowitz and Freedman, JJ. who dissent in part in an Opinion by Freedman, J.

FREEDMAN, J. (dissenting in part)

I respectfully dissent to the extent that I would reduce the convictions of both defendants to robbery in the second degree based on the undisputed evidence in the case. Domingo Lopez was held up at gunpoint in the early morning of April 21, 2006. Defendants put a gun to his head and neck and robbed him. When the police apprehended defendants, a black BB gun or air gun was recovered from the trunk of their car, and Lopez identified the gun at trial as the one that looked like the one used during the robbery.

As indicated by the majority opinion, Penal Law § 160.15(4) provides that "[a] person is guilty of robbery in the first degree when . . . he or another participant . . . [d]isplays what appears to be a pistol . . . or other firearm." However, that Penal Law provision also states that it is an "affirmative defense that such pistol, revolver . . . or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense . . . or preclude a conviction of, robbery in the second degree . . ."

There is no question in this case that the prosecution's case hinged upon the display of what appeared to be a weapon.

When defendants were apprehended, the only gun that was recovered and which the victim identified at the time and at trial as what appeared to be the gun used by defendants was a BB gun or other air gun and not a firearm. The prosecution's summation focused primarily on that gun and the fear that it engendered in the victim. Had defendants requested an instruction or reduction based on the affirmative defense, they would have been entitled to one since the only gun recovered or even discussed during the trial was the BB gun. Thus, the issue is whether the interests of justice mandate a reduction of the conviction based on the fact that the only evidence of a weapon that was adduced was that of a BB gun rather than a firearm.

In *People v Edwards* (121 AD2d 254 [1986], *lv denied* 69 NY2d 710 [1986]), this Court reduced the first-degree robbery conviction to second-degree robbery where it was established as a matter of law that the weapon used was not capable of firing a real bullet even though the defendant neither requested the court to charge this affirmative defense nor objected to its absence in the charge (*id.* at 255). Similarly, in *People v Lyde* (98 AD2d 650 [1983], *lv denied* 61 NY2d 910 [1984]) and *People v Williams* (61 AD2d 992 [1978]), this Court reduced convictions in the interest of justice from first to second-degree robbery where a starter's pistol and a toy gun were displayed, also in the

absence of a request by the defendant. More recent cases in which convictions were reduced based on the display of a BB gun were *People v Layton* (302 AD2d 408 [2003]) and *People v Bowman* (133 AD2d 701 [1987], *lv denied* 70 NY2d 953 [1988]). As the majority indicates, where a defendant proves by a preponderance of the evidence that the object displayed is not capable of producing death or serious injury, the affirmative defense set forth in Penal Law § 160.15(4) is established. All of the evidence adduced in this case establishes that affirmative defense. Thus, as in the cases cited, the conviction should be reduced in the interest of justice.

I find the majority's alternative ground, namely that defendants "consciously displayed something that could reasonably be perceived as a firearm," to be unsupported by the evidence. There was only one statement made during the entire trial referring to what the majority relies upon, namely, "He told me to put my back [*sic*] and I felt the other person was touching me with something else on my back. I don't know. I cannot say it was a gun or something else." Contrary to what the majority states, the word "object" was used neither by the victim nor the prosecutor. That statement did not constitute a "display of a firearm" as described in *People v Lopez* (73 NY2d 214 [1989]). In *Lopez*, the Court of Appeals held that the display

element of Penal Law § 160.15(4) was satisfied where the defendant put his hand in his pocket "as if he had a gun" and announced "this is a stick up" (*Lopez* at 218). Here, the victim specifically said he did not know if the something he felt was a gun, and clearly, his focus was on the BB gun held to his head and neck. In *People v Grant* (17 NY3d 613 [2011]), the Court of Appeals found that a written statement during a robbery threatening to shoot a victim with a gun was insufficient to establish the threat element of Penal Law § 160.15(3). Similarly, an ambiguous statement about feeling "something" should not be sufficient to establish the display element under Penal Law § 160.15(4). In all of the cases cited by the majority, the victim perceived the item at issue to be a gun. In this case, the victim made only one reference to "something" and specifically stated he did not know if it was a gun.

Accordingly, I would reduce the conviction to robbery in the second degree and remand the matter for resentencing on the reduced count.

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

ENTERED: JANUARY 12, 2012

CLERK